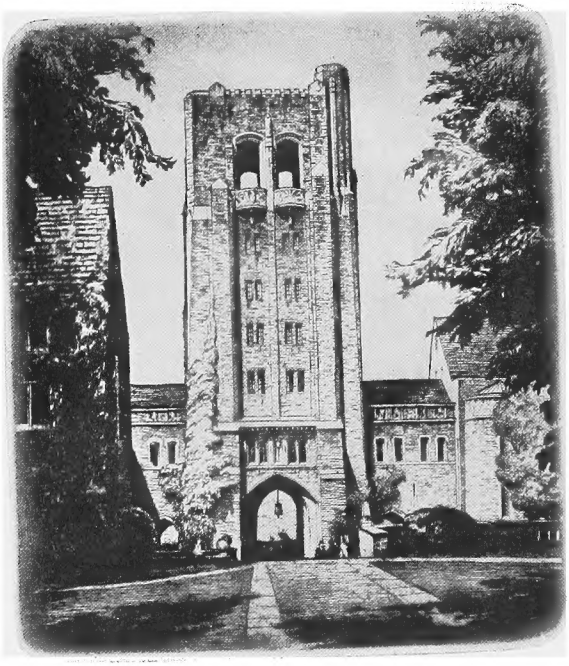

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A

PRACTICAL TREATISE

ON

THE LAW OF TRUSTS

BY

(THE LATE)

THOMAS LEWIN, ESQ.

Twelfth Edition

WITH AN APPENDIX CONTAINING THE TRUSTEE ACT, 1893, PRINTED IN FULL, AND ANNOTATED BY REFERENCE TO THE TEXT OF THE WORK

BY

CECIL C. M. DALE AND GEORGE A. STREETEN

OF LINCOLN'S INN, ESQUIRES, BARRISTERS-AT-LAW

LONDON

SWEET & MAXWELL, LIMITED, 3 CHANCERY LANE

Law Publishers

1911

B 3696

Printed at The Edinburgh Press
FRANK AND EDWARD MURRAY
Printers to His Majesty the King
9 and 11 Young Street

CORNELL UNIVERSITY
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1914
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PREFACE

SINCE the last edition of this work was published, the general law of Trusts has not undergone any great alteration, but an important administrative addition to it has been made by the Public Trustee Act, 1906. As to the practical operation of that enactment it is even yet too early to speak with confidence, but there cannot be any doubt that it contains many useful provisions. These provisions, together with those contained in the Rules made in pursuance of the Act, are referred to in detail in the ensuing pages.

In the present edition of this work, as in previous editions, references to all the cases decided down to the date of completion have either been introduced into the text or, if the work was too far advanced to admit of that course being adopted have been inserted in the Addenda.

The Trustee Act of 1893, the amending Act of 1894, the Rules of Court under those Acts, and the trustee clauses of the Lunacy Acts 1890 and 1891 have been printed *in extenso* in Appendices, and annotated mainly by reference to the text of the work.

In conformity with the course adopted in the five previous Editions, the matter introduced by the Editors, past and present, has been distinguished from the work of the Author by being inserted in square brackets [ ].

The general Index has received careful attention from Mr George A. Streeten, who has been associated as Joint Editor on the present occasion.

The mode of reference to decided cases, adopted by the late Editor, Mr F. A. Lewin, has been retained, and found most useful and convenient.

In the Table of Cases care has been taken to distinguish those cases which are identical in name only, and not in subject matter, by inserting references to the several reports.

The asterisk prefixed to references to pages in the Tables of Cases and Statutes indicates those places in the book where the case, the statute, or the section in question is more particularly referred to.

The decisions of the Court of Appeal, reported in the Law Reports subsequently to the year 1875, have been distinguished by the insertion of the letters (C.A.) in the references to the reports.

For convenience of reference, the Addenda (which will be found immediately after the Table of Statutes) have been printed on one side of the paper only.

CECIL C. M. DALE.
GEORGE A. STREETEN.

December, 1910.

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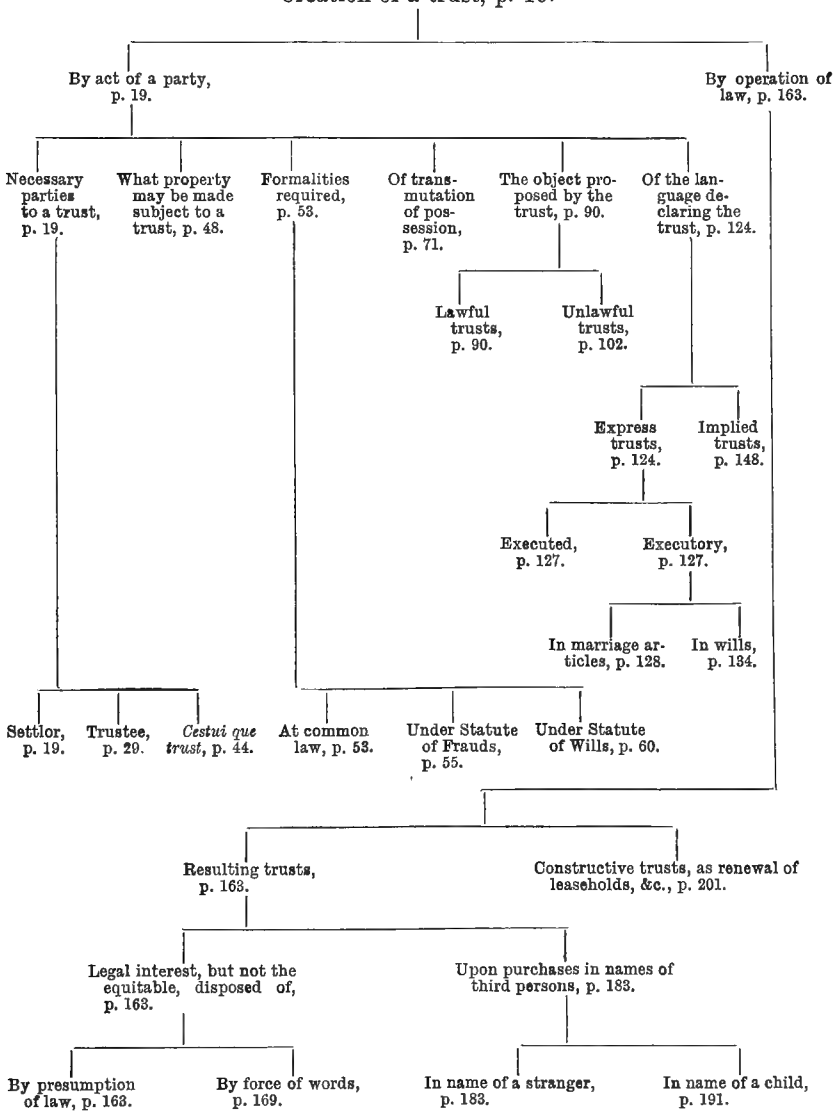

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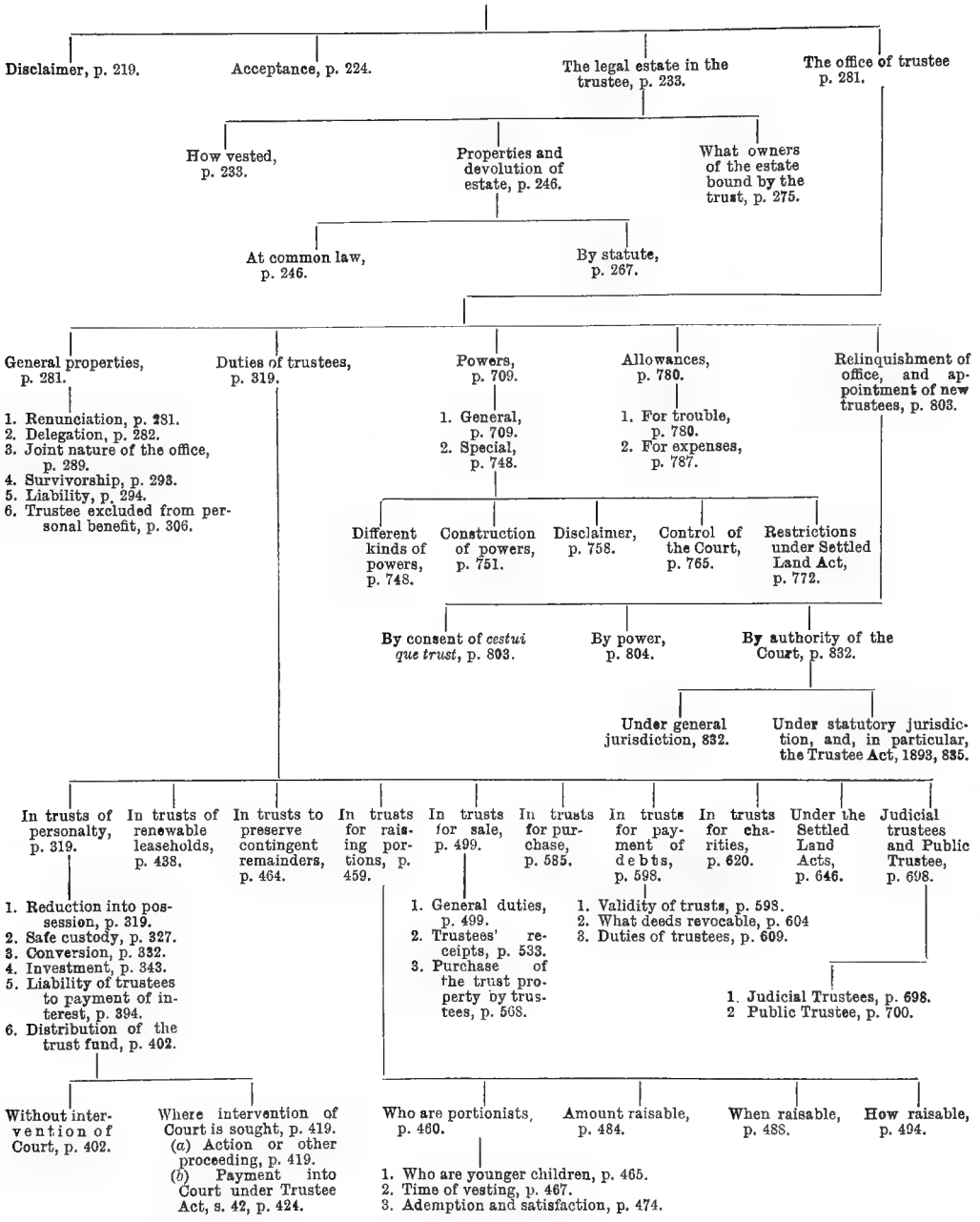

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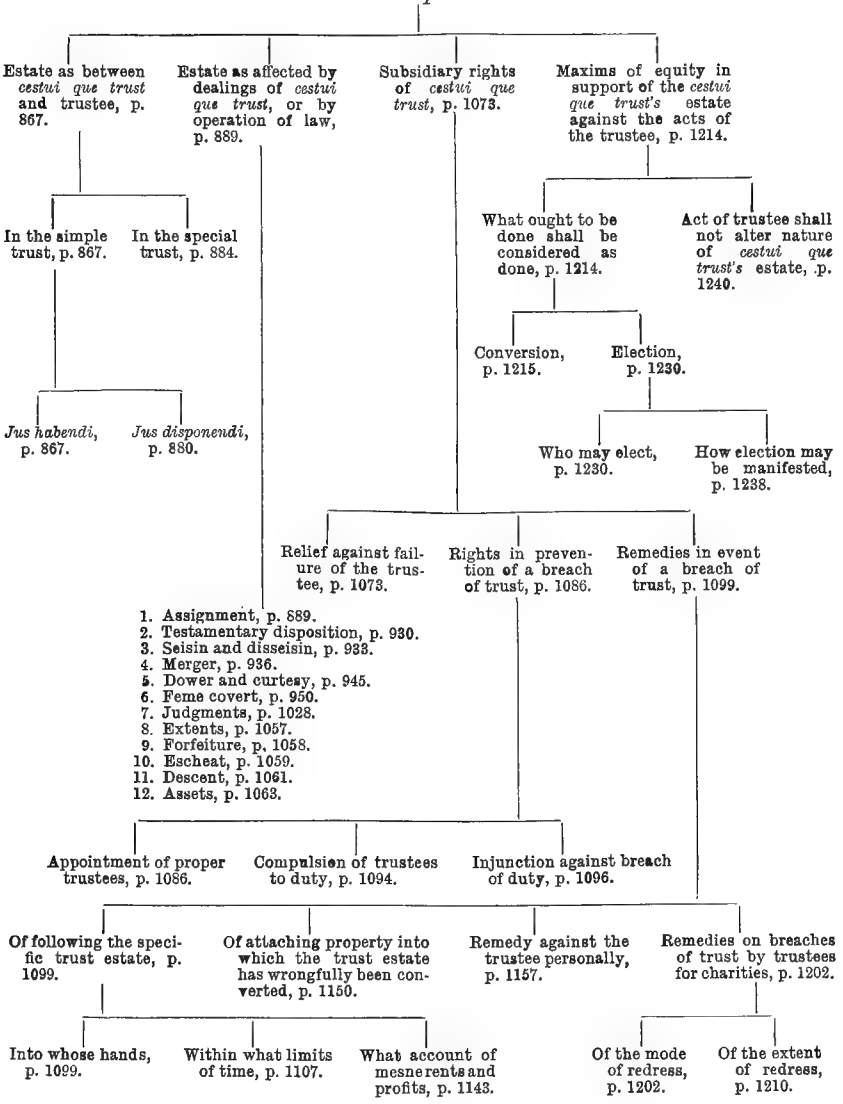

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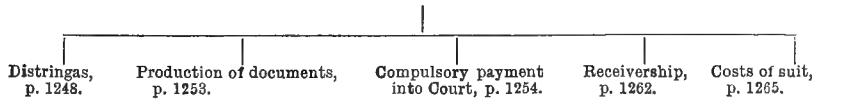

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s. 32 . 813.
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s. 35 . . . 509, 515, 517, 518.
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s. 21, sub.-s. 7 . . . 591.
s. 21, sub.-s. 10 . . . 685.
s. 22 . . . *686, *687, 688, *691.
s. 23 . . . *688.
s. 24 . . *688, 689.
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s. 43 . . 692, 790.
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s. 15 . *519, 587.
s. 16 36.
s. 17 . . 325, 331, *530, *531, 557, 558.
s. 18 *329, *719.
s. 19 . *440, 441, 447.
s. 20 . *327, *535, 546, 558.
s. 21 . 324, *739, 740.
s. 22 293, 510, 739, 755, *765.
s. 23 . 411.
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s. 48 . . . 279.
s. 50 . . . 329, *362, *366, 424, 440, *835, 844, *849, *853.
s. 51 . . 772, 839.
Schedule . . . 772, 839, 1301, 1302, App. I. *in extenso.*
c. 63 (Married Women's Property Act, 1893) . . . 25, 983, 991.
s. 1 . . . *984, 990, 994, 1019.
s. 2 . . . *1018.
s. 3 . . *968.
s. 4 . . . 984, 994, 999.

1894.

c. 73 (Local Government Act, 1894) . . . 626.
ss. 14, 75 . . . 626.
57 & 58, c. 10 (Trustee Act, 1894), 847, 1303, App. I. *in extenso.*
s. 1 . . . 847.
s. 2 . . . 860.
s. 3 . . . 512.
s. 4 . . . 231, *323.
c. 30 (Finance Act, 1894) . . . 522.
c. 35 (Charitable Trusts, Places of Religious Worship, Act, 1894) . . 1208.
s. 4 . . . 1208 note.
c. 46 (Copyhold Act, 1894), s. 44 . . . 291, 745, 746.
s. 84 . . . 263.
s. 88 . . . *248, 252, 255, 263, 279.
c. 60 (Merchant Shipping Act, 1894), ss. 56, 57 . . 185.

1895.

58 & 59, c. 25 (Mortgagees' Legal Costs Act, 1895), s. 2 . . . 310, 781.
s. 3 . . . 310, 315, 781.

1896.

59 & 60, c. 8 (Life Assurance Companies, Payment into Court, Act, 1896) . . . 425.
c. 35 (Judicial Trustees Act, 1896), 698 *et seq.*
s. 1 . . . *698, *699.
s. 2 . . *699, *700.
s. 3 . . . 231, 395, 700, *1169 *et seq.*
s. 4 . . . *700.
s. 6 . . 698.

1897.

60 & 61, c. 65 (Land Transfer Act, 1897), 219, 275, 298, 421, 533, 546, 548, 551, 587, 801, 838, 849, 874.
s. 1 . . . 13, 219, 248, 275, 316, 533, 540, 836, 838, 880.

Victoria—*continued.*

1897—*continued.*

60 & 61, c. 65, s. 1, sub-s. 1 . . . 186, *248, 560, 565, 995, 1219 note.
sub-s. 2 . . 995.
sub-s. 3 . . . 995, 1224 note.
sub-s. 4 . . . *248.
sub-s. 5 . . . 565.
s. 2 . . . 532, 533, 560.
sub-s. 2 . . 533, 540, 565.
sub-s. 3 . 533, 598.
sub-s. 4 533, 1216 note.
s. 3, sub-s. 1 . . . 437.
s. 4 . . . 533, 540.
s. 4, sub-s. 1 . 228, 722, *741, 742.
s. 22, sub-s. 6 . . . 587.

1898.

61 & 62, c. 55 (Universities and College Estates Act, 1898) . . 697.

1899.

62 & 63, c. 20 (Bodies Corporate, Joint Tenancy, 1899) . . . 32.
c. 33 (Board of Education Act, 1899) . . . 631.

1900.

63 & 64, c. 26 (Land Charges Act, 1900) . . . 587, 1038 note, 1045 note, 1046 note, 1047 note, 1048 note, 1055 note, *1056, *1057.
c. 62 (Colonial Stock Act, 1900), s. 2 . . . 364.

1906.

Edward VII. 6, c. 55 (Public Trustee Act, 1906) . . . 28, 282, 531, 700 *et seq*, 720, 786, 843, 851, 887, 1072, 1254.
s. 1 . . . 700, 701.
s. 2 . . . 701, 708.
s. 3 . . . *703, *704.
s. 4 . . . 704, 705.
s. 5 . . . *701, 702.
s. 6 . . . *702, 703.
s. 7 . . . 700 note.
s. 8 . . . 700 note.
s. 9 . 708.
s. 10 . . . *706.
s. 11 . . 706, 707.
s. 12 . 706 note.
s. 13 . . 705, 706.
s. 14 . . 700.
s. 15 . . . 706.

1907.

7, c. 18 (Married Women's Property Act, 1907) . . *37, 223, 850, 987, *1005, *1007.

1908.

8, c. 27 (Married Women's Property Act, 1908) . . . 1027.
9, c. 42 (Irish Land Act, 1909) s. 38 . . . 359 add.

ADDENDA

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18. In note (*b*) after "*Wallis* v. *S. G. for New Zealand*," add "and see *Re Whiteley*, (1910) 1 Ch. 600."

38. In note (*q*) after "*King* v. *Bellord*, 1 H. & M. 343," add "and see *Re Edwards*, (1910) 1 Ch. 541, where a gift over on 'refusal or neglect' to take a certain name and arms within a specified period, was held not to apply to an infant, as not having a legal discretion in reference to the matter."

64. At end of note (*a*) add "The rule to be deduced from *Strong* v. *Bird*, *sup.* and *Re Stewart*, *sup.*, will not be extended to a mere promise by a testator to pay an indefinite sum at a future time; *Re Innes*, (1910) 1 Ch. 188."

71. At end of note (*a*) after "*Mallott* v. *Wilson*, (1903) 2 Ch. 494" add "*Re Plumptre's Settlement*, (1910) 1 Ch. 609."

109. In note (*c*) after "*Re Nash*" add reference "(1910) 1 Ch. (C.A.) 1."

139. Line 21. After the words "though he afterwards die an infant" add reference to a footnote, referring to "*Re Parker*, (1910) 1 Ch. 581 (where infant tenant in tail, dying in the lifetime of the tenant for life, was held to have succeeded to the heirlooms within the terms of the will)."

140. Note (*a*). After the words "*Re Lord Chesham's Estate*, 31 Ch. D. 466" add "distinguished in *Re Parker*, (1910) 1 Ch. 581. As to the meaning of the words 'actual possession' when used in a power of revocation of trusts, see *Re Petre's Settlement Trusts*, (1910) 1 Ch. 290."

145. Note (*c*). After "*Re Burley*" add reference "(1910) 1 Ch. 215."

155. Note (*a*). After "*Re Conolly*" add reference "(1910) 1 Ch. 219."

291. Note (*b*). After "*Wilkinson* v. *Malin*, 2 Tyr. 572" add "and the rule that in the administration of a trust of a 'public' nature, the act of a majority of trustees is to be treated as the act of the whole body, applies equally to a trust of a charitable nature; *Re Whiteley*, (1910) 1 Ch. 600."

337. Note (*c*), at end of note, add "and see *Re Pouser*, (1910) W. N. 189, where Parker, J., preferred the decisions of Swinfen Eady, J., in *Re Dawson*, (1906) 2 Ch. 211 and *Re Perkins*, *sup.*, and of Joyce J., in *Re Thompson*, *sup.*, to those of Kekewich, J., in *Re Baron*, 62 L. J. Ch. 445 and *Re Henry*, (1907) 1 Ch. 30, and made an order similar to that in *Re Perkins*."

342. Note (*g*). At end of note refer to *Re Poyser*, (1910) W. N. 189, as above.

359. Note (*d*). Add "As to the investment, with the consent of the public trustee (as to whose office and functions see *post*, pp. 700 *et seq.*), of purchase money for land purchased by means of an advance under the Land Purchase Acts, where such land is settled land within the Settled Land Acts, see Irish Land Act, 1909 (9 Edw. 7. c. 42), sect. 38.

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371. Note (*c*). At foot of note, add "and see *Re Sir Robert Peel's Settled Estates*, (1910) 1 Ch. 389, where the same principle was applied to a case in which, upon a direction by a tenant for life under the Settled Land Acts, trustees had invested capital moneys in the purchase of stocks on which, at the date of the purchase, dividends had been earned and declared but not paid; and it was held that the tenant for life was not entitled to such dividends."

420. At end of note (*b*), add "In the case of *Re Amalgamated Society of Railway Servants, &c.* (reported in the *Times* of 15th October, 1910) where, under the rules of a society, the object for which a fund was established was *ultra vires* and bad in law, and the plaintiff, who was a subscriber to the fund, was claiming as a *cestui que trust* under a resulting trust, it was held that the plaintiff was not a '*cestui que trust under the trust of any deed or instrument*' within Order 55, Rule 3, as the trust under which he claimed arose in default of, and not under the instrument establishing the fund."

425. Add, by way of note, to be introduced referentially at end of first paragraph on page, "Where the tenant in tail, executing the disentailing assurance, was also protector, his execution of the deed operated as a consent by him in the character of protector; *Re Wilmer's Trusts*, (1910) 2 Ch. 111."

623. Line 9. At end of paragraph, after the words "it cannot be diverted to lighting, paving, and cleansing the town" (*a*), add these words, "nor can a fund which is given for establishing a hospital in one locality be applied for the purposes of a hospital in a neighbouring locality" (*b*); and add, by way of note, these words, "*Re Weir Hospital*, (1910) 2 Ch. (C.A.) 124, a case which is instructive in reference to the jurisdiction of the Charity Commissioners; and see *post*, p. 1210."

623. Note (*e*). Add "And where a legacy of £1000 was given 'to found a bed' in a hospital, the income only was to be applied towards maintaining the bed; *A. G.* v. *Belgrave Hospital*, (1910) 1 Ch. 73."

624. Note (*a*). At end of note, after "*Re Mirrlees Charity*," add reference "(1910) 1 Ch. 163."

627. Note (*c*). At end of note add "And see *Re Weir Hospital*, (1910) 2 Ch. (C.A.) 124, referred to *post*, p. 1210."

631. Note (*a*). At end of note, add "For a case in which an existing scheme for a secondary school was altered by the Court so as to comply with the requirements of the Board of Education, and so enable the school to secure grants from the Board, see *Re Queen's School, Chester*, (1910) 1 Ch. 796."

683. Note (*a*). After "*Re Duke of Manchester's Settled Estates*, (1909) W. N. 212" add "(1910) 1 Ch. 106, where the order was made conditionally, upon the tenant for life agreeing that the payment was to be without prejudice to any question as to the ultimate incidence of the liability for the arrears, as between him and the remainderman."

685. Note (*h*). After "*Cardigan* v. *Curzon Howe*, 41 Ch. D. (C.A.) 375" add "and see *Re Sir Robert Peel's Settled Estates*, (1910) 1 Ch. 389, holding that the rule against allowing the costs of obtaining the concurrence of mortgagees of the life estate applies as well where the capital money is in the hands of trustees, as where it is in Court."

711. At end of note (*b*), after "*Re Brunning*, (1909) 1 Ch. 276" add "and see *Re Cottrell*, (1910) 1 Ch. 402."

744. Note (*f*). At end of note, add "As to the incapacity of trustees to grant leases of *unopened* mines, see *Re Baskerville*, (1910) W. N. 175."

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744. Note (*g*). At end of note add "and for form of declaration and order facilitating the granting of feus in Scotland, in the nature of building leases under a power, see *Re Forrest*, (1910) W. N. 201."

747. At end of note (*b*), after "*Re Whiteley*," add "(1910) 1 Ch. 600."

790. To note (*d*) add "Where a tenant for life directs capital moneys in the hands of the trustees to be applied in payment of the costs, charges, and expenses of his solicitors in relation to a sale by him under the Act, the trustees are not bound to have such costs, charges, and expenses taxed, but are entitled to have an opportunity of considering their propriety, and if satisfied may, without taxation, pay them out of capital moneys. The same rule applies to the payment out of capital moneys of the costs of procuring the concurrence in the sale of the incumbrancers on the fee (as to which see *ante*, p. 685); *Re Sir Robert Peel's Settled Estates*, (1910) 1 Ch. 389."

827. Note (*i*). After "*Re Sampson*" delete "(1904) 2 Ch. (C.A.) 331," and substitute "(1906) 1 Ch. (C.A.) 435."

919. Note (*d*). After "*Skipper* v. *Holloway*" add "but see S. C. in C. A. (1910) W. N. 74 where the decision was reversed on the facts, and it was held that the question did not really arise."

922. Note (*b*). At end of note add "*Re Weniger's Policy*, (1910) 2 Ch. 291, following *Spencer* v. *Clarke*, (1878) 9 Ch. D. 137."

1210. Note (*a*). After "*Re Weir Hospital*," add reference "(1910) 2 Ch. (C.A.) 124."

INTRODUCTORY VIEW

OF THE

RISE AND PROGRESS OF TRUSTS

THE origin of trusts, or rather the adaptation of them to the English law, may be traced in part at least to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the Church by the statutes of mortmain. Another inducement to the adoption of the new device was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates which, by the narrow policy of the common law, they had hitherto been prevented from exercising. Origin of trusts.

Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second, originated the writ of *subpœna*, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the allegations of his *cestui que trust*. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to *uses*, as trusts were then called. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse (*a*). The subpœna.

Of trusts there were two kinds: the *simple* trust, and the *special* trust. The *simple* trust was defined in legal phraseology Trusts simple or special. Simple trust defined.

(*a*) *Attorney-General* v. *Sands*, Hard. 491.

to be, "a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* should take the profit, and that the terre-tenant should execute an estate as he should direct" (*a*). In order rightly to understand what was meant by this rather technical description, we shall briefly consider the principles that were recognised by Courts of Equity (for these had the exclusive jurisdiction of trusts), first, with reference to the terre-tenant or feoffee to uses, and secondly, with reference to the beneficial proprietor, or *cestui que use*.

Confidence in the person.

With respect to the feoffee to uses, it was at first held to be absolutely indispensable that there should be *confidence in the person*, and *privity of estate*. For want of the requisite of *personal confidence* it was ruled that a *corporation* could not stand seised to a use; for how, it was said, could a corporation be capable of confidence when it had not a *soul*? Nor was it competent for the *king* to sustain the character of trustee; for it was thought inconsistent with his high prerogative that he should be made responsible to his own subject for the due administration of the estate. And originally the *subpœna* lay against the trustee himself only, and could not have been sued against either his *heir* or *assign*; for the confidence was declared to be personal, and not to accompany the devolution of the property (*b*). But the doctrine of the Court in this respect was subsequently put on a more liberal footing, and it came to be held that both heir and assign should be liable to the execution of the use (*c*). An exception, however, was still made in favour of a purchaser for valuable consideration not affected by notice (*d*).

Privity of estate.

The meaning of *privity of estate* may be best illustrated by an example. Had a feoffment been made to A. for life to his own use, with remainder to B. in fee to the use of C., and then A. had enfeoffed D. in fee, in this case, though D. had the land by the feoffment, which then operated as a tortious conveyance, yet, as he did not take the identical estate in the land to which the use in favour of C. was attached, he was not bound by C.'s equitable claim. And, by the same rule, neither tenant by the *curtesy*, nor tenant in *dower*, nor tenant by *elegit*, was liable to the execution of the use, for their interests were new and original estates, and could not be said to have been impressed with the use. So

(*a*) Co. Lit. 272, b.
(*b*) 8 E. 4. 6; 22 E. 4. 6.
(*c*) The law as to the heir was altered by Fortescue, Ch. J. Bac. Ab. Uses and Trusts B.
(*d*) Bac. Ab. Uses and Trusts B.; and see 14 H. 8. 4, 7, 8.

the lord who was *in* by *escheat*, a *disseisor*, *abator*, and *intruder*, were not amenable to the *subpœna;* for the first claimed by title paramount to the creation of the use; and the three last were seised of a tortious estate, and held adversely to the feoffee to uses.

Privity as regards the cestui que use.

With respect to the *cestui que use*, the principle upon which his whole estate depended was also what in legal language was denominated *privity*. Thus, on the death of the original *cestui que use*, the right to sue the *subpœna* was held to descend indeed to the *heir* on the ground of *hœres eadem persona cum antecessore;* but the wife of the *cestui que use*, or the husband of a feme *cestui que use*, and a judgment creditor, were not admitted to the same privilege; for their respective claims were founded, not on privity with the person of the *cestui que use*, but on the course of law. And for the like reason a use was not assets, was not subject to forfeiture, and on failure of heirs in the inheritable line did not escheat to the lord.

Special trust defined.

The *special* trust (for hitherto we have spoken of the simple trust only) was where the conveyance to the trustee was to answer some particular and specific purpose, as upon trust to reconvey in order to change the line of descent, upon trust to sell for payment of debts, &c. In the special trust the duty of the trustee was not, as in the simple trust, of a mere passive description, but imposed upon him the obligation of exerting himself in some active character for the accomplishment of the object for which the trust was created. In case the trustee neglected his duty, the *cestui que trust* was entitled to file a bill in Chancery, and compel him to proceed in the execution of his office (*a*).

Trusts applicable to chattels.

Both the *simple trust* and the *special trust* were applicable to *chattels* real and personal, as well as to freeholds; but trusts of chattels were for obvious reasons much less frequently employed. The amount of the property was small; the owner, even without the interposition of a trustee, had the fullest control and dominion over it; and a chattel interest, as it followed the person, was equally subject to forfeiture, whether in the custody of a trustee, or in the hands of the beneficial proprietor (*b*). But to the extent, whatever it was, to which trusts of chattels were adopted, they were administered upon the same principles, *mutatis mutandis*, as were trusts of freeholds; the right to sue a

(*a*) See the case in the reign of Hen. 7. App. to Sugden on Powers, No. 1.

(*b*) 5 H. 5. 3, 6.

subpœna turned equally on privity (*a*), and the interest of the *cestui que trust* was held not to be assignable (*b*).

Statutes affecting trusts.

Such was the nature of trusts as they stood at *common law;* but the manifold frauds and mischiefs, to which the new system gave occasion, particularly "the great unsurety and trouble arising thereby to purchasers," called loudly from time to time for the enactment of remedial statutes. One of the most important of these was 1 Ric. 3. c. 1, the substance of which may be well expressed in the terms of the preamble, viz. that "all acts made by or against a *cestui que use* should be good as against him, his heirs, and feoffees in trust," in other words, that all dealings of the *cestui que use* with the trust property should have precisely the same legal operation as if the *cestui que use* had himself possessed the legal ownership. To what interests the legislature intended this statute to apply has not on all hands been agreed. A feoffment in *fee* to uses was clearly the case primarily intended. Upon a feoffment in *tail*, it seems no use could have been declared, for a tenant in tail was incapacitated by the statute *de donis* from executing estates (*c*). With respect to a feoffment for *life* to uses, there appears to be no reason upon principle (except so far as the language of the Act may be thought to furnish any inference), and certainly there is no objection on the score of authority, why the *cestui que use* might not have passed the legal estate by virtue of the statutory power. It has been contended by Mr Sanders, that on a feoffment for life no use grafted on the life-estate could have been declared, on the ground that as the tenant for life held of the reversioner, the consideration of tenure would have conferred a title to the beneficial interest on the tenant for life himself (*d*). But this reasoning can have no application where the estate for life was not *created*, but was merely *transferred*, for then the assignment of the life-estate was not distinguishable in this respect from a conveyance of the fee; in each case there was no consideration of tenure as between the grantor and grantee, but in each case the services incident to tenure were due from the grantee to a third person (1). It is clear that the statute

(*a*) *Witham's case*, 4 Inst. 87.
(*b*) Jenk. 244, c. 30.
(*c*) Co. Lit. 19, b.
(*d*) Sand. on Uses, c. 1, s. 6, div. 2.

In what case a use might have been declared upon an estate for life.

(1) The state of the law upon this subject appears to have been as follows:— (1). On the *creation* of an estate for life, had no use been mentioned on the face of the instrument, the tenant for life had held for his own benefit in compensation for his services: Perk. s. 535; B. N. C. 60; Br. Feff. al. Uses, 10;

embraced *uses of lands* only, and did not extend either to *special trusts*, or to *trusts of chattels:* not to special trusts, because the trustee combined in himself both the legal estate and the use, though compellable in Chancery to direct them to a particular purpose; and not to trusts of chattels, because the preamble and the statute were addressed to *cestui que use* and *his heirs*, and to *feoffees in trust.*

The statute of Uses (27 H. 8. c. 10).

The mischiefs of the system increasing more and more (the statute of Richard occasioning still greater evils than it remedied, from the facility it gave to the *cestui que use* and his feoffee, who had now each the power of passing the legal estate, of defrauding by collusion the *bonâ fide* purchaser), the legislature again interposed its authority by 27 Hen. 8. c. 10, and thereby annihilated uses as regarded their fiduciary character, by enacting, that "where any person stood *seised* of any hereditaments to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence." (1)

Special trusts and trusts of chattels excepted from the statute.

Uses by the operation of this statute became merged in the legal estate; but *special trusts* and *trusts of chattels* were not within the purview of the Act; the former, because the use, as well as the legal interest, was in the trustee; the latter, because

and no use could have been *averred* in contradiction to the use implied. See Gilb. on Uses, 57. (2) Had a use been *expressly* declared by the deed, the tenant had been bound by the terms on which he accepted the estate: Perk. s. 537; Br. Feff. al. Uses, 10, 40; (3) Unless a rent had been reserved, or consideration paid, in which case a court of equity would not have enforced the use against the purchaser for valuable consideration: B. N. C. 60; Br. Feff. al. Uses, 40. (4) On the *assignment* of a life estate a use might have been declared, as on a conveyance in fee.

Objections to the doctrine that no use could have been declared upon an estate in tail or for life.

(1) As this statute *does* operate on the use of a life estate, but does *not* apply to a *seisin* in tail, the doctrine of Mr Sanders, that prior to 27 Hen. 8. there was no use of a *seisin* either in tail or for life, seems open to the following objections:—1. That the statute in executing the use of a life estate operates on an interest which at the time of the enactment had no existence; and, 2ndly, that in *not* executing a use declared on a seisin in tail, it operates differently on two estates falling, according to his view, within the same principle. To meet the former objection, Mr Sanders holds the statute of Hen. 8. to be prospective, and distinguishes it from the statute of Richard, which he considers not to be prospective, by observing that the latter employs the word "use" only, while the former has the additional term of "trust"; but to this it may be answered, that, although the *statute* of Richard does not contain the word trust, the *preamble* does, and that the distinction contended for between *use* and *trust* had no existence until a comparatively late period. See *Altham* v. *Anglesey*, Gilb. Eq. Rep. 17. To obviate the latter objection, it is maintained by Mr Sanders that tenant in tail *is* within the statute of Hen. 8.; an opinion which, it is submitted, is directly opposed to the general stream of authority: Co. Lit. 19, b.; Shep. Touch. 509; Gilb. on Uses, 11, and Lord St Leonards' note, *ibid.*

a termor is said to be *possessed*, and not to be *seised* of the property.

Introduction of the modern trust.

In the room of uses which were thus destroyed as they arose, the judges by their construction of the statute created a novel kind of interest, since distinguished and now known by the name of *Trust*. Before the statute of Hen. 8. a person, to have had the complete ownership, must have united the *possession* of the land and the *use* of the profits. The possession and the use were even at common law recognised as distinct interests, though the *cestui que use* was left to Chancery for his remedy (*a*). On a feoffment to A. to the use of B. to the use of C., the possession was in A., the use in B., and the limitation over to C. was disregarded as surplusage. When the statute of Hen. 8. was passed, it executed the estate in B. by annexing the possession to the use; but having thus become *functus officio* it did not, as the Act was construed, affect the use over to C. However, Chancery, now that uses were converted into estates, decreed C. to have a title in equity, and enforced the execution of it under the name of a *trust* (*b*).

Land, use, and trust, distinguished by Lord Hardwicke.

"Interests in land," said Lord Hardwicke, "thus became of three kinds: first, the *estate in the land itself*, the ancient common-law fee; secondly, the *use*, which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were joined and made one legal estate; and thirdly, the *trust*, of which the common law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute" (*c*).

Trusts not within statutes relating to uses.

This newly-created interest was held to be so perfectly distinct from the ancient use, that the statutory provisions by which many of the mischiefs of uses had been remedied, as the 19th Hen. 7. c. 15, by which uses had been made liable to writs of execution, and the 26 Hen. 8. c. 13, by which they had become forfeitable to the Crown for treason, were decided to have no application. However, the *trust* took the likeness of the *use*, conforming itself to the nature of special trusts and trusts of chattels, which had never been disturbed by any legislative enactment.

(*a*) Lit. s. 462, 463; Co. Lit. 272, b.; and see Carter, 197; *Porey* v. *Juxon*, Nels. 135; *Megod's case*, Godb. 64.

(*b*) See *Hopkins* v. *Hopkins*, 1 Atk. 591.

(*c*) *Willet* v. *Sanford*, 1 Ves. 186; *Coryton* v. *Helyar*, 2 Cox, 342.

Trusts at first modelled after the pattern of uses.

To show how the principles of uses prevailed after the statute of Hen. 8., it was held in the reign of Elizabeth (*a*), that the equitable term of a *feme covert* did not vest in the husband by survivorship, for a trust, it was said, was a thing in privity, and in the nature of an action, and there was no remedy for it but by writ of *subpœna*. And a few years after in the same reign, it was resolved by all the Judges, that a trust was a matter of privity, and in the nature of a *chose in action*, and therefore was not *assignable* (*b*). And in the sixth year of King Charles the First it was decided by the Judges, that as a feme was dowable by act or rule of law, and a court of equity had no jurisdiction where there was not fraud or covin, the widow of a trustee was not bound by the trust, but was entitled beneficially to her dower out of the trust estate (*c*).

Improvements introduced by Lord Nottingham.

But during the reigns of Charles the First and Charles the Second, and particularly during the Chancellorship of Lord Nottingham, who, from the sound and comprehensive principles upon which he administered trusts, has been styled the father of equity (*d*), the Courts gradually threw off the fetters of uses, and, disregarding the operation of mere technical rules, proceeded to establish trusts upon the broad foundation of conformity to the course of common law. "In my opinion," said Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; but by steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised; so that trusts are now made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid" (*e*).

Alterations made in trusts as regards the trustee.

As to the changes that were successively introduced, it was held *with reference to the trustee*, that *actual confidence in the person* was no longer to be looked upon as essential. A body *corporate*, therefore, was not exempted from the writ of *subpœna* on the ground of incapacity (*f*); and even the *king*, notwithstanding his high prerogative, was invested with the character of a Royal Trustee (*g*), though the precise mode of enforcing the

(*a*) *Witham's case*, 4 Inst. 87; *S. C.* Popham, 106, *sub nomine Johnson's case*.
(*b*) *Sir Moyle Finch's case*, 4 Inst. 86.
(*c*) *Nash* v. *Preston*, Cro. Car. 190.
(*d*) *Philips* v. *Brydges*, 3 Ves. 127; *Kemp* v. *Kemp*, 5 Ves. 858.
(*e*) *Burgess* v. *Wheate*, 1 Eden, 223.
(*f*) See *Green* v. *Rutherforth*, 1 Ves. 468; *Attorney-General* v. *Whorwood*, 1 Ves. 536.
(*g*) See *Penn* v. *Lord Baltimore*, 1

trust against him was not exactly ascertained; to use the language of Lord Northington, "the arms of equity were very short against the prerogative" (*a*). The subtle distinctions which had formerly attended the notion of *privity of estate* were also gradually discarded. Thus it was laid down by Lord Hale, that tenant in *dower* should be bound by a trust as claiming in the *per* by the assignment of the heir (*b*): and so it was afterwards determined by Lord Nottingham (*c*); and when an old case to the contrary was cited before Lord Jeffries, it was unanimously declared both by the bench and the bar to be against equity and the constant practice of the Court (*d*). A tenant by *statute merchant* was held to be bound upon the same principle, for he took, it was said, by the act of the party, and the remedy which the law gave thereupon (*e*). But as to tenant by the *curtesy*, Lord Hale gave his opinion, that one in the *post* should not be liable to a trust *without express mention made by the party who created it;* and therefore tenant by the curtesy should not be bound (*f*): but his Lordship's authority on this point was subsequently over-ruled, and curtesy as well as dower was made to follow the general principle.

As regards the cestui que trust.

With respect to the *cestui que trust*, or the person entitled to the *subpœna*, the narrow doctrine contained under the technical expression of privity began equally to be waived, or rather to be applied with considerable latitude of construction. "The equitable interest," said Justice Rolle, "is not a *thing in action*, but an *inheritance* or *chattel*, as the case may fall out" (*g*); and when once the trust, instead of passing as a *chose in action*, came to be treated on the footing of an actual *estate*, it soon drew to it all the rights and incidents that accompanied property at law: thus, the equity of the *cestui que trust*, though a bare contingency or possibility (*h*), was admitted to be *assignable* (*i*); and *Witham's case*, that a husband who survived his wife could not, for want of privity, claim her equitable chattel, was declared by the Court to be no longer an authority (*j*). So a *judgment creditor*, it was

Ves. 453; *Earl of Kildare* v. *Eustace*, 1 Vern. 439.

(*a*) *Burgess* v. *Wheate*, 1 Eden, 256.

(*b*) *Pawlett* v. *Attorney - General*, Hard. 469.

(*c*) *Noel* v. *Jevon*, 2 Freem. 43.

(*d*) MS. note by an old hand in the copy of Croke's reports in Lincoln's Inn Library, Cro. Car. 191.

(*e*) *Pawlett* v. *Attorney - General*, Hard. 467, *per* Lord Hale.

(*f*) *Pawlett* v. *Attorney - General*, Hard. 469.

(*g*) *Rex* v. *Holland*, Styl. 21; see *Casburne* v. *Inglis*, 2 J. & W. 196.

(*h*) *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 29; *Lord Cornbury* v. *Middleton*, 1 Ch. Ca. 208; *Goring* v. *Bickerstaff*, 1 Ch. Ca. 8.

(*i*) *Courthope* v. *Heyman*, Cart. 25, *per* Lord Bridgman.

(*j*) *Rex* v. *Holland*, Al. 15.

held by Lord Nottingham, might prosecute an equitable *fieri facias* (*a*); and though Lord Keeper Bridgman refused to allow an equitable *elegit* (*b*), it is probable, had the question arisen before Lord Nottingham, his Lordship would in this, as in other cases, have acted on a more liberal principle: at all events, the creditor's right to relief in this respect has since been established by the current of modern authority (*c*). Again, a trust was decided by Lord Nottingham to be *assets* in the hands of the heir (*d*); and though Lord Guildford afterwards held the other way (*e*), yet Lord Nottingham's view of the subject appears to have been eventually established (*f*). *Curtesy* was also permitted of a trust estate, though the widow of a *cestui que trust* could never make good her title to *dower* (*g*); "not," said Lord Mansfield, "on reason or principle, but because wrong determinations had misled in too many instances to be then set right" (*h*); or rather, as Lord Redesdale thought, because the admission of dower would have occasioned great inconvenience to purchasers —a mischief that in the case of curtesy was not to be equally apprehended (*i*).

Lord Mansfield's doctrines.

Lord Mansfield was for carrying the analogy of trusts to legal estates beyond the legitimate boundary. "A use or trust," he said, "was heretofore understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in the *post* was entitled under or bound by the agreement; but now the trust in this Court is the same as the *land*, and the trustee is considered merely as an instrument of conveyance" (*j*). And in the application of this principle his Lordship argued, that the estate of the *cestui que trust* was subject to *escheat*, and that on failure of heirs of the trustee, the lord who took by escheat was bound by the trust. But to these propositions the Courts of Equity have never yet assented (*k*). The limit to which the analogy of trusts to legal estates ought properly to be allowed was well enunciated by Lord Northington in the case of *Burgess* v. *Wheate*. "It is true," he said, "this Court has considered trusts *as between the trustee*, cestui que trust, *and*

Principles governing trusts at the present day.

(*a*) *Anon. case*, cited *Balch* v. *Wastall*, 1 P. W. 445; *Pit* v. *Hunt*, 2 Ch. Ca. 73.
(*b*) *Pratt* v. *Colt*, 2 Freem. 139.
(*c*) See *infra*.
(*d*) *Grey* v. *Colvile*, 2 Ch. Rep. 143.
(*e*) *Creed* v. *Colvile*, 1 Vern. 172.
(*f*) See Chap. XXVIII. s. 12.
(*g*) *Col.* v. *Colt*, 1 Ch. Rep. 254.
(*h*) *Burgess* v. *Wheate*, 1 Eden, 224.
(*i*) See *infra*.
(*j*) *Burgess* v. *Wheate*, 1 Eden, 226.
[(*k*) But see now the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4.]

those claiming under them, as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say therefore this Court has considered the creation and instrument of trust as a mere nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it; for my own part, *I know no instance where this Court has permitted the creation of a trust to affect the right of a third person*" (*a*), that is, to illustrate the principle by instances, a tenant by the curtesy, or in dower, or by *elegit*, as claiming through the *cestui que trust* or trustee, though in the *post*, is bound by and may take advantage of the trust; but according to the doctrine laid down by Lord Northington, the lord who comes in by escheat is not in any sense a privy to the trust, and therefore can neither reap a benefit from it on failure of heirs of the *cestui que trust*, nor is bound by the equity on failure of heirs of the trustee (*b*).

(*a*) *Burgess* v. *Wheate*, 1 Eden, 250, 251.

(*b*) It is clear that [prior to 47 & 48 Vict. c. 71], the lord [could] not acquire an equitable interest by escheat: *Burgess* v. *Wheate*, 1 Eden, 177; *Cox* v. *Parker*, 22 Beav. 168; but whether a lord taking the legal estate by escheat shall or not be bound by the trust, has never been decided. See *post*, Chap. XII. s. 3. [The Trustee Act, 1893, s. 26, sub-s. v., enables the Court to make an order on failure of heirs of the trustee. See also the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30.]

PART I

DEFINITION, CLASSIFICATION, AND CREATION OF TRUSTS

CHAPTER I

DEFINITION OF A TRUST

Definition of a trust.

As the doctrines of trusts are equally applicable to *real* and *personal* estate, and the principles that govern the one will be found, *mutatis mutandis*, to govern the other, we cannot better describe the nature of a trust generally, than by adopting Lord Coke's definition of a *use*, the term by which, before the Statute of Uses, a trust (1) of lands was designated (*a*). A trust, in the words applied to the use, may be said to be "*A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which* cestui que trust *has no remedy but by* subpœna *in Chancery*" (*b*).

(*a*) *Burgess* v. *Wheate*, 1 Eden, 248, *per* Lord Keeper Henley; *Lloyd* v. *Spillet*, 2 Atk. 150, *per* Lord Hardwicke.

(*b*) Co. Lit. 272, b. Law and equity are now administered in all the Courts alike. [For another definition, see *Wilson* v. *Lord Bury*, 5 Q. B. D. (C.A.) 518, at p. 530; and see *Re Williams* (1897) 2 Ch. (C.A.) 12, 19.]

(1) That a trust was anciently known as a *use*, appears from the *Merchant of Venice*. Thus, when Shylock had forfeited one half of his goods to the State to be commuted for a fine, and the other half of his goods to Antonio, the latter offered that, if the Court, as representing the State, would forego the forfeiture of the one half, he (Antonio) would be content himself to hold the other half in *use*, that is, in *trust* for Shylock for life, with remainder, after Shylock's death, for Jessica's husband:—

> "So please my lord the duke, and all the court,
> To quit the fine for one half of his goods;
> I am content so he will let me have
> The other half *in use*,—to render it,
> Upon his death, unto the gentleman
> That lately stole his daughter."
>
> —*Merchant of Venice*, Act IV. Scene I.

This interpretation clears Antonio's character from the charge of selfishness to which it would be exposed if he were to keep the half for his own use during his life.

A confidence.

1. It is "a *confidence*"; not necessarily a confidence *expressly* reposed by one party in another, for it may be raised by implication of law; and the trustee of the estate need not be *actually* capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a *legal* property nor a *legal* right to property (*a*).

Reposed in some other.

2. It is a confidence "*reposed in some other*"; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust;* for as a man cannot sue a *subpœna* against himself, he cannot be said to hold upon trust for himself (*b*). If the legal and equitable interests happen to meet in the same person, the equitable is for ever absorbed in the legal. Thus, if A. be seised of the legal inheritance *ex parte paternâ*, and of the equitable *ex parte maternâ*, upon the death of A. the heir of the maternal line has no equity against the heir of the paternal (*c*), [and where a legal joint tenancy and an equitable tenancy in common become united, the latter is merged (*d*)]. And the same rule prevails as to leaseholds for lives (*e*): as if the legal estate in a freehold lease be vested in a husband and his heirs, in trust for the wife and her heirs, the child who is the heir of both, and takes the legal estate *ex parte paternâ*, and the equitable estate *ex parte maternâ*, will, by the merger of the equitable in the legal, become seised both at law and in equity, *ex parte paternâ*, and the subsequent devolution will be regulated accordingly.

How far the equitable merges in the legal estate.

But this rule holds only where the legal and equitable estates are co-extensive and commensurate; for if a person be seised of the legal estate in *fee*, and have only a *partial equitable* interest, to merge the one in the other might occasion an injurious disturbance of rights. Thus, before the Fines and Recoveries Act (*f*),

(*a*) Bacon on Uses, 5. See *Wainewright* v. *Elwell*, 1 Mad. 634.

(*b*) *Goodright* v. *Wells*, Dougl. 747, *per* Lord Mansfield; *Conolly* v. *Conolly*, 1 Ir. Rep. Eq. 383, *per* Christian, L. J.; [and see *Re Selous*, (1901) 1 Ch. 921].

(*c*) *Selby* v. *Alston*, 3 Ves. 339; *Goodright* v. *Wells*, Dougl. 747, *per* Lord Mansfield; *Wade* v. *Paget*, 1 B. C. C. 363; *S. C.* 1 Cox, 76; *Philips* v. *Brydges*, 3 Ves. 126, *per* Lord Alvanley; *Finch's case*, 4 Inst. 85, 3rd resolution; *Harmood* v. *Oglander*, 8 Ves. 127, *per* Lord Eldon; *Conolly* v. *Conolly*, 1 Ir. Rep. Eq. 376. These cases, except the last, were all before the Inheritance Act, 1833, (3 & 4 W. 4), c. 106; [which, however, has been held not to vary the law, *Re Douglas*, 28 Ch. D. 327].

[(*d*) *Re Selous*, *sup.*]

[(*e*) *Creagh* v. *Blood*, 3 Jon. & Lat. 133.]

(*f*) 3 & 4 W. 4. c. 74.

if lands had been conveyed unto and to the use of A. and his heirs, in trust for B. in tail, with remainder in trust for A. in fee, had the equitable remainder limited to A. been converted into a legal estate, it would not have been barrable by B.'s equitable recovery (*a*).

In what sense mortgagee in fee is trustee for himself and his executors.

In the case of a mortgage in fee it [has been] said [that] a man and his *heirs* are trustees for himself and his *executors* (*b*). But the meaning was, that, until a release or foreclosure of the equity of redemption, the interest of the mortgagee was of the nature of personalty, and passed on his death to his personal representative; the *heir*, therefore, took the estate upon trust for the *executor* (*c*). A release or foreclosure, unless it happen in the lifetime of the mortgagee, comes too late after his decease to alter the character of the property, for, *as the tree falls so it must lie* (*d*).

Trust not issuing out of the land, but collateral to it.

3. A trust is "*not issuing out of the land but as a thing collateral to it.*" A legal charge, as a rent, issues directly out of the land itself, and therefore binds every person, whether in the *per* or *post*, whether a purchaser for valuable consideration or volunteer, whether with notice or without; but a trust is not part of the land, but an incident made to accompany it, and that not inseparably, but during the continuance only of certain indispensable adjuncts; for—

Annexed in privity to the estate.

4. A trust is "*annexed in privity to the estate*," that is, must stand or fall with the interest of the person by whom the trust is created; as, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner, until the fusion of law and equity, could not have himself sued the disseiser, but must have brought an action against him at law in the name of the trustee (*e*).

Extent of the term privity to the estate.

During the system of *uses*, and also while *trusts* were in their

(*a*) *Philips* v. *Brydges*, 3 Ves. 120; see the judgment, pp. 125-127; *Robinson* v. *Cuming*, Rep. *t.* Talb. 164; *S. C.* 1 Atk. 473; and see *Boteler* v. *Allington*, 1 B. C. C. 72; *Merest* v. *James*, 6 Mad. 118; *Habergham* v. *Vincent*, 2 Ves. jun. 204; *Buchanan* v. *Harrison*, 1 J. & H. 662; [*Chetwynd* v. *Allen*, (1899) 1 Ch. 353].

(*b*) *Kendal* v. *Micfield*, Barn. 50, *per* Lord Hardwicke.

[(*c*) Under the Land Transfer Act, 1897, s. 1, the executor, or other legal personal representative (when constituted), would now take the fee.]

(*d*) *Canning* v. *Hicks*, 2 Ch. Ca. 187; *S. C.* 1 Vern. 412; *Tabor* v. *Grover*, 2 Vern. 367; *S. C.* 1 Eq. Ca. Ab. 328; *Clerkson* v. *Bowyer*, 2 Vern. 66; *Gobe* v. *Earl of Carlisle*, cited *ib.*; *Wood* v. *Nosworthy*, cited *Awdley* v. *Awdley*, 2 Vern. 193. But if the heir foreclosed or obtained a release of the equity of redemption, it was said he might keep the estate, and pay the executor the debt only. *Clerkson* v. *Bowyer*, 2 Vern. 67, *per Cur. Sed quære.*

(*e*) *Finch's case*, 4 Inst. 85, 1st resolution; and see Gilbert on Uses, edited by Lord St Leonards, p. 429, note 6. See now the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.

infancy, the notion of privity of estate was not extended to tenant by the curtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have been carried forward, and at the present day a trust follows the estate into the hands of every one *claiming under the trustee*, whether in the *per* or *post*. It was the opinion of Sir T. Clarke and Lord Northington, that a lord taking by escheat, as claiming by title paramount, and not either in the *per* or *post*, was not affected by any privity, and therefore could not be compelled to execute the trust (*a*). But this question was never actually decided, and has in great measure become immaterial (*b*).

Trust annexed in privity to the person.

5. A trust is "*annexed in privity to the person.*" To entitle the *cestui que trust* to relief in equity it is necessary that he should not only prove the creation of the trust, and the continuance of the estate supporting it, but should also establish that the assign is personally privy to the equity, and therefore amenable to the *subpœna*. If it can be shown that the assign had *actual* notice, then, whether he paid a valuable consideration or not, he is plainly privy to the trust, and bound to give it effect; but if actual notice cannot be proved, then, if he be a volunteer, the Court will still affect him with notice by presumption of law; but if he be a purchaser for value, the Court must believe, until proved to the contrary, that, having paid for the estate, he was ignorant, at the time he purchased, of another's equitable title. A purchaser for valuable consideration without notice is therefore the only assign against whom privity annexed to the person cannot at the present day be charged (*c*).

No remedy of the cestui que trust but in Chancery.

6. The cestui que trust "*has no remedy but by a subpœna in Chancery.*" And by Chancery must be understood, not exclusively the Court of the Lord Chancellor, but any Court invested with an equitable jurisdiction, as opposed to common-law courts (*d*), and

(*a*) *Burgess* v. *Wheate*, 1 Eden, 203, 246.

(*b*) See *post*, Chap. XII. s. 3.

(*c*) See Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 7, repealed by Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129.

(*d*) *Sturt* v. *Mellish*, 2 Atk. 612, *per* Lord Hardwicke: *Allen* v. *Imlett*, F. L. Holt's Rep. 641; *Rex* v. *Holland*, Styl. 41, *per* Rolle, J.; *Queen* v. *Trustees of Orton Vicarage*, 14 Q. B. 139; *Vanderstegen* v. *Witham*, 6 M. & W. 457; *Bond* v. *Nurse*, 10 Q. B. 244; *Edwards* v. *Lowndes*, 1 Ell. & Bl. 81; *Drake* v. *Pywall*, 4 H. & C. 78. In *The Queen* v. *Abrahams*, 4 Q. B. 157, the Court professed to proceed upon the *legal* right, so that the principle was not disturbed, though there may be a question how far the facts justified the assumption upon which the Court acted. In *Roper* v. *Holland*, 3 Ad. & E. 99, a *cestui que trust* recovered upon an action of debt for money had and received on proof of the admission by the trustee that he had a balance in

spiritual courts (*a*), neither of which until the fusion of law and equity had any cognisance in matters of trust. A common-law court could never, from the defective nature of its proceedings, have specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract (*b*): an exercise of authority, however, clearly extra-provincial, and afterwards abandoned (*c*). Had a Spiritual court attempted to meddle with a trust, the Court of Queen's Bench might have been moved to issue a prohibition (*d*).

Judicature Acts.

By 36 & 37 Vict. c. 66, and 37 & 38 Vict. c. 83, it was enacted that as from 1st November, 1875 (inclusive), there should be "One Supreme Court of Judicature" consisting of "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal," and the High Court of Justice was made to comprise five divisions, viz.: the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division [but by Order in Council, dated 16th December, 1880, under section 32 of the first-mentioned Act, the Common Pleas Division and the Exchequer Division have been abolished].

Equitable estates and rights are now to be noticed and acted upon in all the courts, and where there is any conflict between the rules of equity and the rules of common law, the rules of equity are to prevail. See sections 24 & 25 of the first-mentioned Act.

Causes and matters pending in the Court of Chancery at the commencement of the Act of 36 & 37 Vict. are transferred to the *Chancery Division of the High Court of Justice*, and all causes and matters for the execution of *trusts*, charitable or private, are to be assigned to the same division, and for that purpose every document by which the cause or matter is commenced is to be marked for that division, or with the name of the Judge to whom the cause or matter is to be assigned. See sections 33 & 34.

hand for the plaintiff; and see *Sloper* v. *Cottrell*, 6 Ell. & Bl. 497; 2 Jur. N. S. 1046; *Topham* v. *Morecraft*, 8 Ell. & Bl. 972; 4 Jur. N. S. 611.

(*a*) *Miller's case*, 1 Freem. 283; *King* v. *Jenkins*, 3 Dow. & Ry. 41; *Farrington* v. *Knightly*, 1 P. W. 549, *per* Lord Parker; *Edwards* v. *Graves*, Hob. 265; *Witter* v. *Witter*, 3 P. W. 102, *per* Lord King.

(*b*) *Megod's case*, Godb. 64; *Jevon* v. *Bush*, 1 *Vern.* 344, *per* Lord Jeffries; *Smith* v. *Jameson*, 5 T. R. 603, *per* Buller, J.; and see 1 Eq. Ca. Ab. 384, D. (*a*).

(*c*) *Barnardiston* v. *Soame*, 7 State Trials, 443, Harg. ed. *per* Chief Justice North; *Sturt* v. *Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Rex.* v. *Holland*, Styl. 41, *per* Rolle, J.; *Allen* v. *Imlett*, F. L. Holt's Rep. 14.

(*d*) *Petit* v. *Smith*, 1 P. W. 7; *Edwards* v. *Freeman*, 2 P. W. 441, *per* Sir J. Jekyll; *Barker* v. *May*, 4 Man. & R. 386; *Ex parte Jenkins*, 1 B. & C. 655.

CHAPTER II

CLASSIFICATION OF TRUSTS

Trusts simple or special.

1. THE first and natural division of trusts is into *simple* and *special*.

Simple trust.

The *simple* trust is where property is vested in one person *upon trust* for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs.

Special trust.

The *special* trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts.

Special trusts either instrumental or discretionary.

2. Special trusts have again been subdivided into *ministerial* (or *instrumental*) and *discretionary*. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment.

A trust to convey an estate must be regarded as ministerial; for, provided the estate be vested in the *cestui que trust*, it is perfectly immaterial to him by what manner of person the conveyance is executed.

Trust to sell held by Mr Fearne to be instrumental.

A trust for sale was considered by Mr Fearne as also ministerial; "for the price," he said, "is not arbitrary, or at the trustee's discretion, but to be the best that can be gotten for the estate, which is a fact to be ascertained independently of any discretion in the trustee" (*a*). But there is much room for judgment in the time

(*a*) Fearne's P. W. 313.

and mode of proceeding to a sale, and the precautions that are taken will have a material influence upon the price; and Mr Fearne's opinion cannot at the present day be maintained (*a*).

Examples of discretionary trusts.

A fund vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit (*b*), or an advowson conveyed to them upon trust to elect and present a proper preacher (*c*), is clearly a discretionary trust; for the selection of the most deserving objects in the first instance, and the choice of the best candidate in the second, is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case.

Mixture of trust and power.

3. There is frequent mention made in the books of a *mixture of trust and power* (*d*), by which is meant, a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees. The *exercise* of such a power is *imperative*, while the *mode* of its execution is matter of judgment and *discretionary*.

Distinguished from trust with power annexed.

A *mixture of trust and power* is not to be confounded with a *common trust to which a power is annexed;* for, in the former case, as in a trust "to distribute at the discretion of the trustees," they are bound at all events to distribute, and the manner only is left open; but in the latter case, the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient; as where lands are limited to trustees with an authority to grant leases, or stock is transferred to trustees with a power of varying the securities; for in such cases the power forms no integral part of the trust, but is merely collateral and subsidiary, and the execution of it, in the absence of fraud, cannot be compelled by application to the Court.

Trusts lawful and unlawful.

4. Again, trusts may be divided, with reference to the object in view, into *lawful* and *unlawful*. The former, such as are directed to some honest purpose (as a trust to pay debts, &c.), which are called by Lord Bacon *Intents* or *Confidences*, and will be administered by the Court. The latter are trusts created for

(*a*) See *King* v. *Bellord*, 1 H. & M. 343; *Robson* v. *Flight*, 5 N. R. 344; *S. C.* 4 De G. J. & S. 608; *Clarke* v. *Royal Panopticon*, 4 Drew. 29.

(*b*) *Attorney-General* v. *Gleg*, 1 Atk. 356; *Hibbard* v. *Lamb*, Amb. 309; *Cole* v. *Wade*, 16 Ves. 27; *Gower* v. *Mainwaring*, 2 Ves. 87.

(*c*) *Attorney-General* v. *Scott*, 1 Ves. 413; *Potter* v. *Chapman*, Amb. 98.

(*d*) *Cole* v. *Wade*, 16 Ves. 27, 43; *Gower* v. *Mainwaring*, 2 Ves. 89, [and see *Tempest* v. *Camoys*, 21 Ch. D. (C.A.) 571; *In re Bryant*, (1894) 1 Ch. 324, 330].

the attainment of some end contravening the policy of the law, and therefore not to be sanctioned in a forum professing not only justice but equity, as a trust to defraud creditors or to defeat a statute. Such are designated by Lord Bacon as *Frauds, Covins* or *Collusions* (*a*).

Trusts public and private.

5. Another division of trusts is into *public* and *private*. By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for *charitable* purposes, and indeed *public* trusts and *charitable* trusts may be considered in general as synonymous expressions (*b*). In *private* trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is, or within the allowed limit will be, competent to control, modify, or determine the trust. The duration of trusts of this kind cannot be extended by the will of the settlor beyond the bounds of legal limitations, viz. a life or lives in being with an engraftment of twenty-one years. A *public* or *charitable* trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character, and is not confined within the limits prescribed to a settlement upon a private trust (*c*).

(*a*) Bac. on Uses, 9.

(*b*) See *Attorney-General* v. *Aspinall*, 2 M. & Cr. 622; *Attorney-General* v. *Heelis*, 2 S. & S. 76; *Attorney-General* v. *Corporation of Shrewsbury*, 6 Beav. 220; *Walker* v. *Richardson*, 2 M. & W. 892; *Attorney-General* v. *Webster*, 20 L. R. Eq. 483. But see [*Re Macduff*, (1896) 2 Ch. (C.A.) 451;] *Attorney-General* v. *Forster*, 10 Ves. 344; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Fearon* v. *Webb*. ib. 19; *Dolan* v. *Macdermot*, 5 L. R. Eq. 60 (in which M. R. observed, "*Public purposes* are such as mending or repairing roads, supplying water, making or repairing bridges, and are distinguished from *charities* in the shape of almsgiving, building almshouses, founding hospitals, and the like"; but *public* purposes, he added, "are *all* in a legal sense *charities*"); affirmed on appeal, 3 L. R. Ch. App. 677. [And see *Re Douglas*, 35 Ch. D. (C.A.) 472; *Wilson* v. *Barnes*, 38 Ch. D. (C.A.) 507; *Re Christchurch Inclosure Act*, 38 Ch. D. (C.A.) 520; aff. H. L. sub. nom. *Attorney-General* v. *Meyrick*, (1893) A. C. 1; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12; *Re St Stephen's, Coleman Street*, 39 Ch. D. 492; *Hunter* v. A. G. *and Hood*, (1899) A.C. (H.L.) 309; *Re Allen*, (1905) 2 Ch. 400; *Re Swain*, (1908) W. N. 209; *Smith* v. *Kerr* (the "Clifford's Inn" case), (1902) 1 Ch. (C.A.) 774; *Wallis* v. *S.G. for New Zealand*, (1903) A.C. (P.C.) 173.]

(*c*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Stewart* v. *Green*, 5 I. R. Eq. 470. [*Re Tyler*, (1891) 3 Ch. (C.A.) 252, and see *Re Bowen*, (1893) 2 Ch. 681; *Re Blunts Trusts*, (1904) 2 Ch. 767; *Re Swain*, (1905) 1 Ch. (C.A.) 669.]

CHAPTER III

OF THE PARTIES TO THE CREATION OF A TRUST

Now that we have defined and distributed trusts, we shall next enter upon the creation of them: *First*, By the act of a party, and *Secondly*, By operation of Law. Upon the subject of the former class we propose to treat, *First*, Of the necessary parties to the creation of a trust; *Secondly*, What property may be made the subject of a trust; *Thirdly*, With what formalities a trust may be created; *Fourthly*, Of Transmutation of Possession; *Fifthly*, What may be the object or scope of the trust; and *Sixthly*, In what language a trust may be declared.

In this chapter, we shall consider the necessary parties to a trust, under the three heads of the *Settlor*, the *Trustee*, and the *Cestui que trust*.

SECTION I

OF THE SETTLOR

General power creating a trust.

1. As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate, may, if he be so disposed, vest it in a trustee for the purpose of executing the settlor's intention.

The Crown.

2. The *sovereign*, as to his private property, may, by letters patent, grant it to one person upon trust for another (*a*). But the trust must appear upon the face of the letters patent; for if the grant be expressed to be made to one person, a trust cannot be proved by *parol* in favour of another, for this would contradict the nature of the instrument which purports to be an act of bounty to

(*a*) Bac. on Uses, 66.

the grantee (*a*). However, if the grant be to A. and his *heirs*, with the limitation of a beneficial interest to A. for life only, a trust of the remainder will not pass to the grantee, but will result to the Crown, for the presumption of bounty as to the whole is rebutted by the declared intention as to the part (*b*).

Prizes.

All prizes taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed mode amongst the captors; but an instrument of this kind is held not to vest an interest in the *cestuis que trust* which they can enforce in equity, but it may at any time be revoked or varied at the pleasure of the sovereign before the general distribution (*c*). [The effect of such an instrument, though the words "in trust" be used, is merely to appoint the persons named to be the agents of the sovereign to effect the distribution (*d*).]

Will of the sovereign.

The Crown may also by *will* bequeath its private personal property to one person in trust for another, but the will must be in writing, and under the sign manual (*e*), though the Probate Court has no jurisdiction to admit it to probate (*f*).

Corporations.

3. As to the power of *Corporate Bodies* to create a trust, it was competent to municipal corporations, before the Municipal Corporations Act, 1835 (*g*), to alienate their property, and as a consequence, to vest it in a trustee (*h*). But now municipal corporations are themselves trustees of their property, for the public purposes prescribed by the Municipal Corporations Act, 1835, and are debarred from alienating their real (*i*) or personal estate (*j*) without the consent of the Lords of the Treasury. A corporation, however, not included in the schedules to the Act, still retains its power of alienation (*k*).

Feme covert.

4. A *Feme Covert* may create a trust of *real* estate, but, unless it be property settled to her separate use, it must be done with the consent of her husband, and there must be all the attendant formalities required by the Fines and Recoveries Act, 1833, 3 & 4 W. 4, c. 74 [as modified by the Conveyancing Act, 1882, 45 & 46

(*a*) *Fordyce* v. *Willis*, 3 B. C. C. 577.

(*b*) Bac. on Uses, 66.

(*c*) *Alexander* v. *Duke of Wellington*, 2 R. & M. 35. As to the execution of the trust by the agency of persons deputed by the principals, see *Tarragona*, 2 Dods. Adm. Rep. 487.

[(*d*) *Kinloch* v. *Secretary of State for India in Council*, 15 Ch. D. (C.A.) 1; 7 App. Cas. 619.]

(*e*) 39 & 40 G. 3. c. 88, s. 10.

(*f*) Williams on Executors, 11, 9th ed. *In the goods of his late Majesty, Geo. III.*, 3 Sw. & Tr. 199.

(*g*) 5 & 6 W. 4. c. 76 [repealed and superseded by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50].

(*h*) *Mayor of Colchester* v. *Lowten*, 1 V. & B. 226.

(*i*) 5 & 6 W. 4. c. 76, s. 94. [See now 45 & 46 Vict. c. 50, s. 108.]

(*j*) *Attorney-General* v. *Aspinall*, 2 M. & Cr. 613; *Attorney-General* v. *Wilson*, Cr. & Ph. 1.

(*k*) *Evan* v. *The Corporation of Avon*, 29 Beav. 144.

Vict. c. 39, sect. 7 ; and a declaration of trust of copyholds by a feme tenant on the rolls is a "disposition" in equity within sect. 77 of the Fines and Recoveries Act, and binding on the customary heir (*a*). But under the Married Women's Property Act, 1882 (*b*), a woman married since the 31st Dec. 1882, and also a woman married before that date, as to property acquired by her after that date, can create a trust of real estate without the concurrence of her husband, and without the formalities of the Fines and Recoveries Act].

5. As to her *choses en action*, by the Married Women's Re- 20 & 21 Vict. c. 57.
versionary Interests Act, 1857 (*c*) (commonly called Malins's Act), a feme covert is enabled, with the concurrence of her husband, and on being separately examined in the manner prescribed by the Fines and Recoveries Act, to dispose by deed (*d*) of any *future* or *reversionary interest* created by an *instrument made after the 31st December* 1857, and as to which interest her power of anticipation is not specially restricted; and is also authorised to release or extinguish her right or equity to a settlement out of personal estate to which she is entitled *in possession*, under such *instrument* as aforesaid. But any personal estate settled for her benefit upon the occasion of her *marriage* is excepted from the foregoing powers (*e*); and an appointment after the date of the Act, but in execution of a power of appointment amongst children created by a settlement of a previous date, is not within the Act (*f*). [And as the interest must be created by an *instrument*, a share of a feme covert as next of kin under an intestacy is not within the Act (*g*).

Where a will by which a reversionary interest is bequeathed is republished by codicil, the date of the will is the date of the "instrument" within the Act (*h*). The expression "future interests" will not extend to mere possibilities or expectancies of interests, but imports interests to which the feme at the date of the disposing deed has some existing title at law or in equity (*i*).

[(*a*) *Carter* v. *Carter*, (1896) 1 Ch. 62 ; *Johnson* v. *Clark*, (1908) 1 Ch. 303, where a local custom dispensing with the acknowledgment was held unreasonable and bad.]

[(*b*) 45 & 46 Vict. c. 75, ss. 2, 5.]

(*c*) 20 & 21 Vict. c. 57.

[(*d*) It may be open to doubt whether the modifications introduced by the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 7, apply to such a deed.]

(*e*) See a case with reference to this section, *Clarke* v. *Green*, 2 H. & M. 474.

(*f*) *Re Butler's Trusts*, 3 Ir. Rep. Eq. 138.

[(*g*) *Allcard* v. *Walker*, (1896) 2 Ch. 369 ; and it seems that, independently of the Act, it has always been possible, by covenant in a marriage settlement, to bind a married woman's reversionary interests, whether contingent or otherwise, acquired during coverture, but not falling into possession until afterwards : *Lloyd* v. *Prichard*, (1908) 1 Ch. 265.]

[(*h*) *Re Elcom*, (1894) 1 Ch. (C.A.) 303.]

[(*i*) *Allcard* v. *Walker*, *ubi sup.*]

By an assignment under this statute the wife can transfer her future property "discharged from her husband's right, as fully and effectually as if she were a feme sole"; and "the assignment ought not to be regarded as that of the husband and wife according to their respective interests" (*a*). The concurrence of the husband will therefore be effectual, although there may be a right of retainer which would have been available as against him if he had been entitled to reduce the property into possession (*b*), or although he may have previously executed a creditors' deed or been adjudicated a bankrupt (*c*).]

Whether the Act applies to *choses en action* in possession.

It will be observed that the statutory power of disposition given by Malins's Act to a feme covert extends in terms no further than to her *future* or *reversionary* interests not limited to her by her marriage settlement; and as to *choses en action* in *possession*, the feme covert, though enabled to waive her equity to a settlement, has no express power of absolute disposition given to her. If, therefore, a feme covert be entitled to a *chose en action* in possession, and join with her husband in assigning it to a trustee, then, if it be not reduced into possession during the coverture, and the wife survives, the question arises whether, though the formalities prescribed in the Act were complied with, she may not claim the fund by survivorship. The meaning of the framer of the Act probably was, that, as the husband can compel a transfer to himself of *choses en action* to which a feme covert is entitled *in possession*, subject only to the wife's equity to a settlement, and as the Act enables a feme covert to waive her equity to a settlement, the husband and wife together can deal with such *choses en action* by making it imperative on the trustees to transfer the fund to the husband or his nominee.

Choses en action, &c., irrespectively of the Act.

6. The husband alone may create a trust of the wife's *choses en action sub modo;* that is, if they be reduced into possession during the coverture, the settlement will be unimpeachable, but if they remain *choses en action* at the death of the husband, the wife will be entitled to them by survivorship.

Chattels real.

As to the wife's equitable chattels real, the husband may, subject to the wife's equity to a settlement (*d*), create a trust of them *jure mariti* (*e*), unless the chattel be of such a nature that it cannot possibly fall into possession during the coverture (*f*).

[(*a*) *Re Batchelor*, 16 L. R. Eq. 481, *per* Lord Selborne, L. C.]

[(*b*) *Re Batchelor*, *ubi supra*.]

[(*c*) *Re Jakeman's Trusts*, 23 Ch. D. 344; *Cooper* v. *Macdonald*, 7 Ch. D. 288; and see *Re Briant*, 39 Ch. D. 471, 478; and that the Act applies to a reversionary legal chose in action, such as a policy of assurance on the life of the feme, see *Witherby* v. *Rackham*, 39 W. R. 363; 60 L. J. Ch. 511.]

(*d*) *Hanson* v. *Keating*, 4 Hare, 1.

(*e*) *Donne* v. *Hart*, 2 R. & My. 360.

(*f*) *Duberly* v. *Day*, 16 Beav. 33.

[7. The above observations apply only to property which was acquired before the 1st of January 1883, by women married before that date; as in all other cases the property vests in the wife, independently of her husband, and she has, under the Married Women's Property Act, 1882 (*a*), power to dispose or create a trust of it without his concurrence.] [Recent alterations.]

8. As regards property settled to the *separate use* of a feme covert, she is, to all intents and purposes, considered a *feme sole*, as, if real estate be conveyed to a trustee and his heirs, or if personal estate be assigned to a trustee and his executors upon trust for the feme covert for her sole and separate use, and to be at her sole disposal as to the fee-simple in the one case, and the absolute interest in the other, she has the entire control, and may exercise her ownership or implied power of appointment by creating a trust, extending even beyond the coverture. So if the feme covert be tenant for life to her separate use, she has full power to make a settlement of her whole life estate, and not during the coverture only. But in all cases where the power of anticipation is restrained, the feme covert can make no disposition of the property, except as to the annual produce which has actually become due (*b*). If a settlement be *fraudulently* procured from the wife by a husband by virtue of her separate use, it may be set aside (*c*). Separate use.

9. The Married Women's Property Act, 1870 (*d*), enacted by sect 1, that *wages and earnings* made by a married woman separately from her husband after the date of the Act (9th of Aug. 1870), were to be deemed settled to her separate use; and, by sect. 7, that where a woman, married after the date of the Act, was entitled to any personal property as *next of kin*, or to any sum not exceeding 200*l.*, under any *deed* or *will*, it should belong to her for her separate use; and, by the next section, that "rents and profits" of any real estate descending upon such married woman as *heiress*, should also belong to her for her separate use. [This Act has been repealed, and its place supplied by the Married 33 & 34 Vict. c. 93. [45 & 46 Vict. c. 75.]

[(*a*) 45 & 46 Vict. c. 75.]

[(*b*) See now the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39, under which a married woman, with the consent of the Court, may bind her interest notwithstanding a restraint on alienation, *post*, Chap. XXVIII. s. 6. As to the form of order for payment of dividends to a married woman restrained from anticipation, see *Stewart* v. *Fletcher*, 38 Ch. D. 627; and as to the power of the Court to impound her interest by way of indemnity to a trustee who has committed a breach of trust at her instigation, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45, and *post*, Chap. XXXI. s. 3.]

(*c*) *Knight* v. *Knight*, 11 Jur. N.S. 617; 5 Giff. 26.

(*d*) 33 & 34 Vict. c. 93.

Women's Property Act 1882 (*a*), which makes all property acquired after the commencement of the Act (1st of January 1883), by women married before that date, and also all the property of women married after that date, their separate property.]

Infants.

10. If an *Infant*, before the Fines and Recoveries Act, had levied a fine or suffered a recovery, he might also have declared the uses (*b*), and unless the fine or recovery had been reversed by him during his nonage he had been bound by the declaration (*c*), but deeds have now been substituted for fines and recoveries, and every deed of an infant, whether under the Act or independent of it, either is void or may be avoided.

Feoffment.

An infant until recently might have made a *Feoffment*, and at the same time have declared a use upon it, and both feoffment and use were voidable only, and not void (*d*); and by analogy the infant might also have engrafted a trust upon the legal estate; but a Court of Equity would never have allowed any equitable interest to be enforced against the infant himself to his prejudice, but gave him the same power of avoidance over the equitable as he had over the legal estate, and if the infant had died without having avoided the trust, the Court would still have investigated the transaction, and seen that no unfair advantage was taken (*e*).

Custom of Kent.

An infant may, by the custom of Kent, for valuable consideration certainly, and, according to the better opinion, even without value (*f*), make a feoffment at the age of fifteen, and upon such feoffment he may declare uses (*g*). But a Court of Equity would, no doubt, confine such a custom within its narrowest bounds, and as trusts have sprung into being since the statute of Hen. 8, might hold the custom to be void as of recent growth in respect of the equitable interest, and, at all events, would not allow the custom to be made an instrument of fraud.

Wills Act.

Before the Wills Act (*h*) an infant of the age of fourteen years might have bequeathed his personal estate, and therefore might have created a trust of it by will; but now, as regards personal as well as real estate, every testator must be of the age of twenty-one years.

[Covenant by an infant.]

[11. A covenant by an infant, if for his benefit, is not void but only voidable, and is binding on him, unless he disaffirms it within a reasonable time after he comes of age (*i*), and a beneficial

[(*a*) 45 & 46 Vict. c. 75; see as to these Acts *post*, Chap. XXVIII. s. 6.]

(*b*) Gilb. on Uses, 41, 245, 250.

(*c*) Gilb. on Uses, 246.

(*d*) Bac. on Uses, 67; Bac. Ab. Uses, E. See now Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3.

(*e*) See Cr. Dig. vol. iv. p. 130.

(*f*) Robinson on Gavelkind.

(*g*) Gilb. on Uses, 250.

(*h*) 7 W. 4 & 1 Vict. c. 26.

[(*i*) *Edwards* v. *Carter*, (1893) A. C. 360; *Re Hodson*, (1894) 2 Ch. 421;

covenant by an infant feme, in contemplation of her marriage, to settle her property to be acquired during the coverture is binding until it is avoided, and the feme may, after attaining twenty-one, and notwithstanding the disability of coverture, affirm or disaffirm the covenant, and if she affirms it, which it seems she may do by unequivocally claiming the benefit of it (*a*) as well as expressly by deed or otherwise, she becomes bound in equity to perform it to the full (*b*). [Infant feme.]

The disability of an infant feme covert is twofold, and therefore as the Infants Settlement Act, 1855 (*c*), assuming it to apply to a post-nuptial settlement, does not remove the disability of coverture, a disposition by the feme of reversionary personalty, not coming within Malins's Act (*d*), and not settled to her separate use, is not voidable, but void, and can only be rendered effectual by a subsequent disposition (*e*).] [Infant feme covert.]

12. *Lunatics or Idiots* might, before the Fines and Recoveries Act, have levied a *fine* or suffered a *recovery*, and the uses declared would have been valid until the fine or recovery was reversed. The *deed* of a lunatic or idiot may be void or not, according to circumstances (*f*). The *feoffment* of a lunatic or idiot, while the feoffment operated tortiously, was voidable by the heir only (*g*). However, should a lunatic or idiot have engrafted a declaration of trust upon any legal estate passed by him, a Court of Equity would have had jurisdiction to set it aside (*h*); though generally it declined to interfere even in this case as against a purchaser for valuable consideration without notice of the lunacy or idiocy (*i*). Lunatics.

13. If a man be declared a *bankrupt*, all the real and personal estate to which he is or may become entitled at the commencement of his bankruptcy [or before his discharge] vests in his Bankruptcy.

and see *In re Jones*, (1893) 2 Ch. 461; but the doctrine has no application to a feme covert in Austria: *Viditz* v. *O'Hagan*, (1900) 2 Ch. (C.A.) 87.]

[(*a*) *Greenhill* v. *North British, &c. Ins. Co.*, (1893) 3 Ch. 474; *Williams* v. *Bailey*, L. R. 2 Eq. 731; *Smith* v. *Lucas*, 18 Ch. D. 531; and see *Harle* v. *Jarman*, (1895) 2 Ch. 419.]

[(*b*) *Greenhill* v. *North British, &c. Co.*, *ubi sup.*; *Re Hodson*, *ubi sup.*; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; *Re Tottenham's Estate*, 17 L. R. Ir. 174.]

[(*c*) 18 & 19 Vict. c. 43.]

[(*d*) 20 & 21 Vict. c. 57.]

[(*e*) See *Seaton* v. *Seaton*, 13 App. Cas. 61.]

(*f*) See *Molton* v. *Camroux*, 2 Exch. 487, 4 Exch. 17; *Elliott* v. *Ince*, 7 De G. M. & G. 488; *Campbell* v. *Hooper*, 3 Sm. & G. 153.

(*g*) Co. Lit. 247, b.

(*h*) See Cruise, vol. iv. p. 130, vol. v. p. 253; *Niell* v. *Morley*, 9 Ves. 478.

(*i*) See *Price* v. *Berrington*, 3 Mac. & G. 486; *Greenslade* v. *Dare*, 20 Beav. 285.

trustee (*a*); but the surplus, after payment of his debts, still belongs to him (*b*), and of this interest he may create a trust (*c*).

Alien as to real estate.

14. An *Alien* might always have acquired real estate, whether freeholds or chattels real, by *purchase*, though he could not take it by operation of law, as by descent or *jure mariti*; and if he purchased it he might have held it until office found, but could not give an alienee a better title than he had himself (*d*). An alien, therefore, could only create a trust of real estate until the Crown stepped in.

As to personal estate.

As to personal estate, an alien *friend* might, although an alien *enemy* could not, be the lawful owner of chattels personal, and might exercise the ordinary rights of proprietorship over them, and consequently might create a trust.

Naturalisation Act, 1870.

Now, by the Naturalisation Act, 1870 (*e*), which came into operation on 12th May 1870, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject (*f*), and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural born subject, but this is not to "qualify an alien for any office or any municipal, parliamentary, or other franchise," and the enactment is not to affect any disposition or devolution before the date of the Act (*g*).

Traitors, felons, and outlaws.

15. With regard to *Traitors, Felons, and Outlaws*, a distinction by the old law was taken between *real* and *personal* estate. In *high treason, lands*, whether held in fee simple, fee tail (*h*), or for life, were *upon attainder* forfeited absolutely to the Crown—and in all other *felonies* the profits of the land were *upon attainder* forfeited to the Crown during the *life* of the offender. Subject to these superior rights of the Crown by forfeiture, and to the year,

[(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54.]

[(*b*) Sect. 65.]

[(*c*) See *Bird* v. *Philpot*, (1900) 1 Ch. 822.]

(*d*) An alien friend residing in the United Kingdom might, by 7 & 8 Vict. c. 66, s. 5, take and hold lands or houses for residence or occupation by him or his servants, or for the purpose of any business, trade, or manufacture for any term not exceeding 21 years.

(*e*) 33 Vict. c. 14.

[(*f*) This section enables a foreigner to dispose of property in England by will, but in the case of personalty the form of the will must, if the testator be domiciled abroad, be subject to the laws of his domicile: *In the goods of Von Buseck*, 6 P. D. 211; *Bloxam* v. *Favre*, 8 P. D. 101; 9 P. D. (C.A.) 130. English leaseholds are for this purpose governed by the same law as real estate: *Pepin* v. *Bruyere*, (1902) 1 Ch. (C.A.) 24.]

(*g*) See as to this *Sharp* v. *St Sauveur*, 7 L. R. Ch. App. 351; [*De Geer* v. *Stone*, 22 Ch. D. 243, 254.]

(*h*) 26 Hen. 8. c. 13. See 2 Bac. Ab. 576, 580.

day, and waste of the Crown (*a*), *land*, in cases of *petit treason* and *murder* (and until the Corruption of Blood Act, 1814 (54 G. 3, c. 145), in all cases of felony), escheated upon the death of the offender, by reason of the corruption of blood caused by *attainder, pro defectu tenentis,* to the lord of the fee, if it was held in fee; but if he held in tail, the land upon the death of the offender devolved upon the issue in tail. *Attainder* related back to the *time of the offence*, and consequently from that time no valid trust could be created by the offender as against the Crown or the lord in cases of *treason, petit treason,* or *murder*, nor in cases of other felonies, except subject to the right of the Crown during the offender's life. As respects the large number of *felonies* in which *no attainder* took place, the offender, though convicted, might convey (*b*), and therefore might create a valid trust of his real estate. Outlawry upon felony was equivalent to attainder, and drew with it the same consequences (*c*).

As to the *goods and chattels* of traitors, felons, and outlaws, they were forfeited absolutely, but only from the time of conviction, or the declaration of outlawry, and therefore up to that period the traitor, felon, or outlaw might vest his goods and chattels in a trustee upon trusts; but the law would not allow this power of disposition to be exercised collusively for the purpose of defeating the just rights of the Crown (*d*). The traitor, felon, or outlaw might sell the goods for valuable consideration (*e*); and so he might assign the property upon trust to secure the *bonâ fide* debt of a creditor (*f*); but the existence of the debt must have been actually proved, and the mere recital of it in the security was not sufficient (*g*). An assignment upon a meritorious consideration, as a bargain and sale to a trustee for the purpose of making provision for a son, would not support the deed (*h*). *Outlawry* in *misdemeanours* and *civil actions* (*i*) was a contempt of Court, and worked a forfeiture of the profits of the offender's lands for his life, and of his goods and chattels, absolutely. The person so outlawed, therefore, could not from that time affect the pernancy of the profits of his real estate, or make any settlement of his personal estate.

(*a*) Attainder was also necessary to entitle the Crown to the year, day and waste. *Rex* v. *Bridger*, 1 M. & W. 145.

(*b*) *Rex* v. *Bridger*, 1 M. & W. 145.

(*c*) See Co. Lit. 390, b.; *Holloway's case*, 3 Mod. 42; *King* v. *Ayloff*, 3 Mod. 72.

(*d*) See *Re Saunder's estate*, 4 Giff. 179: and 1 N. R. 256; *Barnett* v. *Blake*, 2 Dr. & Sm. 117; and see *Anon.* 2 Sim. N.S. 71.

(*e*) Hawk. Pl. of Cr., book 2, c. 49.

(*f*) *Perkins* v. *Bradley*, 1 Hare, 219; *Whitaker* v. *Wisbey*, 12 C. B. 44; *Chowne* v. *Baylis*, 31 Beav. 351.

(*g*) *Shaw* v. *Bran*, 1 Stark. 320.

(*h*) *Jones* v. *Ashurst*, Skinn. 357.

[(*i*) By 42 & 43 Vict. c. 59, outlawry in civil proceedings was abolished.]

Forfeiture Act, 1870.

16. Now, by 33 & 34 Vict. c. 23, it is enacted by sect. 1 that "from and after the passing of the Act (4th July 1870), no confession, verdict, inquest, conviction, or judgment of, or for any treason or felony, or *felo de se*, shall cause any *attainder* or corruption of blood, or any *forfeiture* or *escheat*, provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*."

After defining by sect 6, a "convict" to be "any person against whom, after the passing of the Act, judgment of death or penal servitude shall have been pronounced upon a charge of treason or felony," the Act proceeds by sect. 8 to declare that a convict, while he is such, shall not bring any *action* or *suit* for recovery of any property, debt, or damage, and shall be incapable of *alienation* (*a*), and then sect. 9 empowers the Crown to appoint "an *administrator*" of the convict's property (*b*) in whom, upon appointment, all the real and personal estate of the convict is made by sect. 10 to vest, and such administrator is enabled by sect. 12 to let, mortgage, sell, convey, and transfer any part of the convict's property, and by subsequent sections to pay debts and liabilities, &c., and to make allowances for the support of any wife or child or reputed child, or other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself while at large upon licence (*c*).

Subject as above, the property is, by sect. 18, to be held in trust for the convict, his heirs, or legal personal representatives, or other persons entitled; and on his ceasing to be subject to the operation of the Act (see sect. 7) is to revest in the convict or the persons claiming under him.

In the absence of an administrator appointed by the Crown, an "*interim curator*" may, by sect. 21, be appointed by Justices of the Peace in Petty Sessions, and by sect. 24 such curator is to sue or defend suits, sign discharges for income or debts, and generally manage the convict's property, make allowances for the maintenance of a wife or child, &c., and by sect. 25, may sell any personal property of the convict, but not without the sanction of a Justice or a Court of competent jurisdiction.

[(*a*) This, however, will not prevent the convict from paying his debts and applying his property for that purpose. The object of the section is to prevent the convict from improperly diverting his property either from his creditors or from his family; *Ex parte Graves*, 19 Ch. D. (C.A.) 1. And the sentence does not work a forfeiture under a clause in a will directed against alienation by operation of law; *Re Dash*, 57 L. T. N.S. 219.]

[(*b*) Under the Public Trustee Act, 1907, sect. 2, sub-sect. 1 (see *post*, Chap. XXIII.), the public trustee may now be appointed to act in this capacity.]

[(*c*) As to the powers of the administrator, and his right to costs in an action for an account brought against him by the convict after the sentence has expired, see *Carr* v. *Atkinson*, (1903) 1 Ch. 90.]

SECTION II

WHO MAY BE A TRUSTEE

Who may be a trustee.

The question who may be a trustee involves a variety of considerations. Thus, a person to be a trustee must be capable of *taking* or *holding* the property of which the trust is declared. Again, the trustee should be competent to deal with the estate as required by the trust, or as directed by the beneficiaries, whereas certain classes are by nature, or by the rules of law, under disability. Again, the execution of the trust may call for the application of judgment and a knowledge of business. And again, the trustee ought to be amenable to the jurisdiction of the Court which administers trusts. In general terms, therefore, a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of a Court of Equity. With this outline we proceed to consider certain exceptional cases where the fitness for the trusteeship may more or less be called into question.

The Crown.

1. The *Sovereign* may sustain the character of a trustee, so far as regards the *capacity* to take the estate, and to execute the trust; but great doubts have been entertained whether the subject can, by any legal process, enforce the performance of the trust. The *right* of the *cestui que trust* is sufficiently clear, but the defect lies in the *remedy* (*a*). A Court of Equity has no jurisdiction over the king's conscience, for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject (*b*). The old Court of Exchequer had, in its character of a court of revenue, an especial superintendence over the royal property; and it has been thought that through that channel a *cestui que trust* might indirectly obtain the relief to which, on the general principles of equity, he was confessedly entitled. No such jurisdiction, however, appears to have been known when Lord Hale was Chief

(*a*) *Paulett* v. *Attorney-General*, Hard. 467, 469; *Burgess* v. *Wheate*, 1 Ed. 255; *Kildare* v. *Eustace*, 1 Vern. 439. [And see *Kinloch* v. *Secretary of State for India in Council*, 15 Ch. D. (C.A.) 1; 7 App. Cas. 619; *ante* p. 20; and *Rustomjee* v. *The Queen*, 2 Q.B.D. (C.A.) 69, where it was held that in Sovereign acts, such as the making and performing of a treaty with another Sovereign, the Crown could not be a trustee for a subject.]

(*b*) Said by counsel in *Paulett* v. *Attorney-General*, Hard. 468.

Baron (*a*). Lord Hardwicke once observed in Chancery, "I will not decree a trust against the Crown in *this Court*, but it is a notion established in courts of *revenue* by modern decisions that the king may be a royal trustee" (*b*); but the doctrine was still unsettled in the time of Lord Northington (*c*); and in a more recent case (*d*), it was decided that though the Court of Exchequer could decree the *possession* of the property according to the equitable title, it had no jurisdiction to direct the Crown to *convey* the legal estate. The subject may, undoubtedly, appeal to the sovereign by presenting a petition of right (*e*), and it cannot be supposed that the fountain of justice would not do justice (*f*).

Corporations.

2. A *corporation* could not have been seised to a use, for, as was gravely observed, it had no *soul*, and how then could any confidence be reposed in it? But the technical rules upon which this doctrine proceeded have long since ceased to operate in respect of trusts; and at the present day every body corporate, whether civil or ecclesiastical (*g*), is compellable in equity to carry the intention into execution (*h*). "A trust," said Lord Romilly, "may be of two characters: it may be of a general character or of a private and individual character. A person might leave a sum of money to a corporation in trust to support the children of A. B., and pay them the principal at twenty-one. That would be a private and particular trust which the children could enforce against the corporation if the corporation applied the property to its own benefit. On the other hand, a person might leave money to a corporation in trust for the benefit of the inhabitants of a particular place, or for paving or lighting the town. That would be a public trust for the benefit of all the inhabitants, and the proper form of suit, in the event of any breach of trust, would

(*a*) See *Paulett* v. *Attorney-General*, Hard. 467, 469; and see *Wikes' Case*, Lane, 54.

(*b*) *Penn* v. *Lord Baltimore*, 1 Ves. 453; and see *Reeve* v. *Attorney-General*, 2 Atk. 224; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 617.

(*c*) See *Burgess* v. *Wheate*, 1 Ed. 255.

(*d*) *Hodge* v. *Attorney-General*, 3 Y. & C. 342.

(*e*) As to the transfer of the equity jurisdiction of the Court of Exchequer to the Court of Chancery, see the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 1; and *Attorney-General* v. *Corporation of London*, 8 Beav. 270; 1 H. L. Ca. 440. As to petitions of right, see the Petition of Right Act, 1860, 23 & 24 Vict. c. 34 [and Clode on Petitions of Right].

(*f*) *Scounden* v. *Hawley*, Comb. 172, *per* Dolben, J.; *Reeve* v. *Attorney-General*, cited *Penn* v. *Lord Baltimore*, 1 Ves. 446.

(*g*) *Attorney-General* v. *St John's Hosp.* 2 De G. J. & S. 621.

(*h*) See *Attorney-General* v. *Landerfield*, 9 Mod. 286; *Dummer* v. *Corporation of Chippenham*, 14 Ves. 252; *Green* v. *Rutherforth*, 1 Ves. 468; *Attorney-General* v. *Whorwood*, 1 Ves. 536; *Attorney-General* v. *Mayor of Stafford*, Barn. 33; *Attorney-General* v. *Foundling Hospital*, 2 Ves. jun. 46; *Attorney-General* v. *Earl of Clarendon*,

be an *information* (*a*) by the Attorney-General at the instance of all or some of the persons interested in the matter. If there was a particular trust in favour of particular persons, and they were too numerous for all to be made parties, one or two might then sue, on behalf of themselves and the other *cestuis que trust*, for the performance of the trust (*b*)."

Since the Municipal Corporations Act, 1835, every municipal corporation named in the schedules to the Act (*c*) has *become a trustee*, and has now no longer the power to aliene and dispose of its property, except with the sanction of the lords of the Treasury, but is bound to apply it to certain public purposes pointed out by the Act; and if there be any misapplication, there lies a remedy in Equity by information (*d*). 5 & 6 W. 4, c. 76.

Although the Court has ample jurisdiction to oblige a corporation to observe good faith, and the property already vested in a corporate body will be administered upon the trust attached to it, yet [in the absence of statutory provision to the contrary (*e*)], no real estate can be conveyed to a corporation upon any trust without the *licence* of the Crown. Licence of the Crown.

But there is no objection to an assignment or bequest of pure *personal* estate to a corporation upon trust.

3. The Bank of England cannot directly or indirectly be made a trustee of stock. The Corporation manages the accounts of the public funds, and is charged with the care of paying the dividends, but refuses, and cannot be compelled by law, to notice Bank of England.

17 Ves. 499; *Attorney-General* v. *Caius College*, 2 Keen, 165. [As to the capacity of certain corporations to act as custodian trustees under the Public Trustee Act, 1907, sect. 4 (3), see *post* Chap. XXIII.]

[(*a*) Now an action in the nature of an information. See Rules of Supreme Court, 1883, Ord. 1, r. 1.]

(*b*) *Evan* v. *The Corporation of Avon*, 29 Beav. 149.

(*c*) 5 & 6 W. 4. c. 76 [repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5, but substantially re-enacted, see ss. 6, 105, *et seq.*; and as to the administration of charitable and other trusts by corporations, see ss. 133-135]. Corporations not named in the schedules to the Act of 5 & 6 W. 4, might still dispose of their estates; *Evan* v. *The Corporation of Avon*, *ubi sup.*; [and the Act of 1882 applies to every city and town to which the former Act applied at the commencement of the Act of 1882, and to any town, district, or place whereof the inhabitants are incorporated after such commencement, or whereto the provisions of the Municipal Corporations Acts are extended by charter under the Act of 1882, but to no other place.]

(*d*) *Attorney-General* v. *Aspinall*, 1 Keen, 513; 2 M. & C. 613; *Attorney-General* v. *Borough of Poole*, 4 M. & C. 17; *Parr* v. *Attorney-General*, 8 Cl. & Finn. 409; *Attorney-General* v. *Corporation of Lichfield*, 11 Beav. 120; *Attorney-General* v. *Mayor of Waterford*, 9 I. R. Eq. 522 [*Attorney-General* v. *Mayor of Brecon*, 10 Ch. D. 204; *Attorney-General* v. *Mayor of Stafford*, W. N. 1878, p. 74.]

[(*e*) As in the case of joint stock companies who are empowered by the Companies Act, 1862, ss. 18, 191, to acquire and hold land upon trust or otherwise without any such licence.]

any rights but those of the legal proprietors in whose name the stock is standing. [Nor can the bank be required to recognise a tenancy in common of stock, and, therefore, as a corporation and individual could only hold stock as tenants in common, the Bank could not be compelled to transfer consols into their names (*a*), but, under the National Debt (Stockholders' Relief) Act, 1892 (*b*), stock might be transferred to, and held in the names of, an individual and a body corporate, or of two or more bodies corporate, and any such holding was, in its relation to the Bank, to be deemed a joint tenancy; and now, by the Bodies Corporate (Joint Tenancy) Act, 1899 (*c*) a body corporate is made capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances, or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they are to be entitled to the property as joint tenants. By virtue of this enactment it was held that, under an ordinary power in a settlement for the appointment of new trustees, a corporation could be appointed to be new trustee jointly with a surviving trustee (*d*).

Bank of England cannot be a trustee.

The Bank will not enter notice of instruments *inter vivos* upon their books; and though they were formerly obliged by certain Acts of Parliament to enter the wills, or at least extracts from the wills, of deceased proprietors of stock, the object of the legislature, as the Court determined, was not to make the Company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who under the will were the persons legally entitled (*e*). Had the construction been otherwise, the Bank of England would have been trustee for half the families in the kingdom. By 8 & 9 Vict. c. 97 [repealed by 33 & 34 Vict. c. 69, but substantially re-enacted by the National Debt Act, 1870 (*f*)] executors and

[(*a*) *Law Guarantee and Trust Society* v. *Governor and Company of Bank of England*, 24 Q. B. D. 406, 411.]

[(*b*) 55 & 56 Vict. c. 39, s. 6.]

[(*c*) 62 & 63 Vict. c. 20, replacing and extending the National Debt (Stockholders' Relief) Act, 1892.]

[(*d*) *Re Thompson's Settlement Trusts*, (1905) 1 Ch. 229. As to conditions imposed by the court in allowing the memorandum of association of a company to be altered so as to comprise execution of trusts &c., see *Re Munster* v. *Leinster Bank*, (1907) 1 I. R. 237.]

(*e*) *Hartga* v. *Bank of England*, 3 Ves. 55; *Bank of England* v. *Parsons*, 5 Ves. 665; *Bank of England* v. *Lunn*, 15 Ves. 583, *per* Lord Eldon; *Humberstone* v. *Chase*, 2 Y. & C. 209.

[(*f*) 33 & 34 Vict. c. 71, s. 23.]

administrators of a deceased holder of stock are enabled to transfer on producing probate or letters of administration, and the Acts requiring an entry or registration by the Bank of any will or codicil are repealed (*a*).

[By the Government Annuities Act, 1882 (*b*), sect. 8, the National Debt Commissioners or any savings bank are not to be affected by notice of any trust express, implied, or constructive affecting any savings bank annuity or insurance (except such trusts as are from time to time recognised by law in relation to deposits in savings banks, and except such trusts as are provided for by the Married Women's Property Acts).] [National Debt Commissioners and savings banks.]

4. A *feme covert* may be a trustee, but it would not be advisable to select a *feme covert* (*c*). Feme covert ought not to be appointed trustee.

There is here no absolute want of discretion, for a woman has no less judgment after marriage than before (*d*); nay, as was quaintly added by Sir John Trevor, she rather improves it by her husband's teaching (*e*). The reasons upon which her disabilities are founded are her own interest or her husband's, or both (*f*). Where these are not concerned, she possesses as much legal capacity as if she were perfectly *sui juris*. Thus, she may execute powers simply collateral (*g*), and (somewhat contrary to principle) even powers appendant, or in gross (*h*). Now at law, the trustee is considered as the sole and absolute proprietor, and therefore he can have no power that does not flow from the legal ownership; but in equity, the absolute interest is vested in the *cestui que trust*, and, as the trustee is regarded in the light of a mere instrument, any authority communicated to a trustee must have the character of a power simply collateral (*i*). It follows that if a discretionary trust be committed to a *feme covert*, there is nothing to prevent her due administration of it, so far as relates to her legal *judgment and capacity*. At the same time a woman's Has sufficient discretion.

(*a*) As to the state of the law before the Act of 8 & 9 Vict., see 3rd Edit. p. 32, note (1).

[(*b*) 45 & 46 Vict. c. 51.]

(*c*) *Lake* v. *De Lambert*, 4 Ves. 595, *per* Lord Loughborough; and see *Re Kaye*, 1 L. R. Ch. App. 387; [*Re Turnbull*, (1900) 1 Ch. 180; but see *Re Dickinson's Trusts*, W.N. (1902), p. 104.]

(*d*) *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.; *Hearle* v. *Greenbank*, 1 Ves. 305, *per* Lord Hardwicke; *Bell* v. *Hyde*, Pr. Ch. 330, *per* Sir John Trevor; and see marginal note to *Moore* v. *Hussey*, Hob. 95; and see *Needler* v. *Bishop of Winchester*, Hob. 225.

(*e*) *Bell* v. *Hyde*, Pr. Ch. 330.

(*f*) *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.

(*g*) Co. Lit. 112, a; ib. 187, b; *Lord Antrim* v. *Duke of Buckingham*, 2 Freem. 168, *per* Lord Keeper Bridgman; *Blithe's Case*, ib. 91, *vid.* 2nd resolution; *Godolphin* v. *Godolphin*, 1 Ves. 23, *per* Lord Hardwicke.

(*h*) See Sugden on Powers, c. 5, s. 1, 8th Ed.

(*i*) See *infra*.

will is not always her own, and if a trust were confided to a *feme covert*, the husband would, in fact, exercise no little influence; and, indeed, as [in cases not falling within the Married Women's Property Act, 1882] the husband is liable for her breaches of trust [and as this liability is not confined to losses caused by her active misconduct, but extends to breaches of trust arising from negligence (*a*)], he must, for his own protection, look to the manner in which she discharges the office, and therefore she cannot be allowed to execute the trust without his concurrence (*b*). [This last remark, however, does not apply to the case of a married woman appointed a trustee, or to a *feme sole* trustee marrying, since the Married Women's Property Act, 1882 (*c*), in both of which cases the husband is exempted from all liability in respect of her breaches of trust committed during the coverture, unless he has acted or intermeddled in the trust; but as the relief afforded to the husband by the Act has taken away from the *cestui que trust* the security of the husband's liability, the appointment of a married woman to be a trustee is as impolitic as it was before the Act.]

Her inability to pass the legal estate.

But, further, the appointment of a *feme covert* [was, prior to the recent Act,] attended with inconvenience from her inability (except with the concurrence of her husband, and through expensive forms) to join in the requisite assurances. At common law, if land be vested in a *feme covert* upon *condition* to enfeoff another, she may execute the feoffment by her own act, without the intervention of her husband (*d*); and hence it has been argued, that, in the case of a trust, she may, equally without her husband's concurrence, convey the estate to the parties *equitably* entitled (*e*). But between the two cases there is this clear and obvious distinction, that a *condition* is part and parcel of the common law, while a *trust* is only recognised in the *forum* of a Court of Equity; unless, therefore, the trust be so worded as to bear the construction of a legal condition, it seems impossible to contend that an instrument, otherwise inoperative, should, from the mere circumstance of the trust, which a Court of Law cannot notice, acquire a validity (*f*).

[(*a*) *Bahin* v. *Hughes*, 31 Ch. D. (C.A.) 390.]

(*b*) See *Smith* v. *Smith*, 21 Beav. 385; *Drummond* v. *Tracy*, Johns. 608; *Kingham* v. *Lee*, 15 Sim. 401; *Avery* v. *Griffin*, 6 L. R. Eq. 606; *Lloyd* v. *Pughe*, 8 L. R. Ch. App. 88; *Wainford* v. *Heyl*, 20 L. R. Eq. 321; [*Re Smith's Estate*, 48 L. J. N.S. Ch. 205].

[(*c*) 45 & 46 Vict. c. 75, ss. 1, 18, 24.]

(*d*) *Daniel* v. *Ubley*, Sir W. Jones, 137.

(*e*) *Daniel* v. *Ubley*, Sir W. Jones, 138, *per* Whitlock, and Dodridge, JJ.

(*f*) See Mr Hargrave's Observa-

Feme covert a trustee for sale.

5. Should a *feme covert* be a trustee for sale, it would seem, if these views be correct, that she can *exercise the discretion*, and with the aid of the Fines and Recoveries Act, which requires the concurrence of the husband, can pass the *estate*. But [unless the *feme* has been married, or the trust has been undertaken by her, since 1st January 1883, the commencement of the Married Women's Property Act, 1882] there remains the consideration to whom the purchase-money is to be paid, and who is to sign the receipt. If it be paid to the husband, it passes into the hands of a stranger, and if it be paid to the wife, the law immediately transfers it to the husband, who is a stranger. If any receipt be taken, it should be the joint receipt of the husband and wife (*a*). But the safest course would be to pay the money to the account of the wife at some responsible bank, payable upon the joint receipt of the husband and wife, and to remain there until required for the purposes of the trust, and if the husband and wife took it out of the bank for any other purpose, he would be liable as for a breach of trust.

Acknowledgment dispensed with by Court.

When the husband is a lunatic or idiot, or living apart from the wife, or otherwise incapable (as from infancy (*b*), or from being abroad and not heard of for years (*c*), of joining in the execution of a deed, the [High Court of Justice (*d*)] has power to dispense with the husband's concurrence [in which case the deed need not be acknowledged by the *feme covert* (*e*)]. The Court has frequently exercised this jurisdiction by enabling a *feme covert* entitled to freeholds or copyholds (*f*) in fee simple (*g*), in fee tail (*h*), or for life, either in possession or reversion (*i*), or to dower (*j*), or to leaseholds (*k*), [or to personal estate falling under Malins's Act, 20 & 21 Vict. c. 57 (*l*),] "by deed or surrender, to

tions, Co. Lit. 112, a, note (6); and Mr Fonblanque's Treat. on Equity, vol. i. p. 92; *McNeillie* v. *Acton*, 2 Eq. Re. 25.

(*a*) See *Drummond* v. *Tracy*, Johns. 611.

(*b*) *Re Haigh*, 2 C. B. N.S. 198.

(*c*) *Re Harriet Hedges*, W. N. 1867, p. 19; *Re Tarboton*, W. N. 1867, p. 267; *Ex parte Robinson*, 4 L. R. C. P. 205.

[(*d*) This jurisdiction, originally given to the Court of Common Pleas by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4. c. 74) s. 91, has been transferred to the High Court of Justice by the "Supreme Court of Judicature Act, 1873." See *Ex parte Thompson*, W. N. 1884, p. 28.]

[(*e*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.]

(*f*) *Ex parte Shuttleworth*, 4 Moore and Scott, 332, note.

(*g*) *Re Kelsey*, 16 C. B. 197; *Re Cloud*, 15 C. B. N.S. 833; *Re Woodall*, 3 C. B. 639; *Re Woodcock*, 1 C. B. 437.

(*h*) *Ex parte Thomas*, 4 Moore and Scott, 331.

(*i*) *Ex parte Gill*, 1 Bing. N. C. 168.

(*j*) *Re Turner*, 3 C. B. 639.

(*k*) *Re Harriet Hedges*, W. N. 1867, p. 19.

[(*l*) *Re Alice Rodgers*, 1 L. R. C. P. 47; *Ex parte Alice Cockerell*, 4 C. P. D. 39.]

dispose of, release, or surrender all *her* estate and interest" (the words of the order on one occasion) (*a*), in the premises. The order therefore will not affect the husband's curtesy, if any (*b*). The Court will not direct the *form* of conveyance (*c*), but it looks to the propriety of the order with reference to each particular estate, and it will not give the *feme covert* a roving power of disposition over *any* property which she may happen to have (*d*). In most cases the Court has made the order to enable the wife to deal with her own property for her maintenance, but in other cases the Court has enabled the *feme covert* to execute a trust (*e*): and it would seem, therefore, that where there is an incapacity of the husband to join in a deed, the *feme covert* (who has no want of discretion) can execute the trust by the aid of the Court.

Bare trustee.

6. By [the Trustee Act, 1893, 56 & 57 Vict. c. 53, sect. 16 (*f*)], it is enacted that when any *freehold* or *copyhold* hereditament is vested in a married woman as a *bare trustee* (*g*), she may convey or surrender the same as if she were a feme sole.

[Married Women's Property Act.]

[7. By sect. 18 of the Married Women's Property Act, 1882 (*h*), a married woman who is an executrix or administratrix alone, or jointly with any other person, or a trustee alone, or jointly with any other person, may transfer or join in transferring any annuity or bank deposit, or any part of the public stocks or funds, or of the stocks or funds of any bank, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any corporation, company, public body, or society, without her husband as if she were a feme sole; and this seems to apply to trusts in existence at the time the Act was passed.

(*a*) *Re Kelsey*, 16 C. B. 197.

[(*b*) By s. 91 of the Fines and Recoveries Act, all deeds executed by the wife in pursuance of the order shall (but without prejudice to the rights of the husband as then existing independently of the Act) be as good and valid as they would have been if the husband had concurred. The words in parenthesis have occasioned some difficulty, but it is conceived that the only rights of the husband reserved by them are such rights as he is entitled to by virtue of an independent interest, and that the wife's deed passes all such estate and interest as she is by s. 77 empowered to dispose of with the husband's consent. See *Goodchild* v. *Dougal*, 3 Ch. D. 650; *Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Fowke* v. *Draycott*, 29 Ch. D. 966, where it was held that the wife's disposition did not deprive the husband of his common law right to the rents acquired during the coverture.]

(*c*) *Re Turner*, 3 C. B. 166.

(*d*) *Re Cloud*, 15 C. B. N.S. 833.

(*e*) *Re Mirfin*, 4 M. & G. 635; *Re Haigh*, 2 C. B. N.S. 198; [*Re Caine*, 10 Q. B. D. 284].

[(*f*) Replacing s. 6 of the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78.]

[(*g*) See *Re Docwra*, 29 Ch. D. 693. As to the meaning of the expression "bare trustee," see *post*, Ch. XII. s. 2, ad init. in note.]

[(*h*) 45 & 46 Vict. c. 75.]

8. As regards real estate, it was held that the Married Women's Property Act, 1882, did not confer upon a woman married since the commencement of the Act any power to convey, where she was merely a trustee, and that, where she was a trustee for sale, she could not convey to a purchaser except with the concurrence of her husband and by deed acknowledged (*a*). The incapacity of the *feme covert* to act as trustee was therefore to that extent not removed, but having regard to the other provisions of the Act, and in particular to the provision in sect. 18, under which a married woman trustee "may sue and be sued," whatever the property is with respect to which she is a trustee (*b*), it would seem that where she was a trustee for sale she could, without the concurrence of her husband, not only exercise the discretion, but also give a sufficient receipt for the purchase money.

[Disability of feme covert trustee to pass legal estate not removed.]

[Feme covert trustee for sale.]

Now by the Married Women's Property Act, 1907, sect. 1 (*c*), a married woman is enabled, without her husband, to dispose of real or personal property held by her solely or jointly with any other person as trustee or personal representative, as if she were a feme sole. This provision renders valid and confirms all dispositions made after 31st December 1882, whether before or after the commencement of the Act (1st January 1908), but where any title or right has been acquired through or with the concurrence of the husband before 1st January 1908, that title or right is to prevail over any title or right which would otherwise be rendered valid by the section.]

[Married Women's Property Act, 1907.]

9. It is almost equally undesirable to appoint a *feme* who is single a trustee, for should she marry [she would be liable to be influenced by her husband who, so long as he abstained from active interference, would be under no liability to make good any breaches of trust committed by her during the coverture]. The Court at one time refused to appoint a *feme sole* a trustee, as, in the event of her marriage [it might lead to inconvenience, as the husband would have the power of interfering (*d*)]. But in a more recent case the M.R., after consulting with the other judges, appointed a *feme sole* a trustee (*e*), and the Lords Justices have since made a similar order (*f*).

Feme sole.

10. An *infant* labours under still greater disability than a *feme covert;* for, first, as regards *judgment and discretion*, a *feme* is admitted to *have* capacity, though she cannot in all cases freely

Infant ought not to be appointed trustee.

[(*a*) *Re Harkness*, (1896) 2 Ch. 358.]
[(*b*) *Re Harkness, ubi sup.*]
[(*c*) 7 Edw. 7 c. 18.]
(*d*) *Brook* v. *Brook*, 1 Beav. 531.
(*e*) *Re Campbell's Trusts*, 31 Beav. 176.
(*f*) *In re Berkley*, 9 L. R. Ch. App. 720; [and see *Re Peake's Settled Estates*, (1894) 3 Ch. 520; *Re Dickinson's Trusts*, W. N. (1902), p. 104.]

Has no legal discretion.

exercise it; but an infant is said altogether to *want* capacity (*a*). An infant cannot be steward of the court of a manor (*b*), or attorney for a person in a suit (*c*), or guardian to a minor (*d*), or be a bailiff or receiver (*e*); but can only discharge such acts as are merely ministerial, as to be an attorney to deliver seisin (*f*), or as a lord of a manor to give effect to a custom (*g*), or to appoint a seneschal (*h*). So he might, until the Administration of Estates Act, 1798 (*i*), have been, as executor, the channel or conduit pipe through which the assets found their way to the hands of creditors in a due course of administration (*j*); but had he acted otherwise than ministerially, as by signing an acquittance without receipt of the money, such an exercise of discretion had been actually void (*k*). [However an infant may by instrument *inter vivos* (*l*) exercise a power simply collateral over both real and personal estate (*m*), and as to personal estate he may exercise a power in gross, notwithstanding that it may involve the application of discretion (*n*), but as to real estate it would seem that such a power could not be exercised unless expressly authorised by the instrument creating the power (*o*). And where an intention appears that the power is to be exercisable notwithstanding infancy, an infant may appoint even although his interest may be affected by the appointment (*p*). A trust which requires the exercise of discretion cannot be executed by an infant (*q*).]

Power of passing the estate.

Effect of feoffment, or delivery of chattels.

11. With respect to an infant's ability to pass the estate, it seems to be generally agreed that, at common law, his *feoffment* of land (*r*) or actual *delivery* of goods and chattels (*s*), is an act

(*a*) *Hearle* v. *Greenbank*, 3 Atk. 712, and 1 Ves. 305, *per* Lord Hardwicke; *Grange* v. *Tiving*, O. Bridg. 108, *per* Sir O. Bridgman; *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.; and see *Sockett* v. *Wray*, 4 B. C. C. 486.

(*b*) Co. Lit. 3, b; and see Mr Hargrave's note (4), ib. But acts done by an infant in the character of steward cannot be avoided by reason of his disability; *Eddleston* v. *Collins*, 3 De G. M. & G. 1.

(*c*) Co. Lit. 128, a; Br. Ab. "Covert. and Infant," pl. 55; and see *Hearle* v. *Greenbank*, 3 Atk. 710.

(*d*) Co. Lit. 88, b; [but see *Re D'Angibau*, 15 Ch. D. (C.A.) 228, 245.]

(*e*) Co. Lit. 172, a.

(*f*) Co. Lit. 52, a; Br. Ab. "Covert and Infant," pl. 55.

(*g*) 1 Watk. on Copyh. 24.

(*h*) *Halliburton* v. *Leslie*, 2 Hog. 252.

(*i*) 38 G. 3. c. 87, s. 6.

(*j*) Toller on Executors, 31.

(*k*) *Russell's case*, 5 Rep. 27, a.; Co. Lit. 172, a; ib. 264, b.; 1 Roll. Ab. 730, F. 2.

[(*l*) But not by will; Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 7.]

[(*m*) Sug. on Pow. 8th ed. 177, 911; 1 Preston on Abstracts, 325; *King* v. *Bellord*, 1 H. & M. 343; *Re D'Angibau*, 15 Ch. D. (C.A.) 228.]

[(*n*) *Re D'Angibau*, *ubi sup.*]

[(*o*) *Hearle* v. *Greenbank*, 3 Atk. 695; *S. C.* 1 Ves. 298; *Re Cardross's Settlement*, 7 Ch. D. 728.]

[(*p*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angibau*, 15 Ch. D. (C.A.) 228.]

[(*q*) *King* v. *Bellord*, 1 H. & M. 343.]

(*r*) *Thompson* v. *Leach*, 3 Mod. 311, *per Cur.*: Br. Ab. "Covert. and Inf." pl. 1; and see Co. Lit. 42, b. 51, b.; *Whittingham's case*, 8 Rep. 42, b.; Br. Ab. "Covert. and Inf." pl. 40.

(*s*) Perk. 14; Br. Ab. "Covert. and Inf." pl. 1.

of so great solemnity, that it serves to carry the present possession, and is voidable only, and not void. Where the property is of an *incorporeal* nature, as the delivery of the thing itself is impossible, the common law has substituted the kindred precaution of *delivery of the deed.* The effect of a deed delivered by an infant has been much disputed; by some it has been held to be absolutely null and void (*a*), by others to be voidable only (*b*), and by others again to be void or voidable, as the validity of the execution is taken to be for the infant's benefit or not (*c*). Another opinion still (which is that of Perkins (*d*), and was adopted in the case of *Zouch* v. *Parsons* (*e*), and may be regarded as the doctrine of the present day) is, that an infant's deed, where the delivery of it answers to livery of seisin, and operates as the conveyance of an interest, is merely voidable; but where it does not take effect as an assurance by delivery of the deed, as in a power of attorney (*f*), then it is actually void. Lord Mansfield, however, subjoined the qualification, that if a case should arise where it would be more beneficial to the infant that the deed should be considered as void, as if he might incur a forfeiture, or be subject to damage, or a breach of trust in respect of a third person (*g*) unless it was deemed void, the reason of an infant's privileges would in such case warrant an exception from the rule (*h*). Where the instrument *carries no solemnity with it,* equivalent to feoffment or delivery, the validity of the Act must then depend on the question how far the assurance promotes the interest of the infant (*i*).

Effect of delivery of a deed.

Effect of his assurance without feoffment, delivery, or deed.

12. [A joint tenancy may be severed by an infant by an instrument taking effect by delivery of his hand, but as such instrument is voidable by the infant on attaining full age, there may arise this disadvantage to the other joint tenants, that during a certain

[Severance of joint tenancy.]

(*a*) Br. Ab. "Covert. and Inf." pl. 1 & 10; *Lloyd* v. *Gregory*, Cro. Car. 502, *per Cur.*; *Thompson* v. *Leach*, 3 Mod. 310, *per Cur.* See observations on the last two cases in *Zouch* v. *Parsons*, 3 Burr. 1806 & 1807; and see *Humphreston's case*, 2 Leon. 216.

(*b*) *Norton* v. *Turvill*, 2 P. W. 145, *per* Sir J. Jekyll.

(*c*) See *Zouch* v. *Parsons*, 3 Burr. 1804; and see *Humphreston's case*, 2 Leon. 216; *Lloyd* v. *Gregory*, Cro. Car. 502; *Nightingale* v. *Earl Ferrers*, 3 P. W. 210; *Inman* v. *Inman*, 15 L. R. Eq. 260.

(*d*) Sects. 12 & 154; and see Br. Ab. "Dum fuit infra ætatem," pl. 1; id. "Covert. & Inf." pl. 12; *Stone* v. *Wythipole*, Cr. El. 126; *Marlow* v. *Pitfield*, 1 P. W. 559.

(*e*) 3 Burr. 1807; confirmed by the recent case of *Allen* v. *Allen*, 1 Conn. & Laws. 427; 2 Drur. & War. 307.

(*f*) See Br. Ab. "Covert. and Inf." pl. 1; *Whittingham's case*, 8 Rep. 45, a.

(*g*) *Quære* if a court of law could notice a breach of trust. See *Warwick* v. *Richardson*, 10 M. & W. 295. [But see now Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 24.]

(*h*) *Zouch* v. *Parsons*, 3 Burr. 1807.

(*i*) *Humphreston's case*, 2 Leon. 216; and see *Lloyd* v. *Gregory*, Cro. Car. 502; Co. Lit. 51, b.; *Grange* v. *Tiving*, Sir O. Bridg. 117.

period they might hold and consider that the infant had severed the joint tenancy, and then find at a later period that he had a right to undo that which he seemed to have done (*a*).

[Appointing an attorney.]

13. By the Conveyancing and Law of Property Act, 1881, a married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*b*)].

Infant cannot be guilty of a breach of trust.

14. Another objection to an infant trustee is, that he cannot be decreed to make satisfaction on the ground of a breach of trust (*c*). However, an infant has no privilege to cheat men (*d*), and therefore he will not be protected, if he be old and cunning enough to contrive a fraud (*e*).

Consequent presumption that he takes not as trustee, but beneficially.

From the great inconveniences attending the appointment of an infant as trustee, there arises a strong presumption wherever property is given to an infant, that he is intended to take it *not as trustee* but *beneficially* (*f*).

Alien formerly could not be trustee of freeholds or chattels real.

15. An *alien*, until the Naturalisation Act, 1870 (*g*), could not effectually be a trustee in respect of freeholds or chattels real, for the policy of the law would not allow an alien to sue or to be sued to the prejudice of the Crown touching lands in any Court of Law or Equity (*h*); and on inquisition found, the legal estate of the property vested by forfeiture in the Crown.

Real estate devised to British subject and alien upon trust.

In a case where a testator devised real estate to his wife and an *alien* upon trust to sell, and they sold accordingly, and executed a conveyance, a question afterwards arose whether the purchaser

[(*a*) *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416, 422; 54 L. J. Ch. 466, 469, *per* Pearson, J., explaining *May* v. *Hook*, Butler's Note to Co. Lit. 246, a; and see Simpson on Infants, 2nd ed. p. 24.]

[(*b*) 44 & 45 Vict. c. 41, s. 40.]

(*c*) See *Whitmore* v. *Weld*, 1 Vern. 328; *Russell's case*, 5 Rep. 27, a; *Hindmarsh* v. *Southgate*, 3 Russ. 324. [Under special circumstances, however, an infant trustee might be held liable after his majority for moneys previously received; see *Re Garnes*, 31 Ch. D. (C.A.) 147, where the proper form of enquiry as to moneys received by an infant trustee was considered and settled.]

(*d*) *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 489, *per* Lord King.

(*e*) See *Cory* v. *Gertcken*, 2 Mad. 40; *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 488; *Earl of Buckingham* v. *Drury*, 2 Ed. 71, 72; *Clare* v. *Earl of Bedford*, 13 Vin. 536; *Watts* v. *Cresswell*, 9 Vin. 415; *Beckett* v. *Cordley*, 1 B. C. C. 358; *Savage* v. *Foster*, 9 Mod. 37; *Overton* v. *Banister*, 3 Hare, 503; *Stikeman* v. *Dawson*, 1 De G. & Sm. 503; *Wright* v. *Snowe*, 2 De G. & Sm. 321; *Davies* v. *Hodgson*, 25 Beav. 177; *Re Constantinople & Alexandra Hotel Co., Ebbett's case*, 18 W. R. 202; 21 L. T. N.S. 574; [*Lempriere* v. *Lange*, 12 Ch. D. 675; *Woolf* v. *Woolf*, (1899) 1 Ch. 343.]

(*f*) *Lamplugh* v. *Lamplugh*, 1 P. W. 112; *Blinkhorne* v. *Feast*, 2 Ves. sen. 30; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 1 Atk. 386; *Smith* v. *King*, 16 East 283; and see *King* v. *Denison*, 1 V. & B. 278.

(*g*) 33 Vict. c. 14.

(*h*) Gilb. on Uses, 43; and see *Fish* v. *Klein*, 2 Mer. 431.

had a good title, and with the view of curing the defect an Act of Naturalisation was obtained; but it was held, that the common form of the Act of Naturalisation did not confirm the purchaser's title *retrospectively* and that the objection remained. The parties had endeavoured to introduce into the Bill special words to meet the case, but the departure from the usual course was found impracticable (*a*).

Chattels personal.

In respect of chattels *personal* there was never any objection to an *alien* friend as trustee as regards his ability either to take or to hold the estate.

33 Vict. c. 14.

Now by the Naturalisation Act, 1870, sect. 1, an alien may take, acquire, hold, and dispose of *real* and personal property of every description, in the same manner as if he were a natural born subject. The objection, therefore, to an alien being a trustee of freeholds or chattels real has been removed.

Alien domiciled abroad not a fit trustee.

If, however, the alien be domiciled abroad, it is an objection to his *fitness* for the office of trustee, as he is not amenable to the jurisdiction of the Court (*b*).

Bankrupts not absolutely disqualified.

16. Bankrupts may be appointed trustees, should any one be disposed to commit the administration of his property to those who have not been sufficiently careful in the management of their own. The past or any subsequent act of bankruptcy will have no operation upon the trust estate.

Cestuis que trust should not, as a general rule, be appointed trustees.

17. *Cestuis que trust* are not, as such, incapacitated from being trustees for themselves and others; but, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their duty (*c*).

Relatives.

18. Sir John Romilly, M.R., considered it also objectionable to appoint any *relative* a trustee, from the frequency of breaches of trust committed by trustees at the instance of *cestuis que trust* nearly connected with them (*d*).

However, there is no positive legal objection to appointing either a *cestui que trust* or a relative, and indeed it is not always easy to find a trustee who is neither a *cestui que trust* nor a relative, and this the Court itself has experienced; for, notwithstanding its repugnance to such a course, it has been obliged occasionally to appoint a relative who is also a *cestui que trust*, to be a trustee (*e*). In one case the Court, in appointing two new

(*a*) *Fish* v. *Klein*, 2 Mer. 431.

(*b*) See *Meinertzhagen* v. *Davis*, 1 Coll. 335; *Re Guibert*, 16 Jur. 852; *Re Harrison's Trusts*, 22 L. J. N.S. Ch. 69; *Curtis's Trusts*, 5 I. R. Eq. 429.

(*c*) *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*d*) *Wilding* v. *Bolder*, 21 Beav. 222.

(*e*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W.

trustees, allowed the *husband* of a *cestui que trust* to be one of them upon his undertaking that, if he became sole trustee, he would immediately take steps for the appointment of a co-trustee (*a*), [and in another case the appointment was made with a direction, that in case the husband should become sole trustee, a new trustee should forthwith be appointed (*b*). But in a case in lunacy, where three new trustees were appointed, the Court allowed the husband of the tenant for life to be one of them, without requiring any such undertaking (*c*);] and in other cases the *husbands* of *cestui que trust* in remainder have been appointed trustees (*d*); [but Sir G. Jessel, M.R., refused to appoint a man a trustee of his own marriage settlement, though all the persons interested assented to the application, and no other person could be found to accept the office, on the ground that the wife, who had a life interest to her separate use without power of anticipation, would not be properly protected (*e*).

[Settled Land Act.]

Neither tenant for life of the settled land (*f*) nor, except under special circumstances (*g*), his solicitor (*h*) will be appointed by the Court a trustee of the settlement under the Settled Land Act, 1882. And in one case the Court refused to appoint two brothers trustees, and said there must be two independent trustees (*i*). In a recent case the Court refused to sanction the appointment by a continuing trustee, who was a solicitor, and acted as such for the trust and for some of the *beneficiaries*, of his son and partner, who was also a solicitor, as a co-trustee in the place of the retiring trustee (*j*), and the Court has refused to appoint a person interested in remainder after the estate of an infant tenant in tail (*k*). But although in such cases an appointment will not be

[Appointment out of Court.]

R. 458; *Re Clissold's Settlement*, 10 L. T. N.S. 642; and see *Re Lancaster Charities*, 9 W. R. 192; *Passingham* v. *Sherborn*, 9 Beav. 424; *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; [*Tempest* v. *Lord Camoys*, 58 L. T. N.S. 221].

(*a*) *Re Hattatt's Trusts*, 18 W. R. 416; 21 L. T. N.S. 781; [and see *Re Burgess's Trusts*, W. N. 1877, p. 87; *Re Lightbody's Trusts*, 33 W. R. 452; 52 L. T. N.S. 40.]

[(*b*) *Re Parrott*, W. N. 1881, p. 158; 30 W. R. 97.]

[(*c*) *Re Jesson*, 7 Aug. 1878, M. S.]

(*d*) *Re Davis's Trusts*, 12 L. R. Eq. 214; [*Re Sarah Knight's Will*, 26 Ch. D. (C.A.) 82.]

[(*e*) *Re Lowdell's Trust*, M. S. S., M. R. 11 June, 1877.]

[(*f*) *Re Harrop's Trusts*, 24 Ch. D. (C.A.) 717.]

[(*g*) *Re Earl of Stamford*, (1896) 1 Ch. 288, 299; *Re Marquis of Ailesbury*, (1893) 2 Ch. 345, 360.]

[(*h*) *Re Kemp's Settled Estates*, 24 Ch. D. (C.A.) 485; *Re Earl of Stamford*, (*ubi sup.*); *Re Spencer's Settled Estates*, (1903) 1 Ch. 75, 82.]

[(*i*) *Re Knowles's Settled Estates*, 27 Ch. D. 707.]

[(*j*) *Re Norris*, 27 Ch. D. 333.]

[(*k*) *Re Paine's Trusts*, 33 W. R. 564.]

made by the Court, a similar appointment made *bonâ fide* out of the Court will not necessarily be invalid (*a*).

19. Where a charity has been founded for the purpose of teaching or expounding certain religious doctrines, or for the exclusive benefit of persons holding certain religious views, the trusteeship of the charity should be confined to persons holding those doctrines or views (*b*), and the same rule would seem to apply where the religious object of the charity is the primary object, though there may be a secondary object, as, for instance, the repairing of roads, which can be administered as well by persons of one sect or religious belief as of another. But where the object of the charity is eleemosynary, and it is not restricted to persons of any particular religious denomination, the trusteeship need not be confined to persons holding the doctrines of the church or sect to which the founder belonged, but the most eligible person for the office may be selected without regard to his religious views (*c*).] [Charity.]

Proper number of trustees.

20. We may here remark, that care should be taken, not only to provide for the fitness of the trustee, but also to secure an adequate number of trustees. A single trustee, whether originally appointed such or become so by survivorship, has the absolute and unlimited control at law over the property; and should he become involved in difficulties, he is under a temptation which, notwithstanding recent penal enactments, must still be regarded as strong, to sustain his credit by resorting to a fund of which he can possess himself with certainty, and without the fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives, has lulled the conscience of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where the trust reposed in him is merely a nominal confidence [and the appointment of the public trustee to act as sole trustee is now expressly authorised by statute (*d*), but in all other cases] where the administration of the trust involves the receipt and custody of money, the safeguard of at least two trustees ought never to be dispensed with (*e*).

[(*a*) *Re Norris, ubi sup.; Re Earl of Stamford*, (1896) 1 Ch. 288, 299.]

[(*b*) *Re Ilminster Free School*, 4 Jur. N.S. 676; S. C. *nom. Baker* v. *Lee*, 8 H. L. C. 495; *Attorney-General* v. *Pearson*, 3 Mer. 353; *Attorney-General* v. *St John's Hospital, Bath*, 2 Ch. D. 554.]

[(*c*) *Attorney-General* v. *St John's Hospital, Bath, ubi sup.*; and see *Re Ross's Charity*, (1897) 2 Ch. 397; (1899) 1 Ch. (C.A.) 21.]

[(*d*) The Public Trustee Act, 1906, sec. 5 (1); see *post* Chap. XXIII.]

(*e*) See *Baillie* v. *M'Kewan*, 35 Beav. 183; *Re Dickson's Estate*, 3 I. R. Eq. 345; [*Grant* v. *Grant*, 34 L. J. Ch. 641].

Appointment of new trustees.

And on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee, a precaution, it is feared, but too frequently neglected, from motives of delicacy—the surviving trustee being sensitive, and conceiving his honesty to be called into question, and the *cestuis que trust* (often too ignorant of the world to see the necessity of taking precautions against fraud), being apt to suspect their legal adviser of a wish to create business at the expense of the estate.

To guard against the constant recurrence of appointments of new trustees, it has been common, at least where the property is considerable, to appoint four trustees originally, for then, on the decease of the first or even a second trustee, an immediate substitution is not very material, but the safe rule is, where money is concerned, always to appoint at least three trustees, and to keep the number full. As regards stock, more than *four* trustees are scarcely ever appointed, and it is a *general* rule of the Bank not to allow stock to be transferred into the names of more than four joint proprietors. But in *special* cases so many as five or six have been admitted (*a*).

SECTION III

WHO MAY BE CESTUI QUE TRUST

1. It may be laid down as a general rule that as *æquitas sequitur legem*, those who are capable of taking the legal estate, may, through the channel of the trust, be made recipients of the equitable.

The Crown may be *cestui que trust.*

2. A trust may be declared in favour of the *Sovereign.* While uses were in their fiduciary state, it was held that in order effectually to limit a use to the Crown, the title must have been matter of record. "It behoveth," says Lord Bacon, "that both the declaration of the use and the conveyance itself be matter of record, because the king's title is compounded of both; I say not appearing of record, but by conveyance of record. And, therefore, if I *covenant* with J. S. to levy a fine to him to the king's use, which I do accordingly, and the *deed of covenant be not*

[(*a*) It seems also that the Bank object to Government stock of one description being placed in the names of the same persons except in the same order; *Re Newman's Trusts*, W. N. 1887, p. 47.]

enrolled, and the deed be found by office, the use vesteth not. *E converso*, if enrolled. If I covenant with J. S. to enfeoff him to the king's use, and the deed be enrolled and the feoffment also be found by office, the use vesteth. But if I levy a fine, or suffer a recovery to the king's use, and declare the use by deed of covenant enrolled, though the king be not a party, yet it is good enough" (*a*). These observations apply only to original gifts of land from a subject to the Crown, and, when the limits of the prerogative were much less accurately defined than they now are, the interposition of such a barrier between the subject and the Crown may have been necessary. Where an equitable interest in real or personal estate (*b*) accrued to the Crown by course of law, as by the treason of the subject, or by forfeiture, or on the doctrine of *bona vacantia*, it was not doubted that the Crown could sue without even a previous inquisition. According to Sir T. Clarke, an inquisition was necessary only where the Crown, asserting its prerogative, chose to make a seizure without interpleading with the subject in Court to establish its title, but where the Crown, waiving its prerogative, interpleaded with the subject, as by filing a Bill, there an inquisition was unnecessary and superfluous (*c*).

[By the Intestates Estates Act, 1884 (*d*), the Court is empowered, on the application or with the consent of the Attorney-General, notwithstanding that no office has been found, and no commission issued or executed, to order a sale of any hereditament or any estate or interest therein to which the Crown is entitled, and to dispose of the proceeds of such sale (*e*).]

A corporation.

3. A trust of lands cannot be limited to a *corporation* without a licence from the Crown, both on general principle, and also by analogy to the statutory enactment as to uses (*f*). If corporations could take in the *names of trustees* without a licence, the rule requiring a licence would become a dead letter, and the rights of the Crown effectually evaded, for it makes no material difference whether the legal estate be limited to the corporation directly or to a trustee for the corporation.

Alien.

4. As regards *an alien*, a trust of lands might always have been

(*a*) Bac. on Uses, 60; and see Gilb. on Uses, 44, 204.

(*b*) *Middleton* v. *Spicer*, 1 B.C.C. 201; *Brummel* v. *M'Pherson*, 5 Russ. 263.

(*c*) *Burgess* v. *Wheate*, 1 Eden, 188. See now 33 & 34 Vict. c. 23.

[(*d*) 47 & 48 Vict. c. 71, s. 5.]

[(*e*) For an order for sale under this section see *Re Pratt's Trusts*, W. N. 1886, p. 144; 55 L. T. N.S. 313; 34 W. R. 757.]

(*f*) See Shep. Touch. 509; Sand. on Uses, 339, note E.; 15 Ric. II. c. 5.

declared in his favour (*a*), and might as against all but the Crown have been enforced by him for his own benefit (*b*); but as the same mischiefs would follow from an alien's enjoyment of the equitable, as of the legal interest in lands (*c*), the equitable interest might at any time have been claimed by the Crown. The legal estate was not affected (*d*), but the Crown had the right of suing a *subpœna* against the trustee in equity (*e*). An alien could not, however, take an equitable interest by *act of law* as by descent or curtesy (*f*).

Executory trust for alien.

A distinction was taken, that although where a trust was perfected in favour of an alien the Crown might be entitled, yet where a trust in favour of an alien was not in *esse*, but only in *fieri* and executory, the Court would do no act to give it to the Crown in right of the alien (*g*).

Alien might be *cestui que trust* of proceeds of sale of land.

Where a testator directed an estate to be sold, and the proceeds divided amongst certain persons, some of whom were aliens; there, as according to the intention, which was supposed to be executed at the time of death, the interest devised was money, the Crown was not entitled, for the mere purpose of working a forfeiture, to exercise an election by retaining the property as land; and therefore aliens were not debarred from enjoying their legacies in the pecuniary character which the testator had stamped upon them (*h*).

33 Vict. c. 14.

Now by the Naturalisation Act, 1870, an alien may take, acquire, hold, and dispose of real and personal property of every description in the same manner as if he were a natural born subject. But the Act is not retrospective (*i*).

(*a*) *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92; and see Vin. Ab. Alien. A. 8; *Godfrey and Dixon's case*, Godb. 275; Br. Feff. al. Uses, 389, a, pl. 29.

(*b*) See *Barrow* v. *Wadkin*, 24 Beav. 1; *Godfrey and Dixon's case*, Godb. 275; but see Gilb. on Uses, 43; *King* v. *Holland*, Al. 16; *S. C.* Styl. 21; *Burney* v. *Macdonald*, 15 Sim. 6; *Ritson* v. *Stordy*, 3 Sm. & G. 230.

(*c*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; *Fourdrin* v. *Gowdey*, 3 M. & K. 383. See *Burney* v. *Macdonald*, 15 Sim. 6.

(*d*) *Rex* v. *Holland*, Al. 14; *Sir John Dack's case*, cited ib. 16; *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale.

(*e*) *Sharp* v. *St Sauveur*, 7 L. R. Ch. App. 351; *King* v. *Holland*, Al. 16, *per* Rolle, J.; Roll. Ab. 194, pl. 8. See *Burney* v. *Macdonald*, 15 Sim. 6; *Burgess* v. *Wheate*, 1 Eden, 188. [And see *Perry* v. *Eames*, (1891) 1 Ch. 668.]

(*f*) See *Calvin's case*, 7 Rep. 49; *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92. As to dower, see Co. Lit. 31 b. note (9) by Harg.

(*g*) See *Burney* v. *Macdonald*, 15 Sim. 14; *Ritson* v. *Stordy*, 3 Sm. & G. 240, but see *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St Sauveur*, 7 L. R. Ch. App. 351.

(*h*) *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 Myl. & Cr. 525; *Sharp* v. *St Sauveur* 17 W. R. 1002; 20 L. T. N.S. 799, overruled on another ground, 7 L. R. Ch. App. 343; and see *Master* v. *De Croismar*, 11 Beav. 184.

(*i*) *Sharp* v. *St Sauveur*, 7 L. R. Ch. App. 350; [*De Geer* v. *Stone*, 22 Ch. D. 243].

Distinctions in reference to equitable and legal interests.

5. It may be remarked, that in certain cases persons are capable of taking an equitable interest, to whom the legal estate could not have been similarly limited. Thus, at common law [until the recent Married Women's Property Acts] no property, real or personal, could be so limited to a married woman as to exclude the legal rights of the husband during coverture: but, by way of trust, the beneficial interest could be placed entirely at the disposal of a married woman, so that she should be regarded as a *feme sole*, and the husband should not participate in the enjoyment.

6. So the *legal* estate cannot be limited to the objects of a charity, as to the poor of a parish, in perpetual succession; but in a Court of Equity, where the feudal rules do not apply, the intention of the donor will be carried into effect (*a*), provided the requisitions of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42) be complied with. The Act last referred to does not produce any incapacity in the *cestuis que trust* to take, but only prohibits the alienations of land, or property savouring of land, in any other mode than that prescribed by the Act, for objects falling within the legal definition of charitable purposes.

(*a*) Gilb. on Uses, 204.

CHAPTER IV

WHAT PROPERTY MAY BE MADE THE SUBJECT OF A TRUST

As a general rule, all property, whether real or personal, and whether legal or equitable (*a*), may be made the subject of a trust, provided the policy of the law, or any statutory enactment, does not prevent the settlor from parting with the beneficial interest in favour of the intended *cestui que trust.*

Copyholds may be subject of trust, and equitable interest descends as legal.

1. A trust may be created of lands regulated by local custom, as copyholds. Thus, A., tenant of a manor, may surrender to the use of B. and his heirs, upon trust for C. and his heirs. And as equity follows the law, the trust in C. will devolve in the same manner as the legal estate.

Power to entail equitable interest depends on custom to entail legal estate.

2. If the custom of the manor permit an *entail* of the legal estate, an entail may in like manner be created of the equitable (*b*); but if there be no such custom as to the legal estate, there can be no entail of the equitable (*c*). Where, therefore, the equitable interest in lands held of a manor not permitting an entail is limited to A., and the heirs of his body, the estate is not construed as an entail but as a fee conditional;—that is, on issue born the condition is fulfilled, and A. may alienate in fee. But until alienation, the equitable interest descends in the line of the issue like an entail; and if A. die without issue, an equitable right of entry reverts to the settlor or his heir. This doctrine is attended with important consequences, which are often overlooked. Thus, copyholds are devised to trustees upon trusts corresponding with the limitations of freeholds in strict settlement, and A., the first tenant for life, has a son born, but who lives only a few weeks. If the manor do not permit an entail, the son takes a fee simple

(*a*) *Knight* v. *Bowyer*, 23 Beav. 609, see p. 635; 2 De G. & J. 421. [But there can be no trust of a peerage, which is by its very nature a personal possession, *Buckhurst Peerage*, 2 App. Cas. 1.]

(*b*) *Pullen* v. *Middleton*, 9 Mod. 484; 1 Preston Conv. 152.

(*c*) The opinion of Watkins, Treat. on Cop. p. 153, and following pages, that there may be an entail of copyholds without a special custom, cannot be maintained.

conditional, and all the subsequent limitations are void. In such a case, the copyholds should be settled like leaseholds, so as not to vest absolutely unless a child attain twenty-one, and on his death under that age to devolve on the next taker under the entail of the freeholds.

Equitable interests in foreign personal property.

3. How far equitable interests may be engrafted on *foreign* property requires consideration. As regards *moveable* estate there is no difficulty, for it follows the person, and if the settlor himself be domiciled within the jurisdiction of the Court, all his moveable estate, whether in the East or West Indies, or elsewhere, is deemed to be at home, and governed by the laws of this country. A trust, therefore, may freely be created of such interests, and would be enforced in equity. In certain cases, however, there might be practical obstructions in the way of executing the trust, from the circumstance of the property lying in fact beyond the reach of the Court.

Equitable interests in foreign real property.

4. As to *lands* lying in a foreign country, the Court will enforce *natural equities*, and compel the specific performance of *contracts*, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree. Thus Lord Eldon allowed a consignee to have a lien, upon the application of general principles, for proper advances upon estates in the West Indies (*a*). So the Court has enforced specific performance of articles between parties for ascertaining the boundaries of their estates abroad (*b*), has compelled a person entitled to an estate in Scotland to give effect to an equitable mortgage by deposit of deeds of the Scotch estate, though by the law of Scotland a deposit of deeds created no lien (*c*), has directed an account of the

(*a*) *Scott* v. *Nesbitt*, 14 Ves. 438.

(*b*) *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, and Belt's Suppt.; and see *Roberdeau* v. *Rous*, 1 Atk. 543; *Angus* v. *Angus*, West's Rep. 23; *Tullock* v. *Hartley*, 1 Y. & C. Ch. Ca. 114; *Cood* v. *Cood*, 33 Beav. 314; *Drummond* v. *Drummond*, 37 L. J. N.S. Ch. 811; 17 W. R. 6; [*Ewing* v. *Orr Ewing*, 9 App. Cas. 34, 40; *Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 404, 405].

(*c*) *Ex parte Pollard*, 3 Mont. & Ayr. 340; *reversed* Mont. & Chit. 239. But see *Norris* v. *Chambres*, 29 Beav. 246; [*Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 365]; *Martin* v. *Martin*, 2 R. & M. 507, may be supported on the ground that the mortgagee had a lien for advances and supplies. Had the lien not existed, Sir J. Leach thought the plaintiff might have compelled a sale as against the husband, but that such equity attached not to the *estate*, but to the *person* only: that after the institution of a suit, the equity would have bound the estate, but until bill filed the husband could make a good title even to a purchaser with notice; and the Court instanced the case of a husband, the apparent owner of two estates of equal value, and that he made a settlement of estate A. under the direction of the Court, and that the trustees were afterwards evicted by defect of the husband's title: in that case the Court would oblige the husband to make a settlement of estate B., but that until the bill was

rents and profits of lands abroad (*a*), [has decreed an account, as between trustee and *cestui que trust*, in respect of estates in Ceylon purchased by the defendant as trustee for the plaintiffs (*b*)], has ordered an absolute sale (*c*), and foreclosure of a mortgage (*d*), and has relieved against a fraudulent conveyance of an estate abroad (*e*), and prevented a defendant by injunction from taking possession (*f*). In such cases, however, the Court, according to the modern doctrine, requires as a substratum for its jurisdiction that there should exist a personal privity between the plaintiff and defendant, and in the absence of such privity, no remedy lies by way of lien against the land itself (*g*). Parties out of the jurisdiction may now be served abroad, but this does not extend the jurisdiction of the Court in respect of relief (*h*).

5. While the Court will, to this extent, administer *equities*, and enforce *contracts* as to lands abroad, so far as the Court, by acting upon the parties, can give effect to the decree (*i*), there are cases where the foreign law presents an insuperable obstacle to the execution of the decree, and then the Court will not make a decree which would be nugatory (*j*).

Trusts of lands abroad.

6. The better opinion is that *trusts*, not constructively such, like natural equities or equities arising from contract, but properly such, and formerly known as *uses*, cannot be engrafted upon foreign real estate. The law regulating lands in England has a *local* character. How then can a system adapted exclusively to

on the file the husband remained the owner of the estate B., and could effectually sell or charge it. As to personal equities, see further, *Morse* v. *Faulkner*, 1 Anst. 11; 3 Sw. 429, note (a); *Averall* v. *Wade*, Ll. & Go. temp. Sugden, 261; *Johnson* v. *Holdsworth*, 1 Sim. N.S. 108; *Hastie* v. *Hastie*, 2 Ch. D. (C.A.) 304.

(*a*) *Roberdeau* v. *Rous*, 1 Atk. 543.

[(*b*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196.]

(*c*) *Roberdeau* v. *Rous*, 1 Atk. 544.

(*d*) *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, 18 L. R. Eq. 118; [and see *Re Longdendale Cotton Spinning Company*, 8 Ch. D. 150].

(*e*) *Arglasse* v. *Muschamp*, 1 Vern. 75.

(*f*) *Cranstown* v. *Johnston*, 5 Ves. 278; and see *Bunbury* v. *Bunbury*, 1 Beav. 318; *Hope* v. *Carnegie*, 1 L. R. Ch. App. 320.

(*g*) *Norris* v. *Chambres*, 29 Beav. 246; 3 De G. F. & J. 583; [*Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 365].

(*h*) *Cockney* v. *Anderson*, 31 Beav. 452. In this case the Court said that to found the jurisdiction either the persons against whom the relief was sought must be within the jurisdiction, or the subject matter in dispute must be within those limits, or the contract must have been entered into or intended to be performed within the same limits; *ib.* And see *Maunder* v. *Lloyd*, 2 J. & H. 718; *Edwards* v. *Warden*, 9 L. R. Ch. App. 495; [*Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 398, 399; and the rules of the Supreme Court, 1883, Order XI. r. 1].

(*i*) [See *Ewing* v. *Orr Ewing*, 10 App. Cas. 453.]

(*j*) *Waterhouse* v. *Stansfield*, 9 Hare, 234; 10 Hare, 254; *Carteret* v. *Petty*, 2 Swans, 323, note (a); and S. C. *nom Cartwright* v. *Pettus*, 2 Ch. Ca. 214, the case not of a *contract* as in *Penn* v. *Lord Baltimore*, but of a *partition* which the Court had no means of carrying into effect; and see *Norris* v. *Chambres*, 29 Beav. 246; [*Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 364, 404, 413, 417].

lands in England be transplanted and attached to lands abroad? Could entails, for instance, be created when none are allowed, and if created, by what machinery could they be barred? It has been seen that in the case of copyhold, when the custom of the manor does not allow entails of the legal estate, none can be created of the equitable, and the same principle will apply to trusts of foreign lands. The few authorities upon the subject tend to confirm this view, but there is little light to be obtained from them, and the law must be regarded as still somewhat unsettled (*a*).

[7. In a recent case where foreign land was devised by the will of an English testator to trustees for sale and investment of the proceeds in English securities, and part of the proceeds and rents and profits until sale were to be held in trust for a class for life with remainders over, and it appeared that by the foreign law the trusts for sale and investment were good, but, trust substitution being forbidden, the remainders after the life estates were void and the tenants for life took absolutely, it was held by North, J., that the purchase-money must be distributed according to English law, but that, until the land was sold, the foreign law applied, and the rents and profits of their shares belonged to the tenants for life absolutely (*b*). [Trust prohibited by foreign law.]

8. In the cases which have been considered hitherto no question of title to land arose, and the Court exercised jurisdiction *in personam* for the enforcement of an obligation binding on the conscience of the trustee. Where a dispute as to title arises, the Court has no jurisdiction to determine the rights of parties to foreign immoveables, even though the parties are resident in this country (*c*), or to entertain an action for damages for trespass to foreign land (*d*), and the exceptions to the general rule depend on the existence, between the parties to the suit in this country, of some personal obligation arising out of contract, fiduciary relation or fraud, or other conduct which in the view of an English Court of Equity would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property (*e*). [Where dispute arises as to title to foreign land.]

(*a*) *Glover* v. *Strothoff*, 2 B. C. C. 33; *Nelson* v. *Bridport*, 8 Beav. 547, see 570; *Martin* v. *Martin*, 2 R. & M. 507 (in which case it did not occur either to the bar or the bench that the legal estate could be held upon the trusts of the settlement without the intervention of a sale); *Godfrey* v. *Godfrey*, 12 Jur. N.S. 397.

[(*b*) *Re Piercy*, (1895) 1 Ch. 83.]

[(*c*) *Re Hawthorne*, 23 Ch. D. 743; *Companhia de Mocambique* v. *British South Africa Co.*, (1892) 2 Q. B. 365, 366.]

[(*d*) *British South Africa Co.* v. *Companhia de Mocambique*, (1893) A. C. 602, reversing C.A. (1892) 2 Q. B. 358, and showing that the refusal of the Courts to assume jurisdiction is not based on any technical ground capable of being displaced by the abolition of local venue by Rules of Court, O. XXXVI. r. 1.]

[(*e*) *Deschamps* v. *Miller*, (1908) 1 Ch. 856.]

The Courts of Common Law have never assumed to excuse jurisdiction in such a case, and Courts of Equity, "although armed with much more effectual powers for enforcing their decrees than were possessed by the Courts of Common Law, refused with almost equal uniformity the direct determination of title to foreign land" (*a*).]

[(*a*) *British South Africa Co.* v. *Companhia de Mocambique*, *per* Wright, J., (1892) 2 Q. B. 364.]

CHAPTER V

OF THE FORMALITIES REQUIRED FOR THE CREATION OF TRUSTS

Upon this subject we propose to treat—First, Of Declarations of Trusts at common law. Secondly, Of the Statute of Frauds. Thirdly, Of the Statutes of Wills.

SECTION I

OF TRUSTS AT COMMON LAW

Trusts averrable.

1. Trusts, like uses, are of their own nature *averrable, i.e.* may be declared by word of mouth without writing (*a*); as, if before the Statute of Frauds an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favour of B. (*b*), and since the statute, though a trust of lands cannot be declared by parol without proof of it in writing, no other proof is requisite than a simple note in writing duly signed, but not under seal (*c*).

Averment must not contradict the instrument.

2. But the Court, following the analogy of uses, never permitted the averment of a trust in contradiction to any expression of intention on the face of the instrument itself (*d*).

Nor be repugnant to the scope of the instrument.

3. And averment is excluded, if from *the nature of the instrument* or *any circumstance of evidence* appearing on the face of it, an intention of making the legal holder the beneficiary also, can be clearly implied. Thus a trust cannot be averred, where a *valuable*

(*a*) See *Fordyce* v. *Willis*, 3 B. C. C. 587; *Benbow* v. *Townsend*, 1 M. & K. 506; *Bayley* v. *Boulcott*, 4 Russ. 347; *Crabb* v. *Crabb*, 1 M. & K. 511; *Kilpin* v. *Kilpin*, Id. 520.

(*b*) See *Bellasis* v. *Compton*, 2 Vern. 294; *Fordyce* v. *Willis*, 3 B. C. C. 587; *Thruxton* v. *Attorney-General*, 1 Vern. 341.

(*c*) *Adlington* v. *Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Boson* v. *Statham*, 1 Eden, 513, *per* Lord Keeper Henley.

(*d*) *Lewis* v. *Lewis*, 2 Ch. Rep. 77; *Finch's case*, 4 Inst. 86; *Fordyce* v. *Willis*, 3 B. C. C. 587; see *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482.

consideration is paid (*a*); and if a *pension* from the Crown be granted to A., a trust cannot be raised by parol in favour of B.; for a pension is conferred upon motives of honour, and the inducements to the bounty are the personal merits of the annuitant (*b*).

Trusts not averrable where deed required to pass the legal estate.

4. It was a principle of uses that, on a *feoffment*, which could be made by parol, a use might be declared by parol, but where a *deed* was necessary for passing the legal estate, there the use which was engrafted could not be raised by averment (*c*). As trusts have been modelled after the likeness of the use (*d*), the distinction at the present day may deserve attention. It is laid down by Duke expressly, that, where the things given may pass *without deed* there a charitable use may be averred by witnesses; but, where the things *cannot pass without deed*, there charitable uses cannot be averred without a deed proving the use (*e*). And Lord Thurlow, it is probable, alluded to the same distinction when he observed: "I have been accustomed to consider uses as averrable, but perhaps, when looked into, the cases may relate to *feoffment*, not to conveyances by bargain and sale, or lease and release" (*f*). And in *Adlington* v. *Cann* (*g*), where a testator devised the legal estate in lands to A. and B. and their heirs by a will duly executed, and left an unattested paper referring to trusts for a charity, Mr Wilbraham in the argument observed: "If this were a voluntary *deed*, would a *paper*, even declaring a trust, be sufficient to take it from the grantee? No, certainly" (*h*); and it is very observable that Lord Hardwicke, in referring to this observation, excludes the case of a *deed*, and lays it down that "if the testator had made a *feoffment* to himself and his heirs, and left such a *paper*, this would have been a good declaration of trust" (*i*).

Declaration of trust by the king.

5. The declaration of a *use* by the *king* must have been by letters patent (*j*); and it seems that the same doctrine is now applicable to trusts (*k*).

(*a*) *See* Gilb. on Uses, 51, 57; *Pilkington* v. *Bayley*, 7 B. P. C. 526.
(*b*) *Fordyce* v. *Willis*, 3 B. C. C. 587.
(*c*) Gilb. on Uses, 270.
(*d*) *Fordyce* v. *Willis*, 3 B. C. C. 587; *Lloyd* v. *Spillet*, 2 Atk. 150; *Attorney-General* v. *Lockley*, App. to Sug. Vend. & Purch. No. 16, 11th ed.; *Chaplin* v. *Chaplin*, 3 P. W. 234; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139; *Burgess* v. *Wheate*, 1 Eden, 195, 217, 248; *Geary* v. *Bearcroft*, Sir O. Bridg. 488.
(*e*) Duke, 141.
(*f*) *Fordyce* v. *Willis*, 3 B. C. C. 587.
(*g*) 3 Atk. 141.
(*h*) Ib. 145.
(*i*) Ib. 151.
(*j*) Bacon on Uses, 66.
(*k*) *Fordyce* v. *Willis*, 3 B. C. C. 577.

SECTION II

OF THE STATUTE OF FRAUDS

By the seventh section of the Statute of Frauds (*a*), it is enacted that "all declarations or creations of trusts or confidences of any *lands, tenements, or hereditaments,* shall be *manifested and proved* by some *writing signed* by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." Section 7.

Upon the subject of this enactment we shall first briefly point out what interests are within the Act; and, secondly, what formalities are required by it.

I. *Of the interests within the Act.*

1. *Copyholds* are to be deemed within the operation of the clause, for as a trust is engrafted on the estate of the *copyhold* tenant, the rights of the lord, who claims by title paramount, cannot in any way be injuriously affected, and therefore the ordinary ground for exempting copyholds from statutory enactments does not exist (*b*). A trust, therefore, of a copyhold cannot be declared by *parol* so as to make the copyholder a trustee for another (*c*). Copyholds.

2. *Chattels real* are within the purview of the Act, and a trust of them must, therefore, be evidenced by writing, as in the case of freeholds (*d*). Chattels real within the Act.

3. But *chattels personal* are not within the Act, and a trust by averment will be supported (*e*). It has even been held that a Chattels personal not within the Act.

(*a*) 29 Car. 2. c. 3.

(*b*) See *Withers* v. *Withers*, Amb. 151; *Goodright* v. *Hodges*, 1 Watk. on Cop. 227; *S. C.* Lofft. 230; *Acherley* v. *Acherley*, 7 B. P. C. 273; but see *Devenish* v. *Baines*, Pr. Ch. 5.

(*c*) Mr Hargrave seems to have thought that even the *uses of a surrender* were *trusts* within the intention of the Act; for in a note to Coke on Littleton, he observes: "A nuncupative will of copyholds was a valid declaration of the uses, where the surrender was silent as to the form, till the 29 Car. 2 required all declarations of trusts to be in writing." But the surrender of a copyhold to uses is merely a direction to the lord in what manner to regrant the estate, and the surrenderee is a *cestui que use* by misnomer only, and not in fact; and indeed the Court of Queen's Bench has expressly decided that uses of copyholds are not within the Statute of Frauds, on the ground that a surrender to uses is not the creation of a trust or confidence apart from the legal estate, but a mode established by custom of transferring the legal estate itself; *Doe* v. *Danvers*, 7 East, 299.

(*d*) *Skett* v. *Whitmore*, 2 Freem. 280; *Forster* v. *Hale*, 3 Ves. 696; *Riddle* v. *Emerson*, 1 Vern. 108; and see *Hutchins* v. *Lee*, 1 Atk. 447; *Bellasis* v. *Compton*, 2 Vern. 294; [*Re De Nicols*, No. 2, (1900) 2 Ch. 410].

(*e*) *Bayley* v. *Boulcott*, 4 Russ. 347, *per* Sir J. Leach; *M'Fadden* v. *Jenkyns*, 1 Hare, 461, *per* Sir J. Wigram;

sum of money secured upon a mortgage of real estate is not an interest within the Act, and that a parol declaration is good (*a*); [and so of a partnership in land (*b*)]. And if trust be once created by parol declaration, it cannot be affected by any subsequent parol declaration of the settlor to the contrary (*c*). But the approval of a draft declaration of trust, subject to further consideration as to one of the provisions of it, will not amount to a parol declaration (*d*). If a settlor direct a sum to be invested in the names of the trustees of her marriage settlement, the Court considers this as tantamount to a parol declaration, or rather the presumption is that the sum so invested should be held upon the same trusts as the settled funds (*e*).

Case of fraud.

4. The Statute of Frauds ["was not made to cover fraud" (*f*), and "it is established by a series of cases, the propriety of which cannot now be questioned (*g*), that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another, to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself (*h*), and the principle, it would seem, applies, not only where the trustee, whose conscience is affected, is the defendant, but also as against volunteers or creditors claiming under him" (*i*)].

S. C. 1 Ph. 157, *per* Lord Lyndhurst; *Grant* v. *Grant*, 34 Beav. 623; *Thorpe* v. *Owen*, 5 Beav. 224; *George* v. *Bank of England*, 7 Price, 646; *Hawkins* v. *Gardiner*, 2 Sm. & G. 451, *per* V. C. Stuart; *Peckham* v. *Taylor*, 31 Beav. 250; *Fordyce* v. *Willis*, 3 B. C. C. 587, *per* Lord Thurlow; *Benbow* v. *Townsend*, 1 M. & K. 510, *per* Sir J. Leach; *Fane* v. *Fane*, 1 Vern. 31, *per* Lord Nottingham; *Nab* v. *Nab*, 10 Mod. 404. (But this case, as reported 1 Eq. Ca. Ab. 404, appears an authority the other way). The dictum of Lord Cranworth in *Scales* v. *Maude*, 6 De G. M. & G. 43, that a trust could not be declared by parol in favour of a volunteer was afterwards disclaimed by him; *Jones* v. *Lock*, 1 L. R. Ch. App., 28.

(*a*) *Benbow* v. *Townsend*, 1 M. & K. 506; and see *Bellasis* v. *Compton*, 2 Vern. 294.

[(*b*) *Foster* v. *Hale*, 3 Ves. 695; 5 Ves. 308; *Dale* v. *Hamilton*, 16 L. J. Ch. 126, 397; *Re De Nicols*, No. 2, (1900) 2 Ch. 410 (where a French communitas bonorum of spouses was treated as a partnership).]

(*c*) *Kilpin* v. *Kilpin*, 1 M. & K. 520, see 539; *Crabb* v. *Crabb*, 1 M. & K. 511.

(*d*) *Re Sykes's Trusts*, 2 J. & H. 415.

(*e*) *Re Curteis' Trusts*, 14 L. R. Eq. 217.

[(*f*) *Lincoln* v. *Wright*, 4 De G. & J. 22, *per* Turner, L. J.]

[(*g*) See *Davies* v. *Otty* (No. 2), 35 Beav. 208; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469; *Childers* v. *Childers*, 1 De G. & J. 482; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Booth* v. *Turle*, 16 L. R. Eq. 182.]

[(*h*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 206, *per* Lindley, L. J.]

[(*i*) *Lincoln* v. *Wright*, *ubi sup.*;

Charitable uses within the Act.

5. An attempt was formerly made to have a *charitable use* excepted from the statute, but Lord Talbot decreed (*a*), and Lord Hardwicke affirmed the decision (*b*), and Lord Northington said every man of sense must subscribe to it (*c*), that a gift to a charity must be treated on the same footing with any other disposition.

Whether the Crown is bound by the statute.

6. It was held by the Court of Queen's Bench (*d*), that the *Crown* was bound by the Statute of Frauds, and, therefore, was not at liberty to prove a *superstitious use* by parol: but in the Court of *Exchequer* it was ruled, on the contrary, that the Statute of Frauds did *not* bind the Crown, but took place only between subject and subject.

Colonial or foreign lands.

7. It seems the statute will not apply to lands situate in a *olony* planted before the Statute of Frauds was passed (*e*). Planters carry out with them their country's laws as they subsist at the time; but subsequent enactments at home do not follow them across the sea, unless it be so specially provided; [but inasmuch as the statute "regulates procedure here, and not titles to land in other countries," a defendant may rely on the statute as a defence to any proceedings in this country, having for their object the proof and enforcing of a trust, even of lands abroad (*f*).

The statute to be a bar must be pleaded.

8. If an action be brought to have the benefit of a parol trust of lands, a defendant, who would rely on the Statute of Frauds as a bar, must under the present practice insist upon it by his pleading (*g*).]

II. *What formalities are required by the statute.*

Trusts to be proved *by*, not declared *in* writing.

1. The principal point to be noticed is, that trusts, as already observed, are not necessarily to be *declared* in writing, but only to be *manifested and proved by* writing; for if there be written evidence of the existence of a trust, the danger of parol declarations, against which the statute was directed, is effectually removed (*h*). It may be questioned whether the Act did not

Re Duke of Marlborough, (1894) 2 Ch. 133, where Stirling, J., distinguished *Lord Irnham* v. *Child*, 1 Bro. C. C. 92, and treated *Leman* v. *Whitley*, 4 Russ. 423, as overruled by *Haigh* v. *Kaye*, *ubi sup.*]

(*a*) *Lloyd* v. *Spillet*, 3 P. W. 344.

(*b*) *S. C.* 2 Atk. 148; *S. C.* Barn. 384; and see *Adlington* v. *Cann*, 3 Atk. 150.

(*c*) *Boson* v. *Statham*, 1 Eden, 513.

(*d*) *Rex* v. *Portington*, 1 Salk. 162; and [as to the doctrine, doubted by Lord Hardwicke, but since clearly enunciated, that the Crown is not bound by a statute unless the intention of the legislature to bind the Crown is clear, see *Adlington* v. *Cann*, 3 Atk. 146; *Re Bonham*, 10 Ch. D. (C.A.) 595, 601; *Perry* v. *Eames*, (1891) 1 Ch. 658, 665; *Wheaton* v. *Maple*, (1893) 3 Ch. (C.A.) 48].

(*e*) *See* 2 P. W. 75; *Gardiner* v. *Fell*, 1 J. & W. 22.

[(*f*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 207, *per* Lindley, L. J.]

[(*g*) Rules of the Supreme Court Order XIX. r. 15. As to the former practice, see the 7th Edition of this Treatise, p. 51.]

(*h*) *Foster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *S. C.* 5 Ves. 315,

intend that the *declaration itself* should be in writing; for the ninth section enacts, that "all grants and assignments of any trust or confidence shall *likewise be in writing*, signed by the party granting or assigning the same, or by such last will or devise" (*a*); but whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established.

As by a letter, recital, &c.

2. The statute will be satisfied, if the trust can be manifested and proved by any subsequent acknowledgment by the trustee (*b*), as by an express declaration by him (*c*), or any memorandum to that effect (*d*), or by a letter under his hand (*e*), by his answer in Chancery (*f*), or by an affidavit (*g*), or by a recital in a bond (*h*), or deed (*i*), [or by a memorandum written after marriage, stating an antenuptial oral agreement (*j*)], &c.; and the trust, however late the proof (*k*), operates retrospectively from the time of its creation. Even where a lease was granted to A., who afterwards became bankrupt, and *then* executed a declaration of trust in favour of B., a jury having found, upon an issue directed from Chancery, that A.'s name was *bonâ fide* used in the lease in trust for B., it was held that the assignees of A. had no title to the property (*l*).

Relation to subject matter, and nature of trust must be clear.

3. But with regard to letters and loose acknowledgments of that kind, the Court expects demonstration that they relate to the subject matter (*m*); nor will the trust be executed if the precise nature of the trust cannot be ascertained (*n*); and if the

per Lord Loughborough; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*a*) *i.e.* A will executed in conformity with s. 5. Note that *Crooke* v. *Brooking*, 2 Vern. 50, 106, was before the Statute of Frauds.

[(*b*) *i.e.* As explained in *Forster* v. *Hale*, 3 Ves. at p. 707, "a person having a right to declare himself a trustee."]

(*c*) *Ambrose* v. *Ambrose*, 1 P. W. 321; *Crop* v. *Norton*, 9 Mod. 233.

(*d*) *Bellamy* v. *Burrow*, Cas. *t.* Talb. 98; and see *Re Bennett's Settlement Trusts*, 17 L. T. N.S. 438; 16 W. R. 331.

(*e*) *Forster* v. *Hale*, 3 Ves. 696; *S. C.* 5 Ves. 308; *Morton* v. *Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley* v. *Mackay*, 15 Beav. 12; *Childers* v. *Childers*, 1 De G. & J. 482; *Smith* v. *Wilkinson*, cited 3 Ves. 705; *O'Hara* v. *O'Neill*, 7 B. P. C. 227; and see *Gardner* v. *Rowe*, 2 S. & S. 354.

(*f*) *Hampton* v. *Spencer*, 2 Vern. 288; *Nab* v. *Nab*, 10 Mod. 404; *Cottington* v. *Fletcher*, 2 Atk. 155; *Ryall* v. *Ryall*, 1 Atk. 59, *per* Lord Hardwicke; *Wilson* v. *Dent*, 3 Sim. 385. A bill differed from an answer, as it was not *signed* by the party. See, however, *Butler* v. *Portarlington*, 1 Conn. & Laws. 1.

(*g*) *Barkworth* v. *Young*, 4 Drew. 1.

(*h*) *Moorecroft* v. *Dowding*, 2 P. W. 314.

(*i*) *Deg* v. *Deg*, 2 P. W. 412.

[(*j*) *Re Holland*, (1902) 2 Ch. (C.A.) 360; following *Barkworth* v. *Young*, 4 Drew. 1.]

[(*k*) See *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 206.]

(*l*) *Gardner* v. *Rowe*, 2 S. & S., 346; *S. C.* affirmed, 5 Russ. 258; and see *Plymouth* v. *Hickman*, 2 Vern. 167.

(*m*) *Forster* v. *Hale*, 3 Ves. 708, *per* Lord Alvanley; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*n*) *Forster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *Morton* v. *Tewart*, 2

trust be established on the answer of the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the answer to the rejection of another (*a*); and the plaintiff, if he read the answer in proof of the trust, must at the same time read from it the particular terms of the trust (*b*). When the trust is manifested and proved by letters, parol evidence may be admitted to show the position in which the writer then stood, the circumstances by which he was surrounded, and the degree of weight and credit to be attached to the letters, independently of any question of construction (*c*).

The writing must be signed.

4. It will be observed, that the words of the statute require the writing to be *signed* (*d*); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (*e*); but, as in the analogous case of agreements under the fourth section of the Act (*f*), the terms of the trust may be collected from a paper not signed, provided such paper can be clearly connected with, and is referred to by the writing that is signed (*g*).

Who is the party "enabled to declare the trust."

5. The signature must be by the party "who is by law enabled to declare such trust." It has been occasionally contended, that by this description was meant the person seised or possessed of *the legal estate;* but it has been decided that whether the property be real (*h*), or personal (*i*), the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe. [Where, therefore, an antenuptial agreement that the intended wife's realty should belong to her for her separate use was signed only by the husband, the fee was not affected by the agreement so as to enable the wife to devise it as separate property (*j*).]

Y. & C. Ch. Ca. 80, *per* Sir J. L. K. Bruce; *Smith* v. *Matthews*, 3 De G. F. & J. 139; [*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 205, 206.]

(*a*) *Hampton* v. *Spencer*, 2 Vern. 288; *Nab* v. *Nab*, 10 Mod. 404.

(*b*) *Freeman* v. *Tatham*, 5 Hare 329.

(*c*) *Morton* v. *Tewart*, 2 Y. & C. Ch. Ca. 67, see 77.

(*d*) See *Denton* v. *Davies*, 18 Ves. 503.

(*e*) *Forster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*f*) See Sug. Vend. & Purch. 14th ed. ch. 4, s. 3.

(*g*) *Forster* v. *Hale*, 3 Ves. 696.

(*h*) *Tierney* v. *Wood*, 19 Beav. 330; [*Kronheim* v. *Johnson*, 7 Ch. D. 60; *Dye* v. *Dye*, 13 Q. B. D. (C.A.) 147]; see *Donohoe* v. *Conrahy*, 2 Jon. & Lat. 688.

(*i*) *Bridge* v. *Bridge*, 16 Beav. 315; *Ex parte Pye*, 18 Ves. 140, &c.

[(*j*) *Dye* v. *Dye*, 13 Q. B. D. (C.A.) 147. And upon the question whether a parol agreement to settle may, notwithstanding s. 4 of the Statute of Frauds, be rendered effectual by part performance, see *Ex parte Whitehead*, 14 Q. B. D. 419, *per* Cave, J., at p. 421, and cases there cited.]

SECTION III

OF THE STATUTES OF WILLS

Statute of Frauds.

1. By the fifth section of the Statute of Frauds (*a*), all devises of *lands* are required to be in writing and signed by the testator, or by some person in his presence and by his direction, and to be attested or subscribed in his presence by three witnesses; and by the nineteenth section, all bequests of *personal* estate are required to be in writing, with the exception of certain specified cases in which nuncupative wills were allowed (*b*). And by the Wills Act, 1837 (1 Vict. c. 26), s. 9, wills made on or after January 1, 1838, whether of real or personal estate, must be executed and attested with the special solemnities there mentioned.

Principle of rejecting declarations not testamentary in respect of wills.

2. To trace the operations of these enactments we must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain formalities, a testator cannot by an informal instrument affect the equitable, any more than the legal estate, for the one is a constituent part of the ownership as much as the other. Thus, if a testator by will duly signed and attested give lands to A. and his heirs "*upon trust,*" but without specifying the particular trust intended, and then by a paper, not duly signed and attested as a will or codicil, declare a trust in favour of B., the beneficial interest under the will is a part of the original ownership, and cannot be passed by the informal paper, but will descend to the heir-at-law; or if the will be made since 1837, and contain a residuary devise, will pass to the residuary devisee. So if a legacy be bequeathed by a will, duly executed, to A. "*upon trust,*" and the testator, by parol, express an intention that it shall be held by A. in trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which requires a will duly executed. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and therefore that where the *legal estate* of a freehold is well devised,

(*a*) 29 Car. II., c. 3. (*b*) See *Adlington* v. *Cann*, 3 Atk. 151.

a *trust* may be engrafted upon it by a simple note in writing; and where a chattel personal is well bequeathed, a trust of it, as excepted from the seventh section of the Statute of Frauds, may be raised by a mere parol declaration; the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. "A deed," observes Mr Justice Buller, in a similar case, "must take place upon its execution, or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death" (*a*). If the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but to be ambulatory until his death, such disposition is inoperative, unless it be declared in writing in conformity with the statutory enactments regulating devises and bequests (*b*).

3. If a testator by his will devise an estate, and the devisee, Where no trust appears on the will and no fraud.

(*a*) *Habergham* v. *Vincent*, 2 Ves. jun. 230.

(*b*) The law laid down by Jenkins, 3 Cent. Cas. 26, is founded on mistake, as from the report of the case in Fitzherb. Ab. Devise, 22, it appears that the beneficial interest was decreed to the heir, not, as Jenkins supposed, of the devisee, but of the testator.

In *Metham* v. *Devon*, 1 P. W. 529, a testator by his will directed his executors to pay 3000*l.* as he should by deed appoint, and subsequently by deed appointed the 3000*l.* to certain children, and the Court established the gift to the children on the ground that the deed referred to the will, and was part thereof, and in the nature of a codicil. It does not appear whether the deed had been proved with the will, but it might have been, as, though a deed in form, it was of a testamentary character. If the deed was not proved, or assumed to have been proved, it is difficult to find any principle upon which the case can be supported from the brief statement of it in the report.

In *Inchiquin* v. *French*, 1 Cox 1, a testator devised all his real estate, charged with debts and legacies, in strict settlement, and gave a legacy of 20,000*l.* to Sir Wm. Wyndham; by a deed poll of even date with his will, the testator declared that the 20,000*l.* was given to Sir Wm. Wyndham upon trust for Lord Clare. "The deed poll," adds Mr Cox, the reporter, "does not appear to have been proved as a testamentary paper;" and according to the same report, Lord Hardwicke decreed that the legacy of 20,000*l.* given to Sir Wm. Wyndham, and by the *codicil* declared to be in trust for Lord Clare, was a subsisting legacy. It might be inferred from this statement, that Lord Hardwicke admitted the deed poll as a declaration of trust; but it will be observed that he calls it a codicil, and from the report of the same case in *Ambler*, p. 33, we learn the facts, viz. that Lord Clare was out of the jurisdiction, and Lord Hardwicke declined to entertain the question as to Lord Clare's right in his absence; but the counsel, for all parties, desiring his Lordship to determine whether, assuming the legacy to be valid, it was to be paid out of the real or personal estate, his Lordship held that as the will contained a general charge of legacies, and the gift by the codicil, though not attested according to the Statute of Frauds, was a legacy, it was raisable primarily out of the personal estate, and then out of the real estate. This was the only point determined by him. [And see *Re Fleetwood*, 15 Ch. D. at p. 603.]

so far as appears on the face of the will, is intended to take the beneficial interest, and the testator leaves a declaration of trust not duly attested, and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest: for the estate was well devised by the will, and the informal declaration of trust is not admissible in evidence (*a*). This doctrine, of course, does not interfere with the well-known rule, that a testator may, *by his will, refer to and incorporate therein* any document which at the date of the will has an actual existence, and is thus made part of the will.

Where the devisee is made by the will a trustee, and the testator leaves an informal declaration of trust.

4. Should the testator devise the estate in such language that the will passes the *legal* estate only to the devisee, and manifests an intention of not conferring the equitable, in short, *stamps the devisee with the character of trustee,* and yet does not define the particular trusts upon which he is to hold; in this case, no paper not duly attested (except, of course, papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended. Nor will the devisee be allowed to retain the beneficial interest himself; but while the legal estate passes to him, the equitable will, according to the date and terms of the will, result to the testator's heir-at-law or general residuary devisee (*b*).

Personal estate.

5. So if by will, *personal estate* be given upon trusts to be *afterwards* declared, the testator cannot by any instrument not duly executed as a will, and *a fortiori* he cannot by parol, declare a valid trust, but the equitable interest will result to the next of kin, or pass to the residuary legatee (*c*). [And the same rule was applied where the bequest was on the face of the will a beneficial one, but the legatee, who was a solicitor and drew the will,

The dictum of Lord Northington, in *Boson* v. *Statham*, 1 Eden, 514, is clearly not law; see *Adlington* v. *Cann*, 3 Atk. 151; *Muckleston* v. *Brown*, 6 Ves. 67; *Stickland* v. *Aldridge*, 9 Ves. 519; and see *Puleston* v. *Puleston*, Finch, 312.

(*a*) *Adlington* v. *Cann*, 3 Atk. 141; *Juniper* v. *Batchellor*, 19 L. T. N.S 200; and see *Stickland* v. *Aldridge*, 9 Ves. 519; and the observations of Sir J. L. K. Bruce in *Briggs* v. *Penny*, 3 De G. & Sm. 547.

(*b*) *Muckleston* v. *Brown*, 6 Ves. 52; [*Scott* v. *Brownrigg*, 9 L. R. Ir. 246; *Re West*, (1900) 1 Ch. 84;] *Bishop* v. *Talbot*, as cited, 6 Ves. 60, was a devise to trustees in trust, but on consulting the Reg. Lib. it appears there was no notice of the trust upon the will, Reg. Lib. 1772, A. Fol. 137. In *Boson* v. *Statham*, 1 Eden, 508, the devisees were described as trustees, but this circumstance was not adverted to by the counsel or the Court.

(*c*) *Johnson* v. *Ball*, 5 De G. & Sm. 85; [*Scott* v. *Brownrigg*, 9 L. R. Ir. 246; see *Riordan* v. *Banon*, 10 Ir. R. Eq. 469; *Re Boyes*, 26 Ch. D. 531; *Re Fleetwood*, 15 Ch. D. 594; *Towers* v. *Hogan*, 23 L. R. Ir. 53.]

undertook to hold upon trusts to be afterwards declared, and that he was only a trustee (*a*).]

Admission and rejection of parol evidence as against the title of executors.

6. So if a person before the Executors' Act, 1830 (11 G. 4 & 1 W. 4, c. 40), had been simply appointed executor, which conferred upon him a title to the surplus beneficially, averment was not admissible to make him a trustee for the next of kin (*b*). But apparently, the authorities established that if from any circumstances appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* only that he was *not* intended to take the surplus beneficially, the executor might rebut that presumption by the production of parol evidence (*c*), when of course the next of kin might fortify the presumption by opposing parol evidence in contradiction. [This presumption of law is, however, not to be extended, and, in peculiar circumstances, was held not to apply although equal legacies were given to each of three executors and specific legacies of unequal value to two of them (*d*).] But where the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *primâ facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention (*e*). By the Act referred to, an executor is made *primâ facie* a trustee for the next of kin (*f*), [but he is not made an express trustee, nor is the trusteeship created by the Act different in its nature from that which existed previously under the rule established in Courts of Equity (*g*)]. Where there are no *next of kin*, the title of the executor, as against the *Crown*, is not affected by the statute, and the old law applies (*h*). But if the executor be stamped by the will with the character of trustee, and there are no next of kin, the Crown will take (*i*). And of course, whether there be next of kin or

[(*a*) *Re Boyes*, 26 Ch. D. 531.]

(*b*) *Langham* v. *Sanford*, 19 Ves. 641, *per* Lord Eldon; *White* v. *Williams*, 3 V. & B. 72; *S. C.* G. Coop. 58; [see *Stewart* v. *Stewart*, 15 Ch. D. 539].

(*c*) *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant; *Clennell* v. *Lewthwaite*, 2 Ves. Jun. 474; *Langham* v. *Sanford*, 17 Ves. 442, 443; *Lynn* v. *Beaver*, 1 T. & R. 66.

[(*d*) *A. G.* v *Jefferys*, (1908) A. C. (H. L.) 411; *S. C.* (1908) 1 Ch. (C.A.) 552, (nom. *Re Glukman*).]

(*e*) *Rachfield* v. *Careless*, 2 P. W. 158; *Langham* v. *Sanford*, 17 Ves. 453; *S. C.* 19 Ves. 641; *Gladding* v. *Yapp*, 5 Mad. 59; *White* v. *Evans*, 4 Ves. 21; *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant; and see *Read* v. *Stedman*, 26 Beav. 495.

(*f*) *Love* v. *Gaze*, 8 Beav. 472; *Juler* v. *Juler*, 29 Beav. 34; *Travers* v. *Travers*, 14 L. R. Eq. 275; [*Stewart* v. *Stewart*, 15 Ch. D. 539].

[(*g*) *Re Lacy*, (1899) 2 Ch. 149; and see *M'Causland's Trusts*, (1908) 1 I. R. 327.]

[(*h*) So now decided, *Re Knowles*, 49 L. J. N.S. Ch. 625; *Re Bacon's Will*, 31 Ch. D. 460.]

(*i*) *Read* v. *Stedman*, 26 Beav. 495; [*Dillon* v *Reilly*, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789].

not, if it appear from the whole will that the executors were intended to take beneficially, the statute is excluded (*a*).

Fraud.

7. An exception to the rule, that parol trusts cannot be declared upon an estate devised by a will, exists in the case of fraud. The Court will never allow a man to take advantage of his own wrong, and therefore if an heir, or devisee, or legatee, or next of kin, contrive to secure to himself the succession of the property through fraud, the Court effects the conscience of the legal holder, and converts him into a trustee, and compels him to execute the disappointed intention.

Case of fraud in heir.

Thus, if the owner of an estate hold a conversation with the heir, and be led by him to believe that if the estate be suffered to descend, the heir will make a certain provision for the mother, wife, or child of the testator, a Court of Equity, notwithstanding the Statute of Wills, will oblige the heir to make a provision in conformity with the express or implied engagement; for the heir ought to have informed the testator, that he, the heir, would not hold himself bound to give effect to the intention, and then the testator would have had the opportunity of intercepting the right of the heir by making a will (*b*).

In devisee.

So if a father devise to his youngest son, who promises that if the estate be given to him he will pay 10,000*l.* to the eldest son, the Court, at the instance of the eldest son, will compel the youngest son to disclose what passed between him and the testator, and if he acknowledge the engagement, though he pray the benefit of the statute in bar, he will be a trustee for the eldest son to the extent of 10,000*l.* (*c*).

[In legatee.]

[Where personal estate was by codicil given to A. "to be applied as I have requested him to do," and an unsigned memorandum was written out by A. at the time of the execution of the codicil expressing the wishes of the testator, the Court allowed the trust to be established by the evidence of A. in support of it (*d*); but where a testator appointed his wife sole executrix

(*a*) *Harrison* v. *Harrison*, 2 H. & M. 237; [*Fuge* v. *Fuge*, 27 L. R. Ir. 59; and see *Williams* v. *Arkle*, 7 L. R. H. L. 606; *Re Roby*, (1908) 1 Ch. (C.A.) 71; and as to an executor taking beneficially where there is a continuing intention on the part of the testator to give to him, see *Strong* v. *Bird* 18 L. R. Eq. 315; *Re Stewart*, (1908) 2 Ch. 251].

(*b*) *Sellack* v. *Harris*, 5 Vin. Ab. 521; *Stickland* v. *Aldridge*, 9 Ves. 519; *per* Lord Eldon; *Harris* v. *Horwell*, Gilb. Eq. Rep. 11; *M'Cormick* v. *Grogan*, 4 L. R. H. L. 88, *per* L. C.

(*c*) *Stickland* v. *Aldridge*, 9 Ves. 519.

[(*d*) *Re Fleetwood*, 15 Ch. D. 594, where the cases are examined by Hall, V.C.; and see *Riordan* v. *Banon*, 10 I. R. Eq. 469; *O'Brien* v. *Condon*, (1905) 1 I. R. 51 (where it was held, contrary to *Re Fleetwood*, that a witness to the will was not incapacitated from taking under the secret trust).]

and gave her his property for life, and desired and empowered her by her will or in her lifetime to dispose of his estate "in accordance with my wishes verbally expressed to her," parol evidence as to the verbal wishes was not admitted, and the power of disposition given to the widow was held to be void for uncertainty (*a*); and where a testatrix bequeathed 4000*l.* to C. "for the charitable purposes agreed upon between us," evidence was admissible to show what the purposes agreed upon were, but was not admissible to contradict the will by showing that the agreement was that only the income of the 4000*l.* during the life of the legatee should be devoted to the charitable purposes (*b*). Where by a memorandum (not executed as a testamentary instrument) a trust as to a specified part of the residue was imposed on a legatee of the residue, who was also one of the executors, it was held that, as between such legatee and the objects of the testator's bounty designated in the memorandum, the debts ought to be paid out of the other residue not comprised in the memorandum (*c*).] [Extent of obligation.]

And generally, if a testator devise real estate or bequeath personal estate to A., *the beneficial owner upon the face of the will*, but upon the understanding between the testator and A. that the devisee or legatee will, as to a part or even the entirety of the beneficial interest, hold upon any trust which is *lawful* in itself, in favour of B., the Court, at the instance of B., will affect the conscience of A., and decree him to execute the testator's intention (*d*). But in this, as in other cases, if it appear that A. was not meant to be a trustee, but to have a mere discretion, the Court cannot convert the arbitrary power into a trust (*e*).

[(*a*) *Re Hetley*, (1902) 2 Ch. 866.]

[(*b*) *Re Huxtable*, (1902) 2 Ch. (C.A.) 793.]

[(*c*) *Re Maddock*, (1902) 2 Ch. (C.A.) 220.]

(*d*) *Kingsman* v. *Kingsman*, 2 Vern. 559; *Drakeford* v. *Wilks*, 3 Atk. 539; *Attorney-General* v. *Dillon*, 13 Ir. Ch. Rep. 127; *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218; *Barrow* v. *Greenough*, 3 Ves. 152; *Marriot* v. *Marriot*, 1 Strange, 672, *per Cur.*; *Segrave* v. *Kirwan*, 1 Beatt. 164, *per* Sir A. Hart; *Leister* v. *Foxcroft*, cited ib.; *Chamberlaine* v. *Chamberlaine*, 2 Eq. Ca. Ab. 43; ib. 465; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673; *Norris* v. *Frazer*, 15 L. R. Eq. 318; *Thynn* v. *Thynn*, 1 Vern. 296; *Devenish* v. *Baines*, Prec. Ch. p. 3; *Oldham* v. *Litchford*, 2 Vern. 506; *S. C.* Freem. 284; *Reech* v. *Kennigate*, Amb. 67; *S. C.* 1 Ves. 123; *Newburgh* v. *Newburgh*, 5 Madd. 366, *per* Sir John Leach; *Chamberlain* v. *Agar*, 2 Ves. & B. 259; *Nab* v. *Nab*, 10 Mod. Rep. 404; *Strode* v. *Winchester*, 1 Dick. 397; *S. C.* stated from Reg. Lib. App. No. 1 to 3rd edition of the present work; and see *Alison's case*, 9 Mod. Rep. 62; *Dixon* v. *Olmius*, 1 Cox, 414; [*French* v. *French*, (1902) 1 I. R. (H. L.) 173, 230, *per* Lord Davey]. But in the case put, B. takes by the rules of equity, and not by testamentary disposition, and, therefore, where A. had undertaken, at the request of a testatrix in Ireland, to hold for a charity, he paid legacy duty as beneficial owner, though by the Irish Stamp Acts a legacy to a charity was exempted; *Cullen* v. *Attorney-General*, 1 L. R. H. L. 190.

(*e*) *M'Cormick* v. *Grogan*, 1 Ir. R. Eq. 313; 4 L. R. H. L. 82; *Creagh* v.

[Intention not communicated.]

[8. But where the bequest was on the face of the will a beneficial one, and the understanding between the testator and the legatee was, that the legatee should take the property as trustee upon trust to deal with it according to further directions, which the testator was to give by letter, and the testator subsequently wrote letters containing the directions, but never sent them or communicated their contents to the legatee, it was held that the legatee was a trustee for the next of kin; and it was considered to be essential for the validity of the trust that it should be communicated to the legatee in the testator's lifetime, and that he should *accept the particular trust* (*a*).]

Engagement to execute an unlawful trust.

9. It often happens that a proposed devisee enters into an engagement with the testator in his lifetime to execute a secret trust of an *unlawful* character, one which the policy of the law does not allow to be created by will. In this case the Court will not suffer the devisee to profit by his fraud, but on proof of the fact raises a resulting trust in favour of the testator's heir-at-law. If, therefore, a testator devised an estate in words carrying upon the face of the will the beneficial interest, and obtained a promise from the devisee, either expressed or tacitly implied, that he would hold the estate upon trust for a charitable purpose, the heir-at-law, as entitled to a resulting trust, might bring an action against the devisee, and compel him to answer whether there existed any such understanding between him and the testator; and if the defendant acknowledged it, he was decreed a trustee for the plaintiff, and to convey the estate to him accordingly (*b*).

Devise may be good as to one and void as to another.

10. Where a devise is to several persons as tenets in common, it may be void as to one to whom the testator's unlawful intention was communicated in his lifetime, and good as to the others who were not privies to his intention (*c*). But if there be a joint

Murphy, 7 Ir. R. Eq. 182; [*Re Pitt Rivers*, (1902) 1 Ch. (C.A.) 403; *Sullivan* v. *Sullivan*, (1903) 1 I. R. 193].

(*a*) *Re Boyes*, 26 Ch. D. 531; *Re King's Estate*, 21 L. R. Ir. 273, where the law is summarised at p. 277, and see *Re Downing*, 60 L. T. N.S. 140.]

(*b*) *Adlington* v. *Cann*, Barn. 130; *Springett* v. *Jennings*, 10 L. R. Eq. 488; *Burr* v. *Miller*, W. N. 1872, p. 63; *Rex* v. *Portington*, 1 Salk. 162; *Muckleston* v. *Brown*, 6 Ves. 52; *Stickland* v. *Aldridge*, 9 Ves. 516; *M'Cormick* v. *Grogan*, 1 Ir. R. Eq. 313; 4 L. R. H. L. 82; and see *Attorney-General* v. *Duplessis*, Park. 144; *Russell* v. *Jackson*, 10 Hare, 204; *Tee* v. *Ferris*, 2 K. & J. 357; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Carter* v. *Green*, 3 K. & J. 591; *Burney* v. *Macdonald*, 15 Sim. 6; *Moss* v. *Cooper*, 1 J. & H. 352; *Baker* v. *Story*, W. N. 1874, p. 211; [*Re Spencer's Will*, 57 L. T. N.S. 519].

(*c*) *Tee* v. *Ferris*, 2 K. & J. 357; *Rowbotham* v. *Dunnett*, 8 Ch. D. (C.A.) 430; and see *Burney* v. *Macdonald*, 15 Sim. 6; *Moss* v. *Cooper*, 1 J. & H. 352; [*Geddis* v. *Semple*, (1903) 1 I. R. (C.A.) 73].

devise to two, one of whom has by active fraud procured the devise, the other cannot claim under the fraud, but the devise will be void as to both (*a*).

[11. Where the gift is made to joint tenants on the faith of the promise by one of them that he will carry out the trust, the secret trust will bind them both; but it is otherwise where the will is merely left unrevoked on the faith of a subsequent promise by one, for then he only is bound (*b*).] [Gift to joint tenants.]

12. Where no trust is imposed by the will, and no communication was made in the testator's lifetime, the devise will be good although the devisee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind, to carry out what he believes to have been the testator's wishes (*c*). Devise not void because devisee means to execute the unlawful trust.

[13. Where property was devised to four persons as joint tenants, and one of them in his will made certain statements which pointed to a secret trust, it was held that these statements could not affect the right of the survivor of the joint tenants, and in the absence of other evidence his representatives were held to be entitled to the property (*d*).] [Admission by one joint tenant.]

14. A devise may be a beneficial one upon the face of a will, but there may have existed an understanding between the testator in his lifetime and the devisee, that, without any particular part of the estate being specified, such portions of it as the devisee, in the exercise of his discretion, might think proper should be applied to a charitable purpose. Under such circumstances the heir of the testator would have a right to interrogate the devisee whether he has exercised that discretion, and to call for a conveyance of so much as the devisee may have made subject to the unlawful purpose (*e*). An engagement to hold an indefinite part of the estate upon an unlawful trust.

15. In the above cases it is not a sufficient answer to an action by the heir for the defendant to say that the secret trust is *not for the plaintiff*, for thus the devisee makes himself the judge of the title. The trust might be for a charity, and if so, the beneficial Defendant must discover what the secret trust was.

(*a*) *Russell* v. *Jackson*, 10 Hare, 204; and see *Carter* v. *Green*, 3 K. & J. 603; *Burney* v. *Macdonald*, 15 Sim. 6.

[(*b*) *Re Stead*, (1900) 1 Ch. 237, *per* Farwell, J., referring to *Russell* v. *Jackson*, 10 Ha. 204, and *Jones* v. *Badley*, L. R. 3 Ch. 362, on the one hand; and *Burney* v. *Macdonald*, 15 Sim. 6, and *Moss* v. *Cooper*, 1 J. & H. 352, on the other hand, as authorities.]

(*c*) *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Jones* v. *Badley*, 3 L. R. Eq. 635, reversed, 3 L. R. Ch. App. 362; and see *Carter* v. *Green*, 3 K. & J. 591; [*Rowbotham* v. *Dunnet*, 8 Ch. D. 430.]

[(*d*) *Turner* v. *Attorney-General*, 10 Ir. R. Eq. 386.]

(*e*) *Muckleston* v. *Brown*, 6 Ves. 69.

interest [previously to the recent statute (*a*)] would result for want of a lawful intention, or the equitable interest might, on some other ground, enure to the heir as undisposed of (*b*). If the defendant deny the trust by his answer, the fact in this, as in other cases of fraud, may be established against him by parol evidence (*c*).

Engagement to execute a trust and no trust declared.

16. It is clear that if the devisee enters into an engagement with the testator to execute an unlawful trust, the heir may bring an action, and claim the beneficial interest; but suppose the devisee is a beneficial one upon the face of it, and the testator communicates his will to the devisee, and requests him to be a trustee for such purposes as the testator shall declare, which the devisee undertakes to do, but the testator afterwards *dies without having expressed any trust*, it seems that in this case also the devisee will not be allowed to take the beneficial interest, but the heir-at-law will be entitled (*d*).

Case of devisee made a trustee on face of the will, and parol declaration of trust for a stranger.

17. Another case, distinct from all the preceding, is where a testator *devises an estate to persons as trustees*, but no trusts are declared by the will, so that the equitable interest would, upon the face of the instrument, result to the heir-at-law, and the testator *informs the devisees* that his intention in making the devise is, that they shall hold the estate *in trust for certain persons*, which the devisees undertake to do. Will the Court, under such circumstances, compel the devisees *to execute the parol intention*, or will the equitable interest result to the *heir*? In favour of the parol trust, it may be argued that the testator left his will in the form in which it appears, under the impression that his object, verbally communicated, would be carried out, and that the trust can therefore be supported, on the ground of mistake in himself, or fraud in the devisees in not apprising the testator that the trust could not be executed. To this the answer is, that, upon the face of the will, the equitable interest results to the heir-at-law, and that, if the testator has not disposed of the equitable interest, as required by the statute, the Court cannot make a will for him, on the plea of mistake or fraud (*e*): that the Court has interfered in the case of fraud in those instances only where the *devisee*, taking the beneficial interest under the

[(*a*) *The Mortmain and Charitable Uses Act*, 1891 (54 & 55 Vict. c. 73) applying to the wills of testators dying after August 5, 1891.]

(*b*) *Newton* v. *Pelham*, cited *Boson* v. *Statham*, 1 Eden, 514; [*Re Boyes*, 26 Ch. D. 531].

(*c*) *Kingsman* v. *Kingsman*, 2 Vern. 599; *Pring* v. *Pring*, 2 Vern. 99; [*Riordan* v. *Banon*, 10 Ir. R. Eq. 469; *Re Boyes*, 26 Ch. D. 531, at p. 535].

(*d*) *Muckleston* v. *Brown*, 6 Ves. 52; [*Re Boyes*, 26 Ch. D. 531]. See also the observations of V. C. (afterwards L. J.) Turner, in *Russell* v. *Jackson*, 10 Hare, p. 214.

(*e*) *Newburgh* v. *Newburgh*, 5 Madd. 364.

will, was the contriver of the fraud, and, as no man may take advantage of his own wrong, the Court compels the devisee to execute the intention fraudulently intercepted, but in the case supposed, the *legal estate* only is in the *devisees*, while the beneficial interest is in the heir-at-law, who is wholly disconnected from the fraud. What jurisdiction, therefore, has the Court to act upon the conscience of the heir, to deprive him of that estate which has not been devised away according to the Statute of Wills? and how can the trustees for the heir be held to be trustees for another in the absence of all fraud on the part of the heir? It would seem, upon principle, that where a trust results upon the face of the will, the circumstance of an express or implied promise on the part of the devisee to execute a certain trust is not a sufficient ground for authorising the Court to execute the trust as against the heir-at-law (*a*).

Effect of the Statute of Mortmain.

18. We have stated the rule that if a testator make a devise carrying the beneficial interest on the face of the will, but it appears from the admission of the devisee or by evidence that the devisee was pledged to the testator to execute a charitable trust, the Court will not allow the execution of such a trust, but will give the estate to the heir-at-law. The question here [arose] whether the Statute 9 Geo. 2 c. 36 (*b*), which declared a devise "in trust or for the benefit of" a charity to be absolutely void, applied to such a case, so as not only to defeat the equitable interest admitted or proved to have been intended for a charity, but also to make void the devise of the legal estate itself, so that by the effect of the statute, when the fact had been established, the devisee took no interest either at law or in equity. After some conflict of authority (*c*), it was decided that the devise of the legal estate was good, but that equity would set it aside on the ground of fraud, upon public policy (*d*). [Under the will of a testator dying after 5th August 1891, the date of the passing of

(*a*) The cases upon the subject are *Pring* v. *Pring*, 2 Vern. 99; *Crooke* v. *Brooking*, 2 Vern. 50, 107; *Smith* v. *Attersoll*, 1 Russ. 266; *Podmore* v. *Gunning*, 7 Sim. 644. Other cases are not uncommonly referred to, which really have no application—as *Jones* v. *Nabbs*, Gilb. Eq. Rep. 146 (but there the money passed, and the parol trust was declared in the lifetime of the testator); *Inchiquin* v. *French*, 1 Cox, 1; *Metham* v. *Devon*, 1 P. W. 529; as to which last two cases, see the observations at page 61 *supra*.

(*b*) Repealed, but, for the present purpose, replaced by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(*c*) See *Adlington* v. *Cann*, 3 Atk. 141, 150, & 153; *Edwards* v. *Pike*, 1 Eden, 267; *Boson* v. *Statham*, 1 Eden, 508; *Bishop* v. *Talbot*, cited *Muckleston* v. *Brown*, 6 Ves. 60, 67, Reg. Lib. A. 1772; fol. 137, A. 1773, fol. 686.

(*d*) *Sweeting* v. *Sweeting*, 3 N. Rep. 240.

the Mortmain and Charitable Uses Act, 1891 (*a*), the point can no longer arise.]

The provisions of the Statute of Frauds relating to wills have now been repealed, but the principles established by the foregoing cases with reference to the Statute of Frauds will apply, *mutatis mutandis*, to the enactments of the Statute of Wills at present in force.

[(*a*) 54 & 55 Vict. c. 73 ; see *post*, p. 106.]

CHAPTER VI

OF TRANSMUTATION OF POSSESSION

WHERE *there is valuable consideration*, and a trust is intended to be created, formalities are of minor importance, since, if the transaction cannot take effect by way of trust executed, it may be enforced by a Court of Equity as a contract. But *where there is no valuable consideration*, and a trust is intended, it has been not unfrequently supposed that, in order to give the Court jurisdiction, there must be *Transmutation of possession—i.e.* the legal interest must be divested from the settlor, and transferred to some third person. But upon a careful examination of the authorities the principle will be found to be, that whether there was transmutation of possession or not, the trust will be supported—provided it was in the first instance *perfectly created* (*a*).

The cases upon this subject may be marshalled under the following heads:—

1. It is evident that a trust is *not perfectly created* where there is a *mere intention* of creating a trust, or a *voluntary agreement* to do so, and the settlor himself contemplates some further act for the purpose of giving it completion (*b*). Where some further act is intended.

2. If the settlor proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced as soon as the settlor has executed an express declaration of trust, intended to be final and binding upon him, and in this case it is immaterial Where the settlor declares himself a trustee.

(*a*) See *Ellison* v. *Ellison*, 6 Ves. 662; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99; *Sloane* v. *Cadogan*, Sug. Vend. & P. App.; *Edwards* v. *Jones*, 1 M. & Cr. 226; *Wheatley* v. *Purr*, 1 Keen, 551; *Garrard v. Lauderdale*, 2 R. & M. 453; *Collinson* v. *Pattrick*, 2 Keen, 123; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Meek* v. *Kettlewell*, 1 Hare, 469; *Fletcher* v. *Fletcher*, 4 Hare, 74; *Price* v. *Price*, 14 Beav. 598; *Bridge* v. *Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Donaldson* v. *Donaldson*, Kay, 711; *Scales* v. *Maude*, 6 De G. M. & G. 43; *Airey* v. *Hall*, 3 Sm. & G. 315; [*Paul* v. *Paul*, 20 Ch. D. (C.A.) 742; *Re Earl of Lucan*, 45 Ch. D. 470; *Mallott* v. *Wilson*, (1903) 2 Ch. 494].

(*b*) *Cotteen* v. *Missing*, 1 Mad. 176; *Bayley* v. *Boulcott*, 4 Russ. 345; *Dipple* v. *Corles*, 11 Hare, 183; *Jones* v. *Lock*, 1 L. R. Ch. App. 25; *Lister* v. *Hodgson*, 4 L. R. Eq. 30; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233.

whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer (*a*).

Gift by husband to his wife.

[3. Prior to the Married Women's Property Act, 1882,] a husband was incapable of making a gift of chattels at law to his wife, and if he purported to make such a gift, a Court of Equity [has in some cases] considered it tantamount to a declaration that the husband would hold in trust for the wife for her separate use. [It was held that] the words of gift need not be in writing, or of a technical description, but must be clear, irrevocable, and complete; the unsupported testimony of the wife on her own behalf was not sufficient, but the gift might be proved not only by witnesses at the time, but also by the husband's subsequent declaration. "If," observed Sir J. Romilly, M.R., "A. (who has 1000*l.* Consols standing in his name) says to B., 'I give you the 1000*l.* Consols standing in my name,' that in my opinion would make A. a trustee for B. It would be a valid declaration of trust for B., though the stock remained in the name of A." (*b*).

[Thus where a husband by a deed poll, after reciting that he was beneficially possessed of the ground-rents thereby agreed to be settled, "settled, assigned, transferred, and set over unto his wife, as though she were a single woman," certain leasehold houses and the ground-rents thereof, it was held that the deed was not void as being an intended assignment, but operated as a declaration of trust (*c*). And where a husband by deed assigned leaseholds to his

(*a*) *Gee* v. *Liddell*, 35 Beav. 621; *Morgan* v. *Malleson*, 10 L. R. Eq. 475; *Armstrong* v. *Timperon*, W. N. 1871, p. 4; *Ex parte Pye*, or *Ex parte Dubost*, 18 Ves. 140; *Thorpe* v. *Owen*, 5 Beav. 224; *Stapleton* v. *Stapleton*, 14 Sim. 186; *Vandenberg* v. *Palmer*, 4 Kay & J. 204; *Searle* v. *Law*, 15 Sim. 99; *Steele* v. *Waller*, 28 Beav. 466; *Paterson* v. *Murphy*, 11 Hare, 88; *Drosier* v. *Brereton*, 15 Beav. 221; *Bentley* v. *Mackay*, 15 Beav. 12; *Bridge* v. *Bridge*, 16 Beav. 315; *Gray* v. *Gray*, 2 Sim. N.S. 273; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; [*Kelly* v. *Walsh*, 1 L. R. Ir. 275; and see *Re Shield*, 53 L. T. N.S. 57; *Johnstone* v. *Mappin*, 64 L. T. N.S. 48; *Middleton* v. *Pollock*, 2 Ch. D. 104; *New & Co.'s Trustee* v. *Hunting*, (1897) 2 Q. B. (C.A.) 19; S. C. *nom. Sharp* v. *Jackson*, (1899) A. C. (H. L.) 419; *O'Brien* v. *McMeel*, (1898) 1 I. R. 366]. In the case of *M'Fadden* v. *Jenkyns*, 1 Hare, 471, Sir J. Wigram expressed himself more cautiously than was necessary as to the jurisdiction of the Court, in enforcing a trust against the settlor himself, and suggested several accompanying circumstances as material to the establishment of such a trust. "If," he said, "the owner of property having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, and had *disclosed that instrument* to the *cestui que trust*, and afterwards *acted upon it*, that might perhaps be sufficient; or a Court of Equity, adverting to what Lord Eldon said in *Ex parte Dubost*, might not be bound to enquire further into an equitable title so established in evidence."

(*b*) *Grant* v. *Grant*, 34 Beav. 623. As to the general dictum of M.R., see also *Morgan* v. *Malleson*, 10 L. R. Eq. 475; but see contra *Warriner* v. *Rogers*, 16 L. R. Eq. 349.

[(*c*) *Baddeley* v. *Baddeley*, 9 Ch. D. 113.]

"wife, her executors, administrators, and assigns, as her separate estate," it was held that the deed operated as a valid declaration of trust (*a*). But these cases have since been disapproved of by V.C. Hall, who held that the principle laid down in *Milroy* v. *Lord* (*b*) applies equally to an imperfect gift from husband to wife as to a gift to a stranger, and that such a gift cannot be supported as a declaration of trust (*c*); and this view has since been adopted in Ireland (*d*).

4. Now by the recent Act (*e*), sect. 1, a married woman is capable of acquiring and holding property as her separate property, as if she were a *feme sole*, without the intervention of any trustee, and a gift by a husband to his wife will now be valid, as well at law as in equity. But by sect. 10 it is provided that nothing in the Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband, made by or in the name of his wife in fraud of his creditors, but any moneys so deposited or invested may be followed as if the Act had not been passed. [Married Women's Property Act, 1882].

And since the Act has put a gift by a husband to his wife on a similar footing to a gift to a stranger, the principles governing imperfect gifts to strangers (*f*) must be equally applied to gifts from husband to wife.]

5. If it be proposed to make a stranger the trustee, and the subject of the trust is a *legal interest*, and one *capable of legal transmutation*, as land or chattels which pass by conveyance, assignment, or delivery, or stock which passes by transfer (*g*), in this case the trust is not perfectly created unless the legal interest be actually vested in the trustee. It is not enough that the settlor executed a deed affecting to pass it, and that he believed nothing to be wanting to give effect to the transaction: the intention of divesting himself of the legal property must in fact have been executed, or the Court will not recognise the trust (*h*). "I Where the property is a legal interest.

[(*a*) *Fox* v. *Hawks*, 13 Ch. D. 822.]
[(*b*) See *post*, p. 78.]
[(*c*) *Re Breton's Estate*, 17 Ch. D. 416; and see *Re Whittaker*, 21 Ch. D. 657, 666.]
[(*d*) *Hayes* v. *Alliance Assurance Company*, 8 L. R. Ir. 149.]
[(*e*) 45 & 46 Vict. c. 75; see *Re March*, 24 Ch. D. 222; 27 Ch. D. (C.A.) 166; *Re Jupp*, 39 Ch. D. 148.]
[(*f*) See *post*, p. 78.]
[(*g*) Without formal acceptance by the transferee; see *Standing* v. *Bowring*, 31 Ch. D. (C.A.) 282.]
(*h*) See *Garrard* v. *Lauderdale*, 2 Russ. & M. 452; *Meek* v. *Kettlewell*, 1 Hare, 469; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Coningham* v. *Plunkett*, 2 Y. & C. Ch. Ca. 245; *Searle* v. *Law*, 15 Sim. 95; *Price* v. *Price*, 14 Beav.

take the distinction," said Lord Eldon, "to be, that if you want the assistance of the Court to constitute a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting a *cestui qui trust*, as upon a covenant to transfer stock, &c., but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court" (*a*). If, however, the settlor purports to transfer the legal estate to a trustee, but the trustee afterwards *disclaims*, the accident of the disclaimer does not vitiate the deed, but the Court will appoint a new trustee (*b*).

Where the property is a legal interest incapable of legal transfer.

6. If the subject of the trust were a *legal interest*, but *one not capable of legal transfer*, then both on principle and authority there was considerable difficulty. On the one hand, it was urged that in equity the universal rule is that the Court will not enforce a voluntary agreement in favour of a volunteer; and as by the supposition the legal interest remained in the settlor (who, therefore, at law retained the full benefit), a Court of Equity would not, in the absence of any consideration, deprive him of that interest which he had not actually parted with. On the other hand, as the settlor *could not* divest himself of the legal interest, to say that he should not constitute another a trustee without passing the legal interest, would be to debar him from the creation of a trust in the hands of another at all, and the rule, therefore, should be that if the settlor makes all the assignment of the property in his power, and perfects the transaction as far as the law permits, the Court in such a case will recognise the act, and support the validity of the trust.

Some Judges adopted the one view of the question, and some the other (*c*). But in the leading case of *Kekewich* v.

598; *Bridge* v. *Bridge*, 16 Beav. 315; *Weal* v. *Ollive*, 17 Beav. 252; *Beech* v. *Keep*, 18 Beav. 285; *Tatham* v. *Vernon*, 29 Beav. 604; *Dilrow* v. *Bone*, 3 Giff. 538; *Milroy* v. *Lord*, 8 Jur. N.S. 806; 4 De G. F. & J. 264; *Warriner* v. *Rogers*, 16 L. R. Eq. 340; *Richards* v. *Delbridge*, 18 L. R. Eq. 11; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233; *Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431; [*Re Caplen's Estate*, 45 L. J. N.S. Ch. 280; *West* v. *West*, 9 L. R. Ir. 121; *Re Griffin*, (1899) 1 Ch. 408, where it was held that the indorsement and delivery of a banker's deposit receipt (not transferable) was a complete gift where the donor appointed the donee his executor, although no notice was given to the bank by the donor].

(*a*) *Ellison* v. *Ellison*, 6 Ves. 662; *Antrobus* v. *Smith*, 12 Ves. 39; *Colman* v. *Sarrel*, 1 Ves. jun. 50; *S. C.* 3 B. C. C. 12; *Dening* v. *Ware*, 22 Beav. 184; but see *Airey* v. *Hall*, 3 Sm. & Gif. 315; *Kiddill* v. *Farnell*, 3 Sm. & Gif. 428; and see *Pulvertoft* v. *Pulvertoft*, 18 Ves. 89.

(*b*) *Jones* v. *Jones*, W. N. 1874, p. 190; [*Mallott* v. *Wilson*, (1903) 2 Ch. 494].

(*c*) The authorities for the validity of the trust are, *Fortescue* v. *Barnett*, 3 M. & K. 36; *Roberts* v. *Lloyd*, 2

Manning (*a*), Lord Justice K. Bruce observed: "It is upon legal and equitable principle, we apprehend, clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have and *has it in his power* to make in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced.*" And it is conceived that this principle will for the future prevail (*b*), [but since debts and legal choses in action have been made transferable at law, questions under this head will be of less frequent occurrence (*c*).]

Where the subject was incapable of transfer as a debt, and a parol declaration of trust was communicated to the *debtor*, who undertook to hold it upon those trusts, it was held to be a valid settlement without any transfer or attempt at transfer (*d*).

[7. Where a person wrote a letter to one of the two trustees of the settlement made on his first marriage, stating that he was desirous of making a settlement of six policies on the children of that marriage, and undertaking to make to the trustee and another trustee, to be named by the settlor, an assignment by way of settlement of the policies, *and until the settlement was executed he was to be bound by the agreement, as if the settlement were actually executed,* and afterwards he sent to the trustee another letter enclosing the former letter and three of the policies (the other three being in the possession of a mortgagee), and stating that "the enclosed was the formal letter of assignment previous to a deed, and as binding," but no notice of the letters was ever given to the offices (*e*), no formal settlement was ever executed, and no second trustee was named; it was held by V.C. Hall, that as a complete assignment of the policies had been made, the settlement of them was binding and effectual, notwithstanding that the execution by the settlor of a further [Policies of assurance.]

Beav. 376; *Blakeley* v. *Brady*, 2 Drur. & Walsh, 311; *Airey* v. *Hall*, 3 Sm. & Gif. 315; *Parnell* v. *Hingston*, 3 Sm. & Gif. 337; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229. In favour of the opposite view, see *Edwards* v. *Jones*, 1 M. & Cr. 226; *Ward* v. *Audland*, 8 Sim. 571; C. P. Cooper's Cases, 1837-1838, 146; 8 Beav. 201; *Meek* v. *Kettlewell*, 1 Hare, 464; *Scales* v. *Maude*, 6 De G. M. & G. 43; *Sewell* v. *Moxsy*, 2 Sim. N.S. 189.

(*a*) 1 De G. M. & G. 187, 188.

(*b*) See *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 45; *Penfold* v. *Mould*, 4 L. R. Eq. 564; [*Lee* v. *Magrath*, 10 L. R. Ir. 45, 313; *Re Patrick*, (1891) 1 Ch. (C.A.) 82].

[(*c*) *Lee* v. *Magrath*, 10 L. R. Ir. 313.]

(*d*) *Roberts* v. *Roberts*, 12 Jur. N.S. 971; 15 W. R. 117, reversing Stuart V. C. (11 Jur. N.S. 992; 14 W. R. 123). As to the legal transfer, see now 36 & 37 Vict. c. 66, s. 25, sub-s. 6, *post*, p. 76.

[(*e*) Which, however, is not a material circumstance as between assignor and assignee; *Gorringe* v. *Irwell India Rubber Company*, 34 Ch. D. 128; and *post*, p. 79; and that it is the duty of the trustee to give the notice, see *Re King*, 14 Ch. D. 179, 186.]

instrument was contemplated in order to carry out his intention; and *Fortescue* v. *Barnett* and *Pearson* v. *Amicable Assurance Office* (*a*) were treated by the V.C. as governing the case (*b*).]

If a settlor assign all his personal estate with a power of attorney, the deed, being perfect and all that was intended, will pass a promissory note notwithstanding the want of indorsement, which is required for giving it currency (*c*).

Subject partly incapable of transfer.

8. If the subject of the settlement be partly *incapable* of legal transfer, and partly *capable*, and that part which is capable of transfer is not transferred, in this case all has not been done that might have been done, and no trust is created. Thus where there was a mortgage in fee, and the mortgagee assigned the debt with a power of attorney, but did not convey the mortgaged lands, though they were legally transferable, it was held that the settlement was incomplete (*d*). [But where debts due on bills of sale were assigned to trustees, with power to sue for and get in the debts and execute all necessary assurances, but without any express assignment of the securities, it was held that the debts were completely assigned, and the settlor having got them in, the trustees were creditors against his estate for the amount (*e*).]

36 & 37 Vict. c. 66.

9. By the Supreme Court of Judicature Act, 1873, sect. 25, subsect. 6, "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) (*f*), of any *debt* or other *legal chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the *legal* right to such debt or chose in action from the date of such notice" (*g*).

[(*a*) *Vide sup.* p. 74, note (*c*).]

[(*b*) *Re King*, 14 Ch. D. 179; and see *Johnstone* v. *Mappin*, 64 L. T. N.S. 48.]

(*c*) *Richardson* v. *Richardson*, 3 L. R. Eq. 686. But see *Richards* v. *Delbridge*, 18 L. R. Eq. 11.

(*d*) *Woodford* v. *Charnley*, 28 Beav. 96; [but see observations of Lindley, L. J., *Re Patrick*, (1891) 1 Ch. (C.A.) 82, 88.]

[(*e*) *Re Patrick*, (1891) 1 Ch. (C.A.) 82, 88.]

[(*f*) As to what amounts to such an assignment, see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Burlinson* v. *Hall*, 12 Q. B. D. 347; *Mercantile Bank of London* v. *Evans*, (1899) 2 Ch. (C.A.) 613; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. (C.A.) 190.]

[(*g*) Under the corresponding section in the Irish Act, 40 & 41 Vict. c. 57, s. 28, sub-s. 6, it was held that the voluntary assignee of a promissory note, not negotiable, and not payable at the time of the indorsement, was within the Act; *Lee* v. *Magrath*, 10 L. R. Ir. 45; reversed on other grounds, 10 L. R. Ir. 313.]

[The notice may be given at any time, even after the death of the assignor; but the effect of delaying to give notice will be to let in any equities arising in the interval before the notice is given (*a*).]

Where the property is an equitable interest.

10. If the subject of the trust be an *equitable* interest, then on the authority of *Sloane* v. *Cadogan* (*b*) a valid trust is created when the settlor has executed an assignment of it to a new trustee; for an equitable interest is capable of transmission from one to another; and here the Court finds the relation of trustee and *cestui que trust* established without the necessity of calling on the settlor to join in any act for giving it completion.

The late Vice-Chancellor of England questioned the case of *Sloane* v. *Cadogan* upon this point (*c*); but in *Kekewich* v. *Manning* (*d*), Lord Justice K. Bruce observed: "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?"

These principles have since been acted upon (*e*), and *Sloane* v. *Cadogan* may be regarded as law. It had been before contended that the assignment operated by way of *contract*, and as there was no consideration, the Court could not enforce it; but the rule now is, that the assignment passes the equitable *estate* (*f*).

[(*a*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.]

(*b*) Appendix to Sug. Vend. & Purch. *Quære*, also if the same point was not ruled in *Ellison* v. *Ellison*, 6 Ves. 656; for though the facts are very imperfectly stated, it would seem from some expressions that at the date of the settlement the legal estate was not in the settlor; and see *Reed* v. *O'Brien*, 7 Beav. 32; *Bridge* v. *Bridge*, 16 Beav. 315; *Gannon* v. *White*, 2 Ir. Eq. Rep. 207.

(*c*) *Beatson* v. *Beatson*, 12 Sim. 281.

(*d*) 1 De G. M. & G., p. 188.

(*e*) *Voyle* v. *Hughes*, 2 Sm. & Gif. 18; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Gilbert* v. *Overton*, 2 H. & M. 110; *Woodford* v. *Charnley*, 28 Beav. 99 *per* M.R.; *Re Way's Trust*, 2 De G. J. & S. 365; reversing same case, 4 New Rep. 453.

(*f*) *Donaldson* v. *Donaldson*, 1 Kay, 711. "If," Sir J. Wigram on one occasion observed, "the equitable owner of property, the legal interest of which is in a trustee, should execute a voluntary assignment, and authorise the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the interest and dividends of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity," 1 Hare, 471. The Vice-Chancellor here enumerates all the safeguards and confirmatory acts of which the transaction was capable, but it must not be inferred that if some of these were wanting, the trust would not be supported.

[The rule above stated was held not to apply where the deed was not

Where new trust is created without new trustees.

11. In other cases a person entitled to an equitable interest, instead of assigning it to new trustees, has directed the old trustees to stand possessed of it upon the new trusts (*a*), and, of course, it has been considered quite immaterial whether the settlor selected new trustees or was content with the original trustees.

Assignment to a stranger for his own benefit.

12. In other cases the owner of an equitable interest has simply assigned it to a stranger for the stranger's own benefit (*b*), which also in principle is the same as *Sloane* v. *Cadogan*, for there can be no difference between the gift of an equitable interest to A. himself and the gift of it to B. in trust for A.

Case of particular mode intended, but not effectual.

13. If the settlor intend to make the settlement in one particular mode which fails, the Court will not go out of its way to give effect to it by applying another mode; as if the settlement be intended to be made by transfer of the legal estate, the Court will not hold such intended but ineffectual transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust (*c*).

Meek *v.* Kettlewell.

14. In a case (*d*) heard before Sir J. Wigram, and affirmed by Lord Lyndhurst (*e*), it was held that a voluntary assignment of a mere *expectancy* (as of an heir or next of kin) in an equitable interest, and *not communicated to the trustees*, did not amount to the creation of a trust. This was the only point decided, and perhaps a distinction may be said to exist between the settlement of an *actual interest* and an *expectancy*, for a trust to be enforced must be *perfectly created*, whereas any dealing with what a person *has not*, but only *expects to have*, must necessarily in some sense be *in fieri* (*f*). However, Sir J. Wigram, in the course of his judgment,

an absolute assignment, but took effect only by way of equitable charge, for then the transaction depended only upon contract, which could not be enforced in favour of a volunteer; *Re Earl of Lucan*, 45 Ch. D. 470.]

(*a*) *Rycroft* v. *Christy*, 3 Beav. 238; *M'Fadden* v. *Jenkyns*, 1 Hare, 458; 1 Phill. 153; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; [*Harding* v. *Harding*, 17 Q. B. D. (C.A.) 442; *Re Hancock*, 57 L. J. Ch. 793, 796].

(*b*) *Cotteen* v. *Missing*, 1 Mad. 176; *Collinson* v. *Pattrick*, 2 Keen, 123; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; and see *Godsal* v. *Webb*, 2 Keen, 99.

(*c*) *Milroy* v. *Lord*, 8 Jur. N.S. 809; 4 De G. F. & J. 274, per L. J. Turner; *Richards* v. *Delbridge*, 18 L. R. Eq. 11; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233; [*Bottle* v. *Knocker*, 46 L. J. N.S. Ch. 159; *Re Shield*, 53 L. T. N.S. 5; *Cross* v. *Cross*, 1 L. R. Ir. 389; 3 L. R. Ir. 342; *Hayes* v. *Alliance Assurance Co.*, 8 L. R. Ir. 149; *West* v. *West*, 9 L. R. Ir. 121; *Lee* v. *Magrath*, 10 L. R. Ir. 313; *Re Hancock*, 57 L. J. Ch. 793, 796; 59 L. T. N.S. 197; *Re Breton's Estate*, 17 Ch. D. 416, *sup.* p. 73].

(*d*) *Meek* v. *Kettlewell*, 1 Hare, 464. See observations upon this case in *Penfold* v. *Mould*, 4 L. R. Eq. 564.

(*e*) 1 Ph. 342.

[(*f*) See *Re Parsons*, 45 Ch. D. 51, 59. The law is settled that the voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity; *Re Ellenborough* (1903) 1 Ch. 697.]

denied that any distinction existed between settlements of a *legal* interest, as in *Edwards* v. *Jones*, and of an *equitable* interest, as in *Sloane* v. *Cadogan*, two cases which, both on principle and authority, ought not to be confounded.

Notice unnecessary.

15. Great importance was also attached by his Honour to the circumstances that *notice of the assignment* was not given to the trustees. But notice in these cases is not indispensable. As against the *settlor*, an equitable interest is perfectly transferred without notice. It is only as between *purchasers* that the service of notice on the trustee, or the want of it, has a material effect upon the transfer (*a*).

[Addition to trust property.]

[16. Where trustees voluntarily added certain sums to the settled share of the beneficiary, under an erroneous impression as to the construction of a will, they were held to have constituted themselves trustees for the beneficiary, but not on the trusts of the will as construed by the Court (*b*).]

Settlement retained in settlor's possession.

17. If a person execute a voluntary *settlement*, which is duly sealed and delivered at the time, but the settlor keeps it in his possession and never parts with it, the settlement is, nevertheless, as binding as if it had been handed over to the parties entitled (*c*). But in the case of a conveyance upon a *sale*, though the deed be duly sealed and delivered, and the word "escrow" be not used, yet if it be retained in the hands of the vendor's solicitor it has no operation until handed over to the purchaser on payment of the purchase-money (*d*). The distinction is that in the former case nothing remains to be done, but in the latter case the substance of the agreement on one side, viz., the payment of the purchase-money, is still to be performed.

Where donee incurs expense in respect of the property.

18. Though a settlement be voluntary at the time, and the legal estate do not pass, yet if the donee, with the knowledge and sanction of the donor, incur expense in respect of the property upon the faith of the gift, the donee is no longer regarded as a

(*a*) See *Burn* v. *Carvalho*, 4 M. & Cr. 690; *Donaldson* v. *Donaldson*, Kay, 711; *Sloper* v. *Cottrell*, 6 Ell. & Bl. 504; *Gilbert* v. *Overton*, 2 H. & M. 110; [*Gorringe* v. *Irwell India Rubber Co.*, 34 Ch. D. 128; *Re Patrick*, (1891) 1 Ch. (C.A.) 82, 87]. Lord Romilly had attached importance to notice, even as against the settlor. See *Bridge* v. *Bridge*, 16 Beav. 315; *Re Way's Trust*, 4 New Rep. 453; but this view has been overruled, see *Re Way's Trust*, 2 De G. J. & S. 365.

[(*b*) *Re Walters; Neison* v. *Walters*, 63 L. T. N.S. 328; reversing S. C., 61 L. T. N.S. 872; and see *Re Curteis*, 14 L. R. Eq. 217.]

(*c*) *Re Way's Trust*, 2 De G. J. & S. 365; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Hope* v. *Harman*, 11 Jur. 1097; *Armstrong* v. *Timperon*, 19 W. R. 558; 24 L. T. N.S. 275; and see *Jones* v. *Jones*, 23 W. R. 1.

(*d*) *Hudson* v. *Temple*, 29 Beav. 545, *per* M. R.; *Murray* v. *Stair*, 2 Barn. & Cr. 82; *Nash* v. *Flyn*, 1 Jon. & Lat. 162; [and see *Whelan* v. *Palmer*, 58 L. T. N.S. 937, 940; *London Freehold, &c. Property Co.* v. *Lord Suffield*, (1897) 2 Ch. (C.A.) 608].

volunteer, but, in the character of purchaser, may call for a conveyance of the legal estate (*a*).

Voluntary settlement by way of trust not revocable by settlor.

19. If a complete voluntary settlement, whether with or without transmutation of possession, be once executed, it cannot be revoked by a subsequent *voluntary* settlement (*b*), and the circumstance that the legal estate which was vested in the trustee becomes afterwards by some accident revested in the settlor is immaterial, as he will take it as trustee (*c*). But if the voluntary settlement be in trust for the settlor for life, and then in trust for others, but subject to such debts as the settlor may leave, the settlor may in effect nullify the settlement by creating new debts (*d*). [And where a settlor covenanted that he would in his lifetime, or his executors should after his decease, settle certain specific stocks or others of equivalent value, and, reserving a life interest to himself, declared himself to be trustee, it was held, notwithstanding the use of the words of futurity, that a present complete settlement was intended, and was binding on the settlor (*e*).]

Fraud.

20. A voluntary settlement, though complete on the face of it, may be set aside in equity, where obtained by undue influence (*f*), or where it was not intended to take effect in the events which have actually happened, and was therefore executed under a mistake (*g*).

But in case of lands might be defeated by a sale.

21. *A voluntary settlement of land* by way of trust, perfectly created [was] liable, under 27 Eliz. cap. 4, like a settlement of the legal estate, to be defeated by a subsequent *sale* to a *purchaser*, even with notice, and the *cestui que trust* [could] neither obtain an injunction against the sale, though the settlement was founded on meritorious consideration, as a provision for a wife or child (*h*), nor follow the estate into the hands of the purchaser (*i*), nor charge him with misapplication of the purchase-money, if, with notice of the voluntary settlement, he paid it to the vendor (*j*),

(*a*) *Dillwyn* v. *Llewelyn*, 4 De G. F. & J. 517.

(*b*) *Newton* v. *Askew*, 11 Beav. 145; *Rycroft* v. *Christy*, 3 Beav. 238.

(*c*) *Ellison* v. *Ellison*, 6 Ves. 656; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Paterson* v. *Murphy*, 11 Hare, 88.

(*d*) *Markwell* v. *Markwell*, 34 Beav. 12.

[(*e*) *Johnston* v. *Mappin*, 64 L. T. N.S. 48.]

(*f*) *Huguenin* v. *Baseley*, 14 Ves. 273; [*Allcard* v. *Skinner*, 36 Ch. D. (C.A.) 145; *Morley* v. *Loughnan*, (1893) 1 Ch. 736; and as to the duty of a solicitor advising in such case, see *Powell* v. *Powell*, (1900) 1 Ch. 243, 247; *Wright* v. *Carter*, (1903) 1 Ch. (C.A.) 27; *Willis* v. *Barron*, (1902) A. C. (H. L.) 271; *Howes* v. *Bishop*, (1909) 2 K. B. (C.A.) 390].

(*g*) See *Forshaw* v. *Welsby*, 30 Beav. 243; *Nanney* v. *Williams*, 22 Beav. 452; *Bindley* v. *Mulloney*, 7 L. R. Eq. 343.

(*h*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

(*i*) *Williamson* v. *Codrington*, 1 Ves. 516, *per* Lord Hardwicke.

(*j*) *Evelyn* v. *Templar*, 2 B. C. C. 148; and see *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91, 93; *Buckle* v. *Mitchell*, 18 Ves. 112; but compare *Leach* v. *Dean*, 1 Ch. Rep. 146, with *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91; and see 18 Ves. 92 note (b), and *Townend* v. *Toker*, 1 L. R. Ch. App. 447.

nor come upon the settlor himself, to compensate the *cestui que trust* for the loss (*a*). [In these cases "under a strained interpretation of the Statute," a presumption of what the Statute calls fraud and covin was made (*b*). But the doctrine on which the cases were founded has now been abrogated, and the law completely altered by the Voluntary Conveyances Act, 1893, which enacts (*c*) that "no voluntary conveyance (*d*) of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding." The Act does not apply where the author of the voluntary conveyance has, before the passing of the Act, disposed of or dealt with the lands, tenements or hereditaments to or in favour of a purchaser for value (*e*).] Chattels *personal* (in which respect they differ from chattels *real*) (*f*) are not within the statute 27 Eliz. c. 4, relating to *purchasers*, and therefore a voluntary settlement of chattels personal could not be defeated by a subsequent sale (*g*).

[Voluntary Conveyances Act.]

22. A voluntary settlement, whether of real or personal estate, may be defeated by the operation of 13 Eliz. c. 5, which makes all instruments devised and contrived of "fraud, covin, collusion, or guile," with intent to delay, hinder, or defraud creditors, utterly void as against the creditors "disturbed, hindered, delayed, or defrauded," but the Act is not to extend to any estate or interest in lands, chattels, &c., assured or to be assured on "good consideration and *bonâ fide*" to any person not having notice of covin, fraud, or collusion.

13 Eliz. c. 5.

(*a*) *Williamson* v. *Codrington*, 1 Ves. 516, *per* Lord Hardwicke; but see *Leach* v. *Dean*, 1 Ch. Rep. 146; *S. C.* cited *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91. [For a fuller consideration of the cases on the subject, which can now be material only as affecting titles in the past, see the 9th edition of this work, pp. 75, 76, and see also *De Mestre* v. *West*, (1891) A. C. 264.]

[(*b*) *Ramsay* v. *Gilchrist*, (1892) A. C. 412 (*per* Lord Selborne), where it was held that a voluntary conveyance of freeholds in favour of a charity was not within the doctrine above referred to.]

[(*c*) 56 & 57 Vict. c. 21, s. 2.]

[(*d*) By s. 4, the expression "conveyance" includes every mode of disposition mentioned or referred to in the Act of 27 Eliz. c. 4.]

[(*e*) Sect. 3.]

(*f*) *Saunders* v. *Dehew*, 2 Vern. 272, second note.

(*g*) *Bill* v. *Cureton*, 2 M. & K. 503; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Jones* v. *Croucher*, 1 Sim. & Stu. 315 (this case cites also the authority of Sir W. Grant in *Sloane* v. *Cadogan*, App. to Sug. Vend. & Purch., but the *dictum* does not appear); *Meek* v. *Kettlewell*, 1 Hare, 473, *per* Sir J. Wigram.

Deeds invalid as against creditors.

Upon the construction of this statute, it has been held, that where the settlor was *insolvent* at the time (*a*), or substantially indebted (*b*), or the object of defeating creditors may be inferred from a person settling his whole property, real and personal, and so depriving himself of the means of paying an existing debt (*c*), a voluntary deed, though supported by the meritorious consideration of providing for a wife or child (*d*), and though made in pursuance of a *verbal* antenuptial promise (*e*), and though it was a settlement of the purchase-money, or of an annuity in lieu of purchase-money upon a sale (*f*), is fraudulent as against creditors, though only general creditors without any lien (*g*), or creditors under a voluntary *post obit* bond (*h*). But [the question is always one of intent (*i*), and] a deed is not impeachable merely because it comprises the whole of a person's property (*j*), or is voluntary (*k*), [or reserves a benefit to the debtor, or excludes creditors other than trade creditors (*l*), or is made in order to shield the debtor against a particular class of creditors, *ex. gr.*, in respect of breaches of trust (*m*)], and although it be upon the face of it voluntary, it may be shown by extrinsic evidence to have been founded on valuable consideration (*n*), or to have been otherwise *bonâ fide* (*o*). And on the other hand, a deed, though it was founded on *valuable consideration*, even in consideration of

(*a*) *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Lush* v. *Wilkinson*, 5 Ves. 384; *Whittington* v. *Jennings*, 6 Sim. 493; *French* v. *French*, 6 De G. M. & G. 95; *Acraman* v. *Corbett*, 1 J. & H. 410; *Crossley* v. *Elworthy*, 12 L. R Eq. 158; *Taylor* v. *Coenen*, 1 Ch. D. (C.A.) 636; [*Re Mouat*, (1899) 1 Ch. 831].

(*b*) *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58; *Martyn* v. *Macnamara*, 2 Conn. & Laws. 554 *per Cur.*; *Holmes* v. *Penney*, 3 K. & J. 99; *Cornish* v. *Clark*, 14 L. R. Eq. 184; and see *Richardson* v. *Smallwood*, Jac. 557; *Skarf* v. *Soulby*, 1 Mac. & G. 375.

(*c*) *Smith* v. *Cherrill*, 4 L. R. Eq. 390; and see *Spirett* v. *Willows*, 3 De G. J. & S. 303; [*Re Hughes*, (1893) 1 Q. B. (C.A.) 595].

(*d*) *Barrack* v. *M'Culloch*, 3 K. & J. 110; and see *Lush* v. *Wilkinson*, 5 Ves. 384.

(*e*) *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

(*f*) *French* v. *French*, 6 De G. M. & G. 95; *Neale* v. *Day*, 4 Jur. N.S. 1225.

(*g*) *Reese River Company* v. *Atwell*, 7 L. R. Eq. 347.

(*h*) *Adames* v. *Hallett*, 6 L. R. Eq. 468.

[(*i*) *Thompson* v. *Webster*, 4 Drew. 632; *Godfrey* v. *Poole*, 13 App. Cas. 497, 503.]

(*j*) *Alton* v. *Harrison*, 4 L. R. Ch. App. 622; *Allen* v. *Bonnett*, 5 L. R. Ch. App. 577; [*Ex parte Games*, 12 Ch. D. (C.A.) 314].

(*k*) *Holloway* v. *Millard*, 1 Mad. 414; *Thompson* v. *Webster*, 4 Drew. 632; *Holmes* v. *Penney*, 3 K. & J. 90.

[(*l*) *Maskelyne & Cooke* v. *Smith*, (1903) 1 K. B. (C.A.) 671.]

[(*m*) *New & Co's Trustee* v. *Hunting*, (1897) 2 Q. B. 19; S. C. *nom. Sharp* v. *Jackson*, (1899) A. C. (H. L.) 419; and see *Middleton* v. *Pollock*, 2 Ch. D. 104; *Taylor* v. *London & County Banking Co.*, (1901) 2 Ch. (C.A.) 231; *Re Lake*, (1901) 1 K. B. (C.A.) 710. *Secus*, where directors of a company made a preferential payment in what they conceived to be a case of hardship: *Re Blackburn & Co.*, (1899) 2 Ch. 725.]

(*n*) *Gale* v. *Williamson*, 8 M. & W. 450.

(*o*) *Thompson* v. *Webster*, 4 Drew. 628; 4 De G. & J. 600; [*Godfrey* v. *Poole*, 13 App. Cas. 497, 503].

marriage (*a*), may, if it was executed for the purpose of *defrauding* creditors, be declared to be void (*b*).

[The exception of interests assured upon good consideration and *bonâ fide* protects not only a *bonâ fide* purchaser by the settlement itself, but also a *bonâ fide* purchaser of any interest derived under the settlement whether legal or equitable (*c*).]

Valid deeds.

23. If the settlor was *solvent* at the time (*d*), or was indebted only in the ordinary course as for current expenses, which he had the means of paying (*e*), or not substantially indebted (*f*), or in a sum of considerable amount, but adequately secured by mortgage (*g*), or which the settlor's other property was amply sufficient to meet (*h*), and the settlement was *bonâ fide*, the deed cannot be impeached. The indebtedness of the party at the time is only one circumstance of evidence upon the question of *fraud*, and under all the circumstances the Court may see that no fraud was intended or can be presumed (*i*). On the other hand, though the settlor is perfectly solvent at the time, yet if he executes the settlement with a view of withdrawing the bulk of his property from the reach of his creditors in the event of insolvency which is in his contemplation, as when a person about to embark in a hazardous business makes a settlement on his wife and family to guard against the consequences, the settlement is void (*j*); [and the fact that the voluntary settlement contains a clause providing that the beneficial interest of the settlor shall continue until he becomes a bankrupt or assigns or

(*a*) *Bulmer* v. *Hunter*, 8 L. R. Eq. 46; *Colombine* v. *Penhall*, 1 Sm. & G. 228.

(*b*) *Twyne's* case, 3 Rep. 80, b; *Bott* v. *Smith*, 21 Beav. 511; *Acraman* v. *Corbett*, 1 J. & H. 410; *Hollamby* v. *Oldrieve*, W. N. 1866, p. 94; and see *Harman* v. *Richards*, 10 Hare, 81; *Holmes* v. *Penney*, 3 K. & J. 90. [*Re Pennington, Ex parte Cooper*, 59 L. T. N.S. 774 (affirmed C. A., W. N. (88) 205), where see observations of Cave, J., as to the degree of complicity on the part of the wife which is necessary to avoid the settlement where the intent is to defraud the creditors of the husband.]

[(*c*) *Halifax Joint Stock Banking Co.* v. *Gledhill*, (1891) 1 Ch. 31; and see *Re Williams and Parry*, 72 L. T. N.S. 869.]

(*d*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Battersbee* v. *Farrington*, 1 Swans. 106; *Kent* v. *Riley*, 14 L. R. Eq. 190; *Middlecome* v. *Marlow*, 2 Atk. 519; *Townshend* v. *Windham*, 2 Ves. Sen. 11, *per* Lord Hardwicke; *Russell* v. *Hammond*, 1 Atk. 15; *Walker* v. *Burrows*, 1 Atk. 94; and see *Martyn* v. *Macnamara*, 2 Conn. & Laws. 554.

(*e*) *Skarf* v. *Soulby*, 1 Mac. & G. 375, *per Cur.*; *Lush* v. *Wilkinson*, 5 Ves. 387, *per Cur.*

(*f*) *Graham* v. *O'Keeffe*, Ir. Ch. Rep. 1.

(*g*) *Stephens* v. *Olive*, 2 B. C. C. 90; and see *Skarf* v. *Soulby*, 1 Mac. & G. 375.

(*h*) *Kent* v. *Riley*, 14 L. R. Eq. 190.

(*i*) *Richardson* v. *Smallwood*, Jac. 556; [*Re Johnson*, 20 Ch. D. 389; affirmed *nom. Golden* v. *Gillam*, 51 L. J. N.S. Ch. 503; and see *Ex parte Mercer*, 17 Q. B. D. (C.A.) 290].

(*j*) *Mackay* v. *Douglas*, 14 L. R. Eq. 106; [*Ex parte Russell*, 19 Ch. D. (C.A.) 588; *Re Ridler*, 22 Ch. D. (C.A.) 74].

attempts or affects to assign is not conclusive to make the settlement fraudulent within the statute of Elizabeth (*a*)].

What creditors can set aside the deed.

24. If it can be proved that the settlor contemplated, in fact, a fraud upon *subsequent* creditors, the deed can, no doubt, be set aside at their instance, though the settlor was not indebted at the date of the deed, or the debts which did exist have since been paid (*b*); [but if the settlor has ample means at the date of the settlement, it cannot be set aside because some years afterwards it has the effect of defeating or delaying subsequent creditors (*c*)]. Where fraud is merely *presumed* from the want of consideration and the indebtedness of the party, the settlement is deemed fraudulent only as against those creditors who were such at the date of the settlement (*d*); and if those creditors have since been satisfied, the intention of defrauding them is rebutted (*e*). But when the deed has once been set aside as fraudulent against a creditor who was such at the time, other subsequent creditors are allowed to come in *pro rata* (*f*); and as subsequent creditors have this equity, they may themselves, though this was formerly doubted (*g*), institute proceedings to set aside the deed, so long as any debt incurred at the date of the deed remains unsatisfied (*h*); and where the subsequent creditor proves such a debt to be still in existence, but does not show the insolvency or substantial indebtedness of the settlor at the date of the deed, the Court in its discretion may direct an enquiry (*i*).

[The mere abstaining from suing for a period less than that required to raise a bar under the Statute of Limitations, as for ten years, will not prevent the creditors from setting aside the deed (*j*);

[(*a*) *Re Holland*, (1902) 2 Ch. (C.A.) 360; overruling *Re Pearson*, 3 Ch. D. 807.]

(*b*) *Barling* v. *Bishopp*, 29 Beav. 417; *Jenkyn* v. *Vaughan*, 3 Drew. 426; *Richardson* v. *Smallwood*, Jac. 556; *Tarback* v. *Marbury*, 2 Vern. 510; *Hungerford* v. *Earle*, Ib. 261; *Spirett* v. *Willows*, 3 De G. J. & S. 303; *Ware* v. *Gardner*, 7 L. R. Eq. 317; *Freeman* v. *Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538; [*Re Tetley*, 66 L. J. Q. B. 111; W. N. 1896, p. 86].

[(*c*) *Re Lane Fox*, (1900) 2 Q. B. 508.]

(*d*) *Kidney* v. *Coussmaker*, 12 Ves. 136; *Montague* v. *Sandwich*, cited Ib.; *White* v. *Sansom*, 3 Atk. 410; *Lush* v. *Wilkinson*, 5 Ves. 384; *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58; and see *Whittington* v. *Jennings*, 6 Sim. 493; *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*e*) See *Jenkyn* v. *Vaughan*, 3 Drew. 425; *Richardson* v. *Smallwood*, Jac. 557.

(*f*) *Richardson* v. *Smallwood*, Jac. 558; *Montague* v. *Sandwich*, cited 12 Ves. 156, note (a); *Jenkyn* v. *Vaughan*, 3 Drew. 424; *Taylor* v. *Jones*, 2 Atk. 600.

(*g*) See *Ede* v. *Knowles*, 2 Y. & C. C. C. 178.

(*h*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538; and see *Lush* v. *Wilkinson*, 5 Ves. 387; *Richardson* v. *Smallwood*, Jac. 552.

(*i*) *Richardson* v. *Smallwood*, Jac. 557; *Jenkyn* v. *Vaughan*, 3 Drew. 427; *Townsend* v. *Westacott*, 2 Beav. 345; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Christy* v. *Courtenay*, 13 Beav. 101.

[(*j*) *Three Towns Banking Company* v. *Maddever*, 27 Ch. D. (C.A.) 523.]

and where policy moneys have been received by the assignee and are still in his hands and under his control, the jurisdiction of the Court continues (*a*).]

Whether settlements of stock, &c., within 13 Eliz. c. 5.

25. It was formerly held that settlements of stock, policies of insurance, &c., which were not liable to be taken in execution at the suit of a creditor, were exempt from the operation of the Act, and therefore that settlements of them could not be defeated (*b*). But now that by the Judgments Act, 1838 (1 & 2 Vict. c. 110) such interests are liable to execution, or to be charged by a judge's order, the distinction must be considered as obsolete (*c*).

[Bankruptcy.]

[26. Under the Bankruptcy Act, 1883 (*d*), a *fraudulent* conveyance of a person's property, or any part thereof, is an act of bankruptcy, as also is any conveyance of property which would be void as a fraudulent preference, and by sect. 47 a voluntary settlement is void as against the trustee in bankruptcy if the settlor become bankrupt within *two years;* and if the settlor become bankrupt within *ten years* it is similarly void, unless the parties claiming under the settlement can show that he was solvent at the time without the aid of the property comprised in the settlement, and that the interest of the settlor in the settled property passed to the trustee of the settlement on the execution thereof. But the avoidance takes effect only from the time when the title of the trustee in bankruptcy accrues, so that the antecedent title of a *bonâ fide* purchaser for value is not affected (*e*), and any surplus remaining after payment of the debts and costs of the bankruptcy will revert to the trustees (*f*). In estimating the solvency of the settlor the value of the life interest which he takes under the settlement must be regarded (*g*). The section does not apply to the case of a gift of money to a son made for the purpose of enabling him to commence business on his own account (*h*); and it is not retrospective so far as it differs from sect. 91 of the Bankruptcy Act, 1869 (*i*). "Settlement," for the purposes of the section includes "any conveyance or transfer

[(*a*) *Re Mouat*, (1899) 1 Ch. 831.]

(*b*) *Grogan* v. *Cooke*, 2 B. & B. 230; *Cockrane* v. *Chambers*, Amb. 79, note 1; *Rider* v. *Kidder*, 10 Ves. 368; *Dundas* v. *Dutens*, 2 Cox, 235; 1 Ves. J. 196.

(*c*) *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Sims* v. *Thomas*, 12 A. & E. 536; *Barrack* v. *M'Culloch*, 3 K. & J. 110.

[(*d*) 46 & 47 Vict. c. 52, s. 4.] See *Ex parte Dawson*, 19 L. R. Eq. 433; [*Re Pumfrey*, 10 Ch. D. (C.A.) 622; *Hance* v. *Harding*, 20 Q. B. D. 732; *Re Parry*, W. N. (1903) 206.]

[(*e*) *Re Carter and Kenderdine*, (1897) 1 Ch. (C.A.) 776, overruling *Re Briggs and Spicer*, (1891) 2 Ch. 127.]

[(*f*) *Re Sims*, 45 W. R. 189.]

[(*g*) *Re Lowndes*, 18 Q. B. D. 677.]

[(*h*) *Re Player*, 15 Q. B. D. 682; *Re Plummer*, (1900) 2 Q. B. (C.A.) 790.]

[(*i*) *Re Ashcroft*, 19 Q. B. D. (C.A.) 186, and *quære* whether the section is retrospective at all, *per* Fry, L. J., p. 198.]

of property." Thus a gift of a valuable pearl necklace and furniture, or money to be expended in the purchase of furniture, with an intention that the property should be retained by the donee for an indeterminate time, but without imposing any restriction on the donee's power to alienate it, is a settlement within the meaning of the section (*a*); but not so a deed declaring trusts of shares intended to be transferred, but not containing any covenant by the intending settlor to transfer the shares (*b*).

[Settlement of future property on marriage.]

27. Under the Bankruptcy Act, 1883 (*c*), a covenant or contract made in consideration of marriage for the future settlement on the settlor's wife or children of any property wherein he had not at the date of the marriage any estate or interest, and not being property of the wife, is, on his becoming bankrupt before the property is actually transferred pursuant to the covenant or contract, void against the trustee in the bankruptcy.]

Whether a Court of Equity will enforce specific performance of agreements under seal where there is no valuable consideration.

28. As every *agreement under hand and seal* carries a consideration upon the face of it, and will support an action at law, the inference has not unfrequently been drawn, that equity in such a case, though the trust was not perfectly created, will specifically execute the contract in favour of volunteers (*d*). But equity never enforced a covenant to stand seized to the *use of a stranger in blood;* and, if we examine the authorities, we shall find there is very little ground in support of the position; and it is now well settled that a voluntary covenant, notwithstanding the solemnity of the seal, will *not* be specifically executed (*e*).

(*a*) [*Re Tankard*, (1899) 2 Q. B. 57.]

[(*b*) *Re Ashcroft*, 19 Q. B. D. (C.A.) 186. As to the circumstances in which a declaration of trust for the benefit of creditors may amount to a "conveyance or assignment" within s. 4, sub-s. 1 (a), see *Re Hughes*, (1893) Q. B. (C.A.) 595, explaining *Re Spackman*, 24 Q. B. D. (C.A.) 728; and as to sufficiency of consideration, see *Re Pope*, (1908) 2 K. B. 169, where the wife's refraining from divorce proceedings was held to be a good consideration for a post-nuptial settlement.]

[(*c*) 46 & 47 Vict. c. 52, s. 47, sub-s. 2.]

(*d*) See *Wiseman* v. *Roper*, 1 Ch. Rep. 158; *Beard* v. *Nutthall*, 1 Vern. 427; *Husband* v. *Pollard*, cited *Randal* v. *Randal*, 2 P. W. 467; *Vernon* v. *Vernon*, 2 P. W. 594; *Goring* v. *Nash*, 3 Atk. 186, 2nd ground; *S. C.* cited 1 Ves. 513; *Stephens* v. *Trueman*, 1 Ves. 73; and see *Williamson* v. *Codrington*, 1 Ves. 511; *Hervey* v. *Audland*, 14 Sim. 531.

(*e*) *Hale* v. *Lamb*, 2 Eden, 294, *per* Lord Northington; *Fursaker* v. *Robinson*, Pr. Ch. 475; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Colman* v. *Sarel*, 3 B. C. C. 12; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Meek* v. *Kettlewell*, 1 Hare, 474, *per* Sir J. Wigram; *Fletcher* v. *Fletcher*, 4 Hare, 74; *per eundem; Newton* v. *Askew*, 11 Beav. 145; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Kekewich* v. *Manning*, 1 De G. M. & G. 188; *Dening* v. *Ware*, 22 Beav. 184; [and see *Re Ellenborough*, (1903) 1 Ch. 697].

But a voluntary *covenant* to pay a sum to A. in trust for B. has been allowed to create a debt in favour of B.; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Ward* v. *Audland*, 16 M. & W. 862; *Cox* v. *Barnard*, 8 Hare, 310; *Williamson* v. *Codrington*, 1 Ves. 511;

Meritorious consideration.

29. It has also been sometimes supposed that where the trust is imperfectly created, yet the Court, without proof of *valuable* consideration, will act upon *meritorious* consideration, as payment of debts, or provision for a wife or child (*a*).

Agreement founded thereon not enforced against the settlor.

30. After much conflict of authority (*b*), it may now be considered as settled that an agreement founded on meritorious consideration will not be executed as against the *settlor himself* (*c*).

How far enforced as against parties claiming under him.

31. *As regards parties claiming under the settlor*, it was always admitted, that had the settlor sold the estate or become indebted,

and see *Bridge* v. *Bridge*, 16 Beav. 320. But as the ground of this is, that the covenant is perfect at law and the covenantee could recover upon it, it seems to follow that where only *nominal* damages would be given at law, a Court of Equity would not give more.

A voluntary *bond* or *covenant* creates a debt, which will be paid before legatees, and even at the expense of specific legatees, *Patch* v. *Shore*, 2 Drew. & Sm. 589 ; though after creditors for value, *Watson* v. *Parker*, 6 Beav. 288 ; *Dening* v. *Ware*, 22 Beav. 188 ; *Hales* v. *Cox*, 32 Beav. 118 ; [*Mallott* v. *Wilson*, (1903) 2 Ch. 494 ;] and before interest allowed by the general orders of the Court on debts not carrying interest, *Garrard* v. *Dinorben*, 5 Hare, 213.

And the same principle has been applied to a voluntary promissory note, *Dawson* v. *Kearton*, 3 Sm. & Gif. 191. But though a voluntary promissory note can, if circulated, be recovered upon at law by a *bonâ fide* holder, yet it is conceived that the original payee cannot recover if the maker prove want of consideration ; and if this be so, then, as equity follows the law, this debt should not be allowed in equity ; see *Vez* v. *Emery*, 5 Ves. 141 ; *Hill* v. *Wilson*, 8 L. R. Ch. App. 901 ; *Curteis* v. *Adams*, W. N. 1875, p. 53. In one case a person gave his promissory note to a trustee, for the settlor's natural daughter, and deposited the title deeds of an estate in the hands of the trustee to secure the debt, and the M. R. held that a valid trust had been created of the amount ; *Arthur* v. *Clarkson*, 35 Beav. 458. [And a delivery of a promissory note to the donor's executor to be handed over after the donor's death to a third person on her fulfilling a condition was held to create a trust ; *Re Richards* ; *Shenstone* v. *Brock*, 36 Ch. D. 541.]

A bond or covenant which is voluntary at first may acquire support from valuable consideration by matter *ex post facto* ; *Payne* v. *Mortimer*, 1 Giff. 118 ; 4 De G. & J. 447 ; [*Halifax Joint Stock Banking Co.* v. *Gledhill*, (1891) 1 Ch. 31. For reference to decisions at law showing that the assignor of a debt is liable to be sued by the assignee, if the assignor defeats his own assignment by getting in or releasing the debt, and that if the assignor, being a settlor, could have been sued at law by the trustees, it follows that his estate is liable in equity, see *Re Patrick*, (1891) 1 Ch. 82, 88, *per* Lindley, L. J.].

(*a*) A child may plead meritorious consideration as against the parent, but of course a parent cannot plead it as against the child ; *Downing* v. *Townsend*, Amb. 592.

(*b*) See *Bonham* v. *Newcomb*, 2 Vent. 365 ; *Leech* v. *Leech*, 1 Ch. Ca. 249 ; *Fothergill* v. *Fothergill*, Freem. 256 ; *Sear* v. *Ashwell*, cited *Gordon* v. *Gordon*, 3 Swans. 411, note ; *Watts* v. *Bullas*, 1 P. W. 60 ; *Bolton* v. *Bolton*, Serjt. Hill's MSS. 77 ; *S. C.* 3 Sw. 414, note ; *Goring* v. *Nash*, 3 Atk. 186 ; *Darley* v. *Darley*, 3 Atk. 399 ; *Hale* v. *Lamb*, 2 Eden, 292 ; *Evelyn* v. *Templar*, 2 B. C. C. 148 ; *Colman* v. *Sarrel*, 1 Ves. jun. 50 ; *S. C.* 3 B. C. C. 12 ; *Antrobus* v. *Smith*, 12 Ves. 39 ; *Rodgers* v. *Marshall*, 17 Ves. 294 ; *Ellis* v. *Nimmo*, Ll. & G. *t.* Sugd. 333. The subject will be found discussed at length in 3rd ed. p. 95.

(*c*) *Antrobus* v. *Smith*, 12 Ves. 46 ; *Holloway* v. *Headington*, 8 Sim. 325 ; *Walrond* v. *Walrond*, Johns. 25.

the equity of the *cestui que trust*, claiming on the ground of meritorious consideration, would not bind a purchaser or creditors (*a*). But if he subsequently made a voluntary settlement, or died without disposing of the estate by act *inter vivos*, then the old cases were that the equity would attach as against the volunteers under the settlement (*b*), a devisee or legatee (*c*), the heir-at-law or next of kin (*d*), with, however, the saving clause, that the Court would not have enforced it even as against these classes of persons, where they, too, could plead meritorious consideration (as if they were the children of the settlor), without a previous enquiry by the Master, whether they had any adequate provision independently of the estate (*e*). At the present day, however, it is conceived that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary agreement, whether under seal, or not, cannot be enforced on the mere ground of meritorious consideration (*f*).

No trust unless there be an intention to create one.

32. It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated (*g*).

Field v. Lonsdale.

Thus, where a person, having deposited in a savings bank as much money in his own name as the rules allowed, deposited a further sum in his name as trustee for his sister, but without making any communication to her; and it appeared that he made such deposit with a view of evading the rules of the bank, and not to benefit his sister; and by the Act of Parliament he retained the control of the fund; the Court held that no trust was created (*h*). So, if a person indorse and hand over promissory notes with the intention of making a testamentary disposition, the transaction does not create a trust *inter vivos* (*i*).

(*a*) *Bolton* v. *Bolton*, 3 Serjt. Hill's MSS. 77; *S. C.* 3 Sw. 414 note; *Goring* v. *Nash*, 3 Atk. 186; *Finch* v. *Earl of Winchelsea*, 1 P. W. 277; and see *Garrard* v. *Lauderdale*, 2 R. & M 453, 454.

(*b*) *Bolton* v. *Bolton*, 3 Serjt. Hill's MSS. 77; S. C. 3 Sw. 414 note.

(*c*) Ib.

(*d*) *Watts* v. *Bullas*, 1 P. W. 60; *Goring* v. *Nash*, 3 Atk. 186; *Rodgers* v. *Marshall*, 17 Ves. 294.

(*e*) See *Goring* v. *Nash*, *Rodgers* v. *Marshall*, *ubi sup.*

(*f*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138: *Antrobus* v. *Smith*, 12 Ves. 39; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Holloway* v. *Headington*, 8 Sim. 324; *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123. *Ellis* v. *Nimmo*, Ll. & G., *t.* Sugd. 333, must be considered as overruled.

(*g*) See *Gaskell* v. *Gaskell*, 2 Y. & J. 502; *Hughes* v. *Stubbs*, 1 Hare, 476; *Smith* v. *Warde*, 15 Sim. 56; [*Re Pitt Rivers*, (1902) 1 Ch. (C.A.) 403].

(*h*) *Field* v. *Lonsdale*, 13 Beav. 78; and see *Davies* v. *Otty*, 33 Beav. 540.

(*i*) *Re Patterson's Estate*, 4 De G. J. & S. 422; and see *Kennard* v. *Kennard*, 8 L. R. Ch. App. 230; *Maguire* v. *Dodd*, 9 Ir. Ch. R. 452; [*Towers* v. *Hogan*, 23 L. R. Ir. 53].

33. As the business of a money scrivener is now almost obsolete, and the looking for and procuring investments for the money of clients on landed security is now commonly transacted by solicitors, it has been held that if a sum of money be placed by a client in the hands of a *solicitor* for *investment*, the mere deposit will not *per se* create the relation of trustee and *cestui que trust* between the solicitor and the client (*a*). [If the solicitor is merely employed to invest in a particular security or securities to be approved by the client, it is clear that the relation of trustee and *cestui que trust* is not created between them, but it may be otherwise where the solicitor is employed generally to find securities and invest the money, the client taking little or no part in the business (*b*). Money scrivener.

34. A letter of advice that a special credit for a particular sum has been opened with the person writing the letter in favour of a third person to whom the letter is sent, and that it will be paid rateably as certain goods are delivered, upon receipt of certificates of reception of the goods, will not of itself constitute an equitable assignment or specific appropriation of moneys in the hands of the person writing the letter, amounting to that particular sum, so as to create a trust thereof in favour of the third person (*c*).] [Special credit.]

(*a*) *Mare* v. *Lewis*, 4 Ir. R. Eq. 219; [and see *Dooby* v. *Watson*, 39 Ch. D. 178; *Hamilton* v. *Lane*, 25 L. R. Ir. 188, 218; *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199].

[(*b*) *Dooby* v. *Watson*, 39 Ch. D. 178, 183; *Hamilton* v. *Lane*, 25 L. R. Ir. 188, 220.]

[(*c*) *Morgan* v. *Larivière*, 7 L. R. H. L. 423, overruling S. C. *sub. nom.* *Larivière* v. *Morgan*, 7 L. R. Ch. App. 550.]

CHAPTER VII

OF THE OBJECT PROPOSED BY THE TRUST

TRUSTS, with reference to their *object*, are *Lawful* or *Unlawful*: the former, such as are directed to some legitimate purpose; the latter such as are in contravention of the policy of the law.

SECTION I

OF LAWFUL TRUSTS

Intention.

1. The *general and primâ facie* rule is, that the intention of the settlor is to be carried into effect (*a*).

No objection to a trust because the legal estate cannot be so dealt with.

2. If the object of the trust do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the *legal* estate is no argument that it cannot be accomplished through the medium of the *equitable*. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present day does not apply; but a trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the Court.

Fee upon a fee.

3. In legal estates, for example, a fee cannot, except by executory devise, be limited upon a fee—that is, cannot be shifted from one person to another; but this modification of property was allowable in uses, and by the statute of Hen. 8 has gained admittance into legal estates, and the shifting of the fee from one person to another is now matter of daily occurrence in settlements by way of trust (*b*).

Contingent remainders.

4. At law, except in executory devises, a freehold contingent limitation must be supported by a freehold particular estate, and if the contingent limitation do not vest at the determination of the

(*a*) *Attorney-General* v. *Sands*, Hard. 494, *per* Lord Hale; *Pawlett* v. *Attorney-General*, ib. 469; Bacon on Uses, 79; *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir T. Clarke; and see *Attorney-General* v. *Dedham School*, 23 Beav. 355.

(*b*) See *Duke of Norfolk's case*, 3 Ch. Ca. 35.

particular estate, it is extinguished (*a*), but to trusts the rule is held not to be applicable, or, as the doctrine is expressed, the legal estate in the trustees is sufficient to support all the equitable interests (*b*).

Limitations of chattels.

5. At law a chattel real can by *executory devise* only, and not by *deed*, and a chattel personal can neither by *will* nor by *deed*, be limited to one person for life, with a limitation over to another; but in trusts a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity (*c*).

Trusts for a church or chapel.

6. If a testator before the Statute of Mortmain (*d*) had devised to one that served the cure of a church, and to all that should serve the cure after him, all the tithes, profits, &c.: here, as the successive curates were not a body corporate, they were incapable of taking the legal estate, but equity carried the intention into effect by way of trust, and decreed the devisee or heir to hold in trust for the persons intended to be benefited (*e*). So on the erection of a chapel, the endowment cannot, without an Act of Parliament, be transmitted at law to the successive preachers and their congregations, but the ordinary mode of accomplishing the object is by vesting the legal estate of the property in trustees (with a power of renewing their number on vacancies by death, &c.), upon trust to permit the preacher and congregation for the time being to have the use and enjoyment of the chapel.

Trust for the poor of a parish.

7. The limitation of an estate to the *poor of a parish* would *at law* be void (*f*), because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but by way of trust they are capable of purchasing, for they assert no title in themselves, but only require the trustee to keep good faith (*g*).

Trust of an advowson for the parishioners.

8. Again an *advowson* cannot at law be given to a parish which is not a corporate body, but it may be vested in trustees, upon trust

[(*a*) But see now the Contingent Remainders' Act, 1877 (40 & 41 Vict. c. 33).]

(*b*) *Chapman* v. *Blissett*, Cas. *t.* Talb. 145; *Hopkins* v. *Hopkins*, ib. 43. ["The principle is, that as the legal estate in the trustees fulfils all feudal necessities, there being always an estate of freehold in existing persons who can render the services to the lord, there is no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator." *Per* M.R. *Abbiss* v. *Burney*, 17 Ch. D. (C.A.) 211, 229; and see *Re Freme*, (1891) 3 Ch. 167.]

(*c*) See Lord Nottingham's observations in *Duke of Norfolk's case*, 3 Ch. Ca. 32.

(*d*) 9 Geo. 2. c. 36; now repealed, see *post*, p. 104.

(*e*) *Anon. case*, 2 Vent. 349.

(*f*) Co. Lit. 3. a.

(*g*) Gilb. on Uses, 44.

for the "*parishioners and inhabitants*," that is, the parishioners, being inhabitants (*a*) of a parish. [It has been said that a] trust of this kind is not a charity, but is [to be] administered on the footing of an ordinary trust, and that application must be made to the Court, not by way of information, but by action (*b*). The case of an advowson held in trust for a parish has been called an anomalous one. A valid trust, for the benefit of a parish or the parishioners for ever, cannot be made, except on the ground that it is a charity; and the reasoning by which it [has been] sought to bring it under this head is, that the parishioners who elect get no *personal* benefit, but it is a mode of selecting the charity trustee, for the incumbent who performs divine service and ministers to the spiritual wants of the parish is in a large sense a trustee for the parish (*c*). [But in a recent case this was described as a "far-fetched theory," and it was held, after a careful examination of the earlier authorities, that an advowson is no exception from the general law as to charitable trusts (*d*).]

Who shall elect the clerk.

9. From the infinite mischiefs arising from popular election (*e*), the Court, where the settlement does not expressly give the election to the parishioners, or usage has not put such a construction upon the instrument, will infer the donor's intention to have been that the trustees should themselves exercise their discretion in the election of a clerk for the benefit of the parish (*f*); but if the language of the instrument, or the evidence of common usage, prevent such a construction, then the parishioners, as the *cestuis que trust* and beneficial owners of the advowson, will be entitled to elect, and the trustees will be bound to present the person upon whom the choice of the electors shall fall (*g*). Had the point been unprejudiced by decision, Lord Eldon doubted whether the Court

(*a*) *Fearon* v. *Webb*, 14 Ves. 24, *per* Chief Baron M'Donald; ib. 26, *per* Baron Graham; *Wainwright* v. *Bagshaw*, Rep. t. Hardwicke, by Ridg. 56, *per* Lord Hardwicke.

(*b*) *Attorney-General* v. *Forster*, 10 Ves. 344; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Fearon* v. *Webb*, ib. 19.

(*c*) *Attorney-General* v. *Webster*, 20 L. R. Eq. 483, see 491; [and see *Re St Botolph's Parish Estates*, 35 Ch. D. 142; *Re St Bride's Parish Estate*, 35 Ch. D. 147 n.].

[(*d*) *Re St Stephen's, Coleman Street*, 39 Ch. D. 492, 504, 505, *per* Kay, J.; and see *Re Church Patronage Trust*, (1904) 1 Ch. 41, 50; (1904) 2 Ch. (C.A.) 643.]

(*e*) See, in addition to the cases cited in the next note, the observations of Vice-Chancellor Knight Bruce, *Attorney-General* v. *Cuming*, 2 Y. & C. Ch. Ca. 158; and the Sale of Advowsons Act, 1856 (19 & 20 Vict. c 50), authorising the sale of advowsons held upon trust for parishioners.

(*f*) See *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 106, 109; *Attorney-General* v. *Scott*, 1 Ves. 413; *Attorney-General* v. *Foley*, cited ib. 418.

(*g*) *Attorney-General* v. *Parker*, 3 Atk. 577, *per* Lord Hardwicke; *Attorney-General* v. *Forster*, 10 Ves. 338, 341, *per* Lord Eldon; *Attorney-General* v. *Newcombe*, 14 Ves. 6, 7, *per eundem*.

could execute such a trust, at least otherwise than *cy près* (*a*), but, as authority has now clearly settled that the Court must undertake the trust, notwithstanding the difficulties attending it, the only subject for enquiry is, *in what manner* a trust of this kind will be executed.

Meaning of "parishioners and inhabitants."

10. The expression "parishioners and inhabitants" is, in itself, extremely vague, and has never acquired any very exact and definite meaning (*b*); but, this doubt removed, another question to be asked is, are women, children, and servants, who are parishioners and inhabitants, to be allowed to vote? It seems the extent of the terms must be taken *secundum subjectam materiam*, with reference to the nature of the privilege which the *cestuis que trust* are to exercise (*c*), and, if so, none should be admitted to vote, who, from poverty, infancy, or coverture, are presumed not to have a will of their own (*d*). In a case, where the election was given to "the inhabitants and parishioners, or the major part of the *chiefest and discreetest* of them," it was held that by *chiefest*, was to be understood those who paid the church and poor rates, and by *discreetest*, those who had attained the age of twenty-one (*e*); but Lord Hardwicke said, that, even where "parishioners and inhabitants" stood *without any restriction at all*, it was a reasonable limitation to confine the meaning to those who paid scot and lot, that is, who paid to church and poor (*f*); and so, in a previous case, it seems his Lordship had actually determined (*g*). The Court of Exchequer adopted a similar construction in the *Clerkenwell Case* (*h*), though it does not appear how far the Court was guided in its judgment by the evidence of the common usage (*i*); and Lord Eldon, in a subsequent case, restricted the election to the same class (*j*), but his Lordship's decree was possibly founded on the circumstance, that those only who paid scot and lot were admitted to the *vestry* (*k*): not that, for the purposes of election,

"Chiefest and discreetest."

(*a*) *Attorney-General* v. *Forster*, 10 Ves. 340, 342.

(*b*) *Attorney-General* v. *Parker*, 3 Atk. 577; *Attorney-General* v. *Forster*, 10 Ves. 339, 342. See further as to the Clerkenwell case, *Carter* v. *Cropley*, 8 De G. M. & G. 680. By parishioners and inhabitants in *vestry* assembled are meant the persons who by the existing law constitute the vestry; *In re Hayle's estate*, 31 Beav. 139; and see *Etherington* v. *Wilson*, 20 L. R. Eq. 606, 1 Ch. D. (C.A.) 160.

(*c*) See *Attorney-General* v. *Forster*, 10 Ves. 339.

(*d*) See *Fearon* v. *Webb*, 14 Ves. 27.

(*e*) *Fearon* v. *Webb*, 14 Ves. 13.

(*f*) *Attorney-General* v. *Parker*, 3 Atk. 577; *S. C.* 1 Ves. 43.

(*g*) *Attorney-General* v. *Davy*, cited ib.; *S. C.* 2 Atk. 212.

(*h*) *Attorney-General* v. *Rutter*, stated 2 Russ. 101, note.

(*i*) See *Attorney-General* v. *Forster*, 10 Ves. 345.

(*j*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93.

(*k*) See ib. 110.

the vestry is representative of the parish (*a*), but in one of the oldest documents the trust was said to be for "the parishioners of the said parish *at a vestry or vestries to be from time to time holden for the said parish*" (*b*). But where the instrument creating the trust contains merely the words "parishioners and inhabitants," the Court will not confine the privilege of voting to those paying scot and lot, if it appears from constant usage that the terms are to be taken in a wider and more extensive signification, to include, for instance, all *housekeepers*, whether paying to the church and poor or not (*c*). By persons *paying* to the church and poor must be understood persons *liable to pay*, though they may not have actually paid (*d*); but it seems to be a necessary qualification that they should have been *rated* (*e*), unless, perhaps, the name has been omitted by mistake (*f*), or there is the taint of fraud (*g*).

"Ratepayers."

Mode of electing.

11. With respect to the *mode* in which the votes are to be taken, it is clear that the election cannot be conducted by ballot, not only on the general principle that the ballot is a form of proceeding unknown to the common law of England (*h*), but also on the ground that the right of voting in the election of a clerk is a privilege coupled with a *public duty*, and the trustees have a right to be satisfied that the voters, in the exercise of their right, have fairly and honestly discharged their duty; whereas in election by ballot there are no means of ascertaining for whom each particular elector voted (*i*). The choice of the candidate must therefore be determined by one of the modes known to the common law, viz. either by poll or a show of hands (*j*). However, the *cestuis que trust* may *expressly* agree among themselves, that they will abide by the declaration of the result of the ballot, and will ask no

(*a*) *Attorney-General* v. *Parker*, 3 Atk. 578, *per* Lord Hardwicke; *Attorney-General* v. *Forster*, 10 Ves. 340, 344, *per* Lord Eldon.

(*b*) See *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 94.

(*c*) *Attorney-General* v. *Parker*, 3 Atk. 577; *S. C.* 1 Ves. 43. [Now that the compulsory payment of church rates has been abolished by the Compulsory Church Rates Abolition Act, 1868 (31 & 32 Vict. c. 109), paying such rates cannot, it is conceived, be regarded as necessary in any case for a qualification to vote.]

(*d*) See *Attorney-General* v. *Forster*, 10 Ves. 339, 346.

(*e*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 110.

(*f*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 110.

(*g*) *S. C.* ib. 111.

(*h*) *Faulkner* v. *Elger*, 4 B. & C. 449.

(*i*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 108, 109, *per* Lord Eldon.

(*j*) See ib. 106, 110. [Some doubt has, however, been thrown upon this in the recent case of *Shaw* v. *Thompson*, 3 Ch. D. 233, in which V. C. Bacon intimated an opinion that as, under the modern mode of voting by ballot papers, no objection could now be taken as in the case of *Faulkner* v. *Elger*, *ubi sup.*, to a ballot on the ground that it afforded no opportunity for a scrutiny, an election by that means would be valid.]

questions how the individual votes were given; or such a contract may be *inferred* from long and clear antecedent usage (*a*). But it is said an agreement of this kind can apply only to each particular election as it occurs, for any one parishioner has a right to insist that the coming election shall be conducted on a different principle; it would be a bold thing to say, that the parish of to-day could bind the parish of to-morrow to deviate from the original and legitimate mode (*b*).

[Where an election had taken place, the Court, although of opinion that the proceedings in vestry determining the mode of election had been illegal and irregular, refused to set the election aside, in the absence of evidence that the election itself had been improperly conducted, or that any voter had been prevented from recording his vote (*c*).]

Trusts for accumulation.

12. Again, upon principles founded on the Law of Tenure, the freehold *in præsenti* must be vested in some person *in esse;* but under the system of trusts, which are wholly independent of feudal rules, a settlor may give directions for an accumulation of rents and profits, and it does not vitiate the trust that there is no ascertained owner of the equitable freehold in possession (*d*).

Trusts for accumulation must not lead to a perpetuity.

But trusts for accumulation must be confined within the limits established against perpetuities. A settlor is permitted (by analogy to the duration of a regular entail under a common law conveyance) to fetter the *alienation* of property for a life or lives in being and twenty-one years; and the power of preventing the *enjoyment* of property, by directing an accumulation of the annual proceeds, is restricted to the same period. If the trust exceed this boundary it is void *in toto*, and cannot be cut down to the legitimate extent (*e*).

Phipps *v.* Kelynge.

But no objection exists on the ground of a perpetuity, where rents, though directed to be accumulated, are applicable as a vested interest *de anno in annum*. Thus, where a testatrix devised a term which had thirty-three years to run, upon trust, from time to time, to lay out the profits in the purchase of lands to be settled upon A. for life, remainder to B. in tail, remainders over, here,

(*a*) See *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 106, 108, 109.

(*b*) See 2 Russ. 106; [*Shaw* v. *Thompson*, 3 Ch. D. 233].

[(*c*) *Shaw* v. *Thompson*, 3 Ch. D. 233.]

(*d*) See Fearne's C. R. by Butler, 537, note (*x*); [*Abbiss* v. *Burney*, 17 Ch. D. (C.A.) 211].

(*e*) *Marshall* v. *Holloway*, 2 Swans. 432; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Curtis* v. *Lukin*, 5 Beav. 147; *Boughton* v. *James*, 1 Coll. 26; *S. C.* on appeal, 1 H. L. C. 406; *Browne* v. *Stoughton*, 14 Sim. 369; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Turvin* v. *Newcombe*, 3 K. & J. 16; [*Cochrane* v. *Cochrane*, 11 L. R. Ir. 361, and see *post*, p. 108].

inasmuch as the *cestuis que trust* could at any time call for the investment of the rents in land, and when B. attained his age, and could suffer a recovery, A. and B. were entitled to call for the assignment of the lease, it was held the trust was good (*a*). And generally, although there be an accumulation directed which might by possibility extend beyond a life in being and twenty-one years, yet if the whole beneficial interest in the accumulations must by the terms of the settlement become vested within a life in being and twenty-one years, there is no perpetuity, for in this case the beneficiaries may immediately upon the vesting, and therefore within the allowed limits, put an end to the accumulation (*b*).

Thellusson Act.

13. By the Accumulations Act, 1800 (39 & 40 Geo. 3. c. 98), commonly called the Thellusson Act, the period of accumulation was further restricted by limiting it to "the life or lives of any grantor or grantors, settlor or settlors; *or* the term of twenty-one years from the death of the grantor, settlor, devisor, or testator; *or* during the minority, or respective minorities, of any person or persons who shall be living, or in *ventre sa mere*, at the time of the death of the grantor, devisor, or testator; *or* during the minority, or respective minorities, of any person or persons who, under the uses or trusts of the deed, surrender, will, codicil, or other assurance directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated."

Act embraces both simple and compound accumulation.

The following points have been resolved upon the construction of this Act—1. The statute embraces *simple* as well as *compound* accumulation. By the former is meant the collection of a principal sum by the mere addition of the annual proceeds, while the interest upon the accumulating funds either results undisposed of to the settlor or his representative, or passes to the residuary devisee or legatee. Compound accumulation is, where not only the income *de anno in annum* is added altogether, but the fund is further increased by the interest upon the income (*c*). 2. The

(*a*) *Phipps* v. *Kelynge*, 2 V. & B. 57, note (*b*). In *Curtis* v. *Lukin*, 5 Beav. 147, the accumulation was held to be void, as the respective interests of the parties could not be ascertained until the time of renewal arrived. The parties might or might not agree upon a distribution amongst themselves during the interim, but this could not affect the legal construction.

(*b*) *Oddie* v. *Brown*, 4 De G. & Jon. 179; *Bateman* v. *Hotchkin*, 10 Beav. 426; *Bacon* v. *Proctor*, T. & R. 31; and see *Briggs* v. *Earl of Oxford*, 1 De G. M. & G. 363; *Williams* v. *Lewis*, 6 H. L. Cas. 1013.

(*c*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135; *S. C.* by title of *Evans* v. *Hellier*, 5 Cl. and Fin. 114.

Act applies, though the accumulating fund be from the first a vested interest, so that not the *right to the enjoyment*, but only the *actual enjoyment*, is suspended; as where a settlor directs rents to be accumulated to raise a certain sum for A., to be paid to him on the completion of the accumulation; so that A. has a vested interest in the rents as they arise (*a*). 3. An accumulation can be directed for one only of the periods allowed by the statute, and not for two or more of the periods combined (*b*). 4. The accumulation, though directed to commence not at the testator's death, but at some subsequent period, must still terminate at the expiration of twenty-one years from the testator's death (*c*), and the term of twenty-one years is to be reckoned exclusive of the day on which the testator died (*d*). 5. If the trust exceeds the limits prescribed by the statute, but not the limits allowed by the common law, the accumulation will be established to the extent permitted by the Act, and will be void for the excess only (*e*). 6. If an accumulation be not *expressed*, but *implied*, as in the gift of a residue to *all* the children of A., and no life estate given to A. himself, so that the class cannot be ascertained until his death, and the fund must accumulate during the interim, it is the better opinion, as originally decided by Lord Langdale (*f*), that the prohibition of the statute was meant to apply (*g*). The late Vice-Chancellor of England observed that the statute was intended only to put an end to accumulations *expressly* directed (*h*); and in a subsequent case before him so decided (*i*). And the same view was adopted by Sir J. Romilly, Master of the Rolls (*j*). But the decision in the last case in which the Master of the Rolls so held was reversed on appeal by the Lord Chancellor and Lord Justices, and though the reversal rested upon the ground that, as the will was worded, an accumulation was *expressly* directed (*k*), the Lord Chancellor felt himself called

Applies to case of suspended enjoyment, though the *right* to the enjoyment be vested.

Where the limit exceeded, the trust is good *pro tanto*.

(*a*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135; and see *Oddie* v. *Brown*, 4 De G. & Jon. 179.

(*b*) *Wilson* v. *Wilson*, 1 Sim. N.S. 288; [*Jagger* v. *Jagger*, 25 Ch. D. 729]; see *Lady Rosslyn's Trust*, 16 Sim. 391.

(*c*) *Attorney-General* v. *Poulden*, 3 Hare, 555.

(*d*) *Gorst* v. *Lowndes*, 11 Sim. 434.

(*e*) *Griffiths* v. *Vere*, 9 Ves. 127; *Longdon* v. *Simson*, 12 Ves. 295; *Haley* v. *Bannister*, 4 Mad. 275; *Shaw* v. *Rhodes*, 1 M. & Cr. 155; *Crawley* v. *Crawley*, 7 Sim. 427; *Attorney-General* v. *Poulden*, 3 Hare, 555; [*Re Pope*, (1901) 1 Ch. 64].

(*f*) *M'Donald* v. *Bryce*, 2 Keen, 276.

(*g*) *Morgan* v. *Morgan*, 4 De G. & Sm. 170; *Tench* v. *Cheese*, 6 De G. M. & G. 453.

(*h*) *Elborne* v. *Goode*, 14 Sim. 165.

(*i*) *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 538.

(*j*) *Bryan* v. *Collins*, 16 Beav. 14; *Tench* v. *Cheese*, 19 Beav. 3.

(*k*) *Tench* v. *Cheese*, 6 De G. M. & G. 453. [In *Re Cox*, W. N., (1900) p. 89, a direction to "retain and set apart"

upon to say that the distinction taken by the Master of the Rolls between an accumulation *expressed* and an accumulation *implied* was untenable; and he justly remarked as to the case of infancy (cited in support of the opposite view), that if of age, the infant, instead of spending, might accumulate the rents, and the Court did no more than exercise a discretion for the infant, which was a very different thing from creating a suspense fund to go to somebody who had no title during the accumulation.

To whom the excess shall belong.

The statute proceeds to declare, that "the produce of the property, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Subsequent limitations not accelerated.

14. If there be a series of limitations of *real* estate, and one of them be upon trust to accumulate the rents beyond the limits allowed by the Act, the subsequent limitations are in general not accelerated; but the interim limitation, which is void under the Act, will result for the benefit of the heir-at-law (*a*); and if the resulting trust be a *chattel interest*, carved out of real estate, it will devolve, on the death of the heir, on the personal representative of the heir (*b*); and if the resulting interest be an estate *pur autre vie*, it is the better opinion that it also goes to the heir's personal representative (*c*). But under the Wills Act, 1 Vict. c. 26, sect. 25, if the will contain a residuary devise (*d*), and there is no evidence of a contrary intention on the face of the will, the void accumulations will go to the residuary devisee.

In personal estate.

15. In *personal* estate, if there be a residuary legatee, the excess beyond the allowed period of accumulation will fall into the residue (*e*), [the will being construed independently of the

was held equivalent to a direction to accumulate within the meaning of the Act.]

(*a*) *Eyre* v. *Marsden*, 2 Keen, 564; *Nettleton* v. *Stephenson*, 3 De G. & Sm. 366; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Re Drakeley's Estate*, 19 Beav. 395; *Green* v. *Gascoyne*, 11 Jur. N.S. 145; *S. C.* 4 De G. J. & S. 565; *Smith* v. *Lomas*, 10 Jur. N.S. 743; *Talbot* v. *Jevers*, 20 L. R. Eq. 255; and see *Griffiths* v. *Vere*, 9 Ves. 127. In *Trickey* v. *Trickey*, 3 M. & K. 560, the testator's daughter was held entitled to the excess of the accumulations, but *semble* not as a tenant for life, but as the testator's heiress-at-law. In *Shaw* v. *Rhodes*, 1 M. & Cr. 135; *S. C.* by the title of *Evans* v. *Hellier*, 5 Cl. & Fin. 114, Thomas, the devisee subject to the accumulations, took the excess beyond the limits of the statute; but James Shaw was probably the testator's heir, and as James had died before the institution of the suit, Thomas, it is likely, thereupon became the heir of the testator, and took in that character. But see *Re Clulow's Trust*, 1 J. & H. 648.

(*b*) *Sewell* v. *Denny*, 10 Beav. 315.

(*c*) *Barrett* v. *Buck*, 12 Jur. 771; see *Halford* v. *Stains*, 16 Sim. 488, *contra*.

[(*d*) As to the meaning of this expression, see *Mason* v. *Ogden*, (1903) A. C. (H.L.) 1.]

(*e*) *Haley* v. *Bannister*, 4 Mad. 275; *O'Niell* v. *Lucas*, 2 Keen, 313; *Webb*

Thellusson Act, and the Act then applied to the state of things so determined (*a*);] and where the residue is settled on A. for life, remainder to B., will form part of the capital (*b*). [If there is no residuary gift, or none applicable *in præsenti*, there will be an intestacy (*c*).]

Residue.

16. If the subject of the accumulation be the income of the residue itself, the void accumulation will, according to the nature of the residue, *i.e. real or personal*, result to the heir-at-law or to the next of kin (*d*).

Charge.

17. If an estate be devised *subject* to a void direction to accumulate in such terms that the void accumulation, if valid, would have been construed a mere *charge*, it will, like any other charge which fails (*e*), sink for the benefit of the devisee (*f*).

Exceptions from the Act.

18. Lastly, the statute provides, that "nothing in the Act contained shall extend to any provision for *payment of debts* (*g*), of any grantor, settlor, or devisor, or other person or persons, or for *raising portions* for any child of the settlor or devisor, or any person *taking an interest* under the settlement or devise, or to any direction touching the produce of *timber or wood*." The words "any other person or persons" authorise a grantor, settlor, or devisor to provide for the debts of any stranger whomsoever (*h*);

v. *Webb*, 2 Beav. 493; *Attorney-General* v. *Poulden*, 3 Hare, 555; *Jones* v. *Maggs*, 9 Hare, 605; *Re Drakeley's Estate*, 19 Beav. 395; [*Re Parry*, 60 L. T. N.S. 489].

[(*a*) *Re Parry*, 60 L.T. N.S. 489, 491; *Weatherall* v. *Thornburgh*, 8 Ch. D. (C.A.) 261, 268; and see *Wharton* v. *Masterman*, (1895) A. C. 186, 200.]

(*b*) *Crawley* v. *Crawley*, 7 Sim. 427; [*Re Pope*, (1901) 1 Ch. 64 (per Farwell J. disapproving the decision of Malins V. C. in *Re Phillips*, 49 L. J. Ch. 198). The ratio decidendi of *Re Pope* appears to be that a direction that the accruing income of a fund should be invested, and the income of the investment paid to a tenant for life, is not a direction for accumulation. But, on the other hand, there is force in the observation of Malins, V. C. in *Re Phillips*, that "to go on investing the income (after the twenty-one years) is, to all intents and purposes, to go on accumulating, but the Thellusson Act says that the accumulations shall stop at the end of the twenty-one years"].

[(*c*) *Re Travis*, (1900) 2 Ch. (C.A.) 541.]

(*d*) *M'Donald* v. *Bryce*, 2 Keen, 276; *Eyre* v. *Marsden*, 2 Keen, 564; *Pride* v. *Fooks*, 2 Beav. 430; *Elborne* v. *Goode*, 14 Sim. 165; *Bourne* v. *Buckton*, 2 Sim. N.S. 91; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Mathews* v. *Keble*, 4 L. R. Eq. 467; 3 L. R. Ch. App. 691; *Simmons* v. *Pitt*, 8 L. R. Ch. App. 978; *Talbot* v. *Jevers*, 20 L. R. Eq. 255; [*Weatherall* v. *Thornburgh*, 8 Ch. D. (C.A.) 261; *Re Mason*, (1891) 3 Ch. 467].

(*e*) See *Tucker* v. *Kayess*, 4 K. & J. 339.

(*f*) *Re Clulow's Trust*, 1 J. & H. 639; *Combe* v. *Hughes*, 34 Beav. 12; 2 De G. J. & S. 657.

(*g*) *Bateman* v. *Hotchkin*, 10 Beav. 426. [A provision for recoupment of debts already paid is not a provision for payment of debts within the meaning of the section: see *Re Heathcote*, (1904) 1 Ch. 826, following *Tewart* v. *Lawson*, 18 L. R. Eq. 490.]

(*h*) See *Barrington* v. *Liddell*, 2 De G. M. & G. 497; 10 Hare, 415.

and the exception in the statute extends to *liabilities* of a testator, though no *debt* had actually accrued at the time of his death (*a*). By children must, of course, be understood exclusively legitimate children (*b*). [By "portion" is meant a sum of money secured to a child out of property either coming from or settled upon its parents, and the benefit is none the less a portion because it is given not to younger children only, but to all the children: thus where there is a direction to accumulate a part of the income until the youngest child attains twenty-one, and then to distribute amongst the children, the rest of the income being payable to the parent, the accumulated fund is a "portion" (*c*).] The accumulation to be protected by the clause must be a provision for raising *portions* out of the *corpus*, not an accumulation of the *corpus* itself, for the purpose of making a gift of the aggregate fund (*d*), and must be a provision for children certain, and not a chance limitation in favour of any child that may happen to survive certain persons not necessarily standing in the relation of parent and child, but uncles or aunts, &c. (*e*). By "taking an interest under the devise" is meant *a substantial* interest. A small annuity, for instance, to the parent, would not justify an accumulation of the residue of the rents beyond the limits of the Act for raising portions for the children (*f*); and it was once considered that it was necessary that an interest should be taken, not merely under the *will* generally, but under the *particular* gift, devise, or bequest, which contained the provision for accumulation (*g*); but this view has since been overruled, so that now, if the person take a substantial interest in any property under the will, it is sufficient (*h*). The portions intended by the Act are not necessarily portions *created* by the deed or will directing the accumulation, but may be portions pre-existing (*i*).

(*a*) *Varlo* v. *Faden*, 27 Beav. 255; 1 De G. F. & J. 211; [and see *Re Mason*, (1891) 3 Ch. 467].

(*b*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135, see 159.

[(*c*) *Re Stephens*, (1904) 1 Ch. 322, *per* Buckley, J.]

(*d*) *Eyre* v. *Marsden*, 2 Keen, 564; *Bourne* v. *Buckton*, 2 Sim. N.S. 91; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Jones* v. *Maggs*, 9 Hare, 605; *Wildes* v. *Davies*, 1 Sm. & Gif. 475; *Watt* v. *Wood*, 2 Dr. & Sm. 56; [*Re Walker*, 54 L. T. N.S. 792;] and see *Beech* v. *St Vincent*, 3 De G. & Sm. 678. In *Burt* v. *Sturt*, 10 Hare, 427, this was said to be "a shadowy distinction."

(*e*) *Burt* v. *Sturt*, 10 Hare, 415.

(*f*) *Shaw* v. *Rhodes*, 1 M. & Cr. 159; and see *Bourne* v. *Buckton*, 2 Sim. N.S. 91; but see *Evans* v. *Hellier*, 5 Cl. & Fin. 127; *Barrington* v. *Liddell*, 2 De G. M. & G. 500; *Edwards* v. *Tuck*, 3 De G. M. & G. 63.

(*g*) *Bourne* v. *Buckton*, 2 Sim. N.S. 91, see 101; *Morgan* v. *Morgan*, 4 De G. & Sm. 164.

(*h*) *Barrington* v. *Liddell*, 10 Hare, 415; 2 De G. M. & G. 500; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Burt* v. *Sturt*, 10 Hare, 415; and see *Watt* v. *Wood*, 2 Dr. & Sm. 60.

(*i*) *Halford* v. *Stains*, 16 Sim. 488; *Barrington* v. *Liddell*, 2 De G. M. & G. 498; *Middleton* v. *Losh*, 1 Sm. & Gif. 61; and see *Burt* v. *Sturt*, 10 Hare, 415.

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[19. A direction by will to pay out of the income of the testator's property the premiums on a policy of assurance effected on the life of another person by the testator in his lifetime, or to be effected after his death on the life of a person *in esse* at his death, is not an accumulation within the Act, and may be continued after the expiration of twenty-one years from the testator's death (*a*); and a direction to apply a yearly sum out of the rents of leaseholds, held for a term of more than twenty-one years, in effecting and keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, was held not to fall within the Act (*b*). [Direction to keep up a policy.]

20. A direction for the application of income in the repairing and reinstating of buildings in due course in the execution of the trusts of a settlement or will is not an accumulation within the meaning of the Thellusson Act, but if the direction goes further, and extends to expenditure in erecting new buildings, or in providing against mere possible future liability, it is to that extent an accumulation to which the Act applies (*c*). [Trust for repairing and reinstating buildings.]

21. By the Accumulation Act, 1892 (*d*), it is enacted that "no person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated *for the purchase of land only*, for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation, would, for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." The Act applies to a will made before and coming into operation after the Act (*e*), and is not confined to the minority of persons born in the testator's lifetime (*f*). The word "land" in the Act, when read in conjunction with the Interpretation Act, 1889 (52 & 53 Vict. c. 63), includes incorporeal as well as corporeal hereditaments (*g*); and a direction to accumulate for the purchase [Accumulation for purchase of land only restricted to minorities.]

[(*a*) *Bassil* v. *Lister*, 9 Hare, 177; *Re Vaughan*, W. N. 1883, p. 89; and see *Vine* v. *Raleigh*, (1891) 2 Ch. 13, 21, *per* Chitty, J.]

[(*b*) *Re Gardiner*, (1901) 1 Ch. 697.]

[(*c*) *Vine* v. *Raleigh*, (1891) 2 Ch. (C.A.) 13; *Re Mason*, (1891) 3 Ch. 467.]

[(*d*) 55 & 56 Vict. c. 58, s. 1; see *Re Danson*, W. N. 1895, p. 102.]

[(*e*) *Re Baroness Llanover*, (1903) 2 Ch. 330, where a trust for discharge of incumbrances on the devised estates, or purchase of other estates to like uses, was held available only for the former purpose; and in *Re Baroness Llanover*, (1907) 1 Ch. 629, a mortgage for the purpose of raising estate duty was held to be an "incumbrance" within the same trust.]

[(*f*) *Re Cattell*, (1907) 1 Ch. 567.]

[(*g*) *Re Clutterbuck*, (1901) 2 Ch. 285.]

of "real estate" is a direction to accumulate for the purchase of "land only" within the Act (*a*).]

Scotland and Ireland.

22. Scotland was expressly excepted from the Act of 1800; but it was extended to that country by The Entail Amendment Act, 1848 (11 & 12 Vict. c. 36), sect. 41.

As the statute was passed a short time before the union with Ireland, Irish estates are not affected by it (*b*). But where the rents of Irish property belonging to a domiciled Englishman were directed to be accumulated and become part of the personal estate, it was held that although the rents themselves might be invested for more than twenty-one years, the income arising from their investment could not be accumulated (*c*); and the Act applies to an accumulation of rents of leaseholds in England, but belonging to a testator domiciled in Ireland (*d*).

SECTION II

OF UNLAWFUL TRUSTS

Trusts against the policy of law.

1. The Court will not permit the system of trusts to be directed to any object that contravenes the *policy* of the law (*e*). Thus, if the trust of a *chattel* be limited to A. and his *heirs*, it will, nevertheless, be personal estate, and vest in the executors (*f*), for to hold the contrary would shake the first principles of law, and confound the great landmarks of property. So the trust of a chattel cannot be entailed, as if it be limited to A. and the heirs of his body, with remainder to B., the absolute interest vests in A., and the remainder to B. is a nullity (*g*). But trusts of terms attendant upon the inheritance, while they existed, were always excepted from the rule; for these, partly to protect the estate from secret incumbrances, and partly to keep the property in the right channel (*h*), were made in equity to follow, as shadows, the devolution of the freehold (*i*).

[(*a*) *Re Clutterbuck*, *sup.*]

(*b*) *Ellis* v. *Maxwell*, 12 Beav. 104; *Heywood* v. *Heywood*, 29 Beav. 9.

(*c*) *Ellis* v. *Maxwell*, 12 Beav. 104.

(*d*) *Freke* v. *Lord Carbery*, 16 L. R. Eq. 461.

(*e*) See *Attorney-General*, v. *Pearson*, 3 Mer. 399; *Hamilton* v. *Waring*, 2 Bligh, 209; *Earl of Kingston* v. *Lady Pierepoint*, 1 Vern. 5.

(*f*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *S. C.* 1 Vern. 164, *per* Lord Guildford; *Hunt* v. *Baker*, 2 Freem. 62; *Attorney-General* v. *Sands*, Nels. 133.

(*g*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *Hunt* v. *Baker*, 2 Freem. 62.

(*h*) See *Willoughby* v. *Willoughby*, 1 T. R. 765.

(*i*) For the law upon this subject, see Sugd. Vend. & Purch. 14th ed. 738 *et seq.*

Illegitimate children.

2. Again, a person cannot settle property upon trust for illegitimate children *to be thereafter born*, since this tends to immorality, but the declaration of trust is void, and the beneficial interest results to the settlor (*a*). [*Primâ facie* a gift to children includes only legitimate children (*b*),] but illegitimate children born at the date of the settlement may take under the description of children if there were no legitimate children at the time (*c*), or the illegitimate children are otherwise identified as *personæ designatæ* (*d*). But a gift to A. for life, with remainder to his child or children, will not be taken to designate an illegitimate child of A. born previously to the date of the will, though A. had no legitimate child at the date of the will, and was fifty-seven years old, and so unlikely to have legitimate children (*e*).

Trust for Corporation

3. So a trust of real estate cannot be declared in favour of a *corporation* without a licence from the Crown, for the same mischief would follow from putting equitable, as in putting legal, estate into mortmain (*f*).

Trust for alien.

4. Where a trust of real estate was, before the Naturalization Act, 1870 (*g*), declared in favour of an *alien*, the Crown might have claimed the benefit of it by suit in equity, without the form of a previous inquisition, for the subject was sufficiently protected by the decree of the Court (*h*).

(*a*) *Medworth* v. *Pope*, 27 Beav. 71; and see *Hill* v. *Crook*, 6 L. R. H. L. 265; *Dorin* v. *Dorin*, 7 L. R. H. L. 568; *In re Ayles' Trusts*, 1 Ch. D. 282; *Wilkinson* v. *Wilkinson*, 1 Y. & C. Ch. Ca. 657; *Pratt* v. *Mathew*, 22 Beav. 328; *Howarth* v. *Mills*, 2 L. R. Eq. 389; [*Thompson* v. *Thomas*, 27 L. R. Ir. 457]. The case of *Occleston* v. *Fullalove*, 42 L. J. N.S. Ch. 514, has since been reversed, 9 L. R. Ch. App. 147; 43 L. J. N.S. Ch. 297; and the law on the subject has, by the decisions of L.JJ. James and Mellish, against the opinion of Lord Selborne, been considerably modified; see and consider the judgments of the L.JJ., and more particularly that of Lord Selborne.

[(*b*) See *Wilkinson* v. *Adam*, 1 V. & B. 472; Jarm. on Wills, 5th ed. Vol. II. p. 1076; Vaizey on Settlements, 1088.]

(*c*) *Gabb* v. *Prendergast*, 3 Eq. Rep. 648; *Clifton* v. *Goodbun*, 6 L. R. Eq. 278; *Savage* v. *Robertson*, 7 L. R. Eq. 176; *Lepine* v. *Bean*, 10 L. R. Eq. 160; *Wilson* v. *Atkinson*, 4 De G. J. & S. 455; *Milne* v. *Wood*, 42 L. J. N.S. Ch. 545; *In re Brown's Trust*, 16 L. R. Eq. 239; *Occleston* v. *Fullalove*, 9 L. R. Ch. App. 147; *In re Goodwin's Trust*, 17 L. R. Eq. 345; [*Re Hastie's Trusts*, 35 Ch. D. 728; *Re Horner*, 37 Ch. D. 695; *Re Loveland*, (1906) 1 Ch. 542].

(*d*) *Holt* v. *Sindrey*, 7 L. R. Eq. 170; *Crook* v. *Hill*, 6 L. R. Ch. App. 311, *S. C. nom. Hill* v. *Crook*, 6 L. R. H. L. 265; *Dorin* v. *Dorin*, 17 L. R. Eq. 463; [*Re Humphries*, 24 Ch. D. 691; *Re Harrison*, (1894) 1 Ch. 561; *Re Du Bochet*, (1901) 2 Ch. 441; and as to the case where an illegitimate child *en ventre* may be held to take, see *Ebbern* v. *Fowler*, (1909) 1 Ch. (C.A.) 578, overruling *Re Shaw*, (1894) 2 Ch. 573].

(*e*) *Paul* v. *Children*, 12 L. R. Eq. 16.

(*f*) See Shep. Touch. 509; Sand. on Uses, 339, note E. 15 Ric. 2. c. 5.

(*g*) 33 Vict. c. 14.

(*h*) See *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92; Vin. Ab. Alien, A. 8; *Godfrey and Dixon's Case*, Godb,

[Trust prohibiting entry into naval or military services.]

[So a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy (*a*).]

[Trust for charity.]

[5. By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), repealing the Act of 9 Geo. 2. c. 36 (commonly called the Mortmain Act) and other statutes (*b*), and consolidating the law, every *assurance* (*c*), which expression includes testamentary disposition (*d*), of land (*e*), or of personal estate to be laid out in the purchase of land to or for the benefit of any *charitable uses*, is void (*f*) unless made in accordance with the requirements of the Act. The principal requirements are that the assurance must take effect in possession immediately from the making thereof (*g*), and must be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or any person claiming under him (*h*), except the following, viz. a grant or reservation of a peppercorn or other *nominal rent*, or of *mines*, minerals, or any *easement*, *covenants* or provisions as to *buildings*, streets, drainage, or nuisances, a *right of entry* on non-payment of rent, and stipulations of a like nature (*i*); but the same benefits must be reserved to persons claiming under the assuror as to the assuror himself. The assurance must be enrolled in the Central Office of the Supreme Court of Judicature within six months after its execution (*j*), and must also, except in the case of copyholds, be by deed executed in the presence of at least two witnesses (*k*). Where the uses are declared by a separate instrument, that instrument, and not the assurance, must be enrolled, but the

275; Br. Feff. al. Uses, 389; *King* v. *Holland*, Al. 16; Styl. 21; *Burney* v. *Macdonald*, 15 Sim. 6; *Burgess* v. *Wheate*, 1 Eden, 187; *Barrow* v. *Wadkin*, 24 Beav. 1; see now 33 Vict. c. 14.

[(*a*) *Re Beard*, (1908) 1 Ch. 383.]

[(*b*) *Ex. gr.* 9 Geo. 4. c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44; 34 & 35 Vict. c. 13; and 35 & 36 Vict. c. 24.]

[(*c*) S. 4, sub-s. 1.]

[(*d*) Sect. 10.]

[(*e*) *I.e.*, in England. The Act does not extend to Scotland or Ireland, see s. 11. By s. 10, sub-s. 3, "land" included "tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate or interest in land"; but this definition has been repealed, and a new definition substituted for it by the Act of 1891, see *post* p. 106.]

[(*f*) *I.e.*, not merely as to the charitable trusts sought to be created, but as to the legal estate expressed to be conveyed; *Churcher* v. *Martin*, 42 Ch. D. 312; see form in Seton, 6th ed. p. 1333, No. 10, altered accordingly.]

[(*g*) S. 4, sub-s. 2. See *Limbrey* v *Gurr*, 6 Mad. 151. And as to demises for terms of years, see Charity Lands Act, 1863 (26 & 27 Vict. c. 106).]

[(*h*) S. 4, sub-s. 3. See *Attorney-General* v. *Munby*, 1 Mer. 327, 343.]

[(*i*) S. 4, sub-s. 4.]

[(*j*) S. 4, sub-s. 9.]

[(*k*) S. 4, sub-s. 6. By s. 10 assurances by a registered disposition under the Land Transfer Act, 1875, are exempt from the provisions as to enrolment and attestation.]

enrolment must in that case be within six months after the making of the assurance (*a*).

Unless made in good faith for full and valuable consideration, which consideration may consist wholly or partly of a rent, rent-charge, or other annual payment, with or without a right of re-entry for non-payment (*b*), the assurance must be made at least twelve months before the death of the assuror (*c*). The Act also contains provisions under which the omission to enrol an instrument within the requisite time may be remedied, if such omission has arisen from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, and if also the assurance to be validated was made in good faith, for full and valuable consideration, to take effect in possession without any power of revocation, &c., except such as is authorised, and possession or enjoyment is held under such assurance (*d*).]

Secret trust for assuror.

6. Where lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a secret trust that the deed should not operate until after the settlor's death, the deed was upon bill filed, declared void, and decreed to be set aside (*e*). But such a secret trust must be proved, and retention of possession of the deed by the settlor during his life, though a circumstance of evidence, does not necessarily imply a previous fraudulent agreement (*f*).

[Exemptions from Act. Parks, schools, and museums.]

[7. The recent Act exempts from its operation assurances for the purposes only of a "public park," "a schoolhouse" for an "elementary school," or a "public museum" as therein defined; but gifts by will and voluntary assurances must be executed not less than twelve months before the death of the testator or assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed, the execution of the deed, and the quantity of land assured by will must not exceed twenty acres for a park, or two acres for a museum, or one acre for a school (*g*).

[Universities, colleges, and religious and other societies.]

Assurances to or in trust for any of the universities of Oxford, Cambridge, London, and Durham, the Victoria University, or any of the colleges or houses of learning within those universities,

[(*a*) S. 4, sub-s. 9. See *Doe* v. *Munro*, 12 M. & W. 845.]

[(*b*) S. 4, sub-s. 5; and s. 10. And see *Doe* v. *Hawthorne*, 2 B. & Ald. 96.]

[(*c*) S. 4, sub-s. 7.]

[(*d*) S. 5, practically re-enacting 24 & 25 Vict. c. 9; 27 Vict. c. 13, s. 3; 29 & 30 Vict. c. 57, ss. 1, 2; and 35 & 36 Vict. c. 24, s. 13.]

(*e*) *Way* v. *East*, 2 Drew. 44.

(*f*) *Fisher* v. *Brierley*, 1 De G. F. & J. 643; 10 H. L. C. 159.

[(*g*) S. 6, substantially re-enacting 34 & 35 Vict. c. 13.]

or the colleges of Eton, Winchester, and Westminster, for the better support or maintenance of the scholars only upon the foundations of the last-mentioned colleges, or the warden, council, and scholars of Keble College, and also assurances (otherwise than by will) made in good faith for full and valuable consideration to trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, are also exempted from the operation of the Act (*a*).

[Recreation grounds, churches, &c.]

The Act, while repealing previous statutes, only deals in a partial manner with the existing exemptions from the operation of the repealed statutes. There are numerous statutes left unrepealed by the Act which contain such exemptions. Thus, for instance, the Act of 22 Vict. c. 27 exempts any grant or conveyance of land to trustees for open public grounds or recreation of adults or playgrounds for children. So also numerous exemptions are contained in the Church Building Acts and other Acts (*b*). The effect of the recent Act apparently is to continue these exemptions (*c*).

[Mortmain and Charitable Uses Act, 1891.]

8. An important change in the law has been recently made by the Mortmain and Charitable Uses Act, 1891 (*d*), which has repealed the definition of "land" contained in sect. 10 of the Act of 1888 last referred to, and provided (*e*) that "land" in both those Acts shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; thus removing, as to a large class of property, the prohibition against alienation in favour of a charity retained by the earlier Act. It is further enacted in general terms that "land may be assured by will to, or for the benefit of, any charitable use," subject, however, to the requirement that land so assured shall be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any Judge thereof sitting at Chambers, or by the Charity Commissioners (*f*). So

[(*a*) S. 7, extending 9 Geo. 2. c. 36, and continuing 31 & 32 Vict. c. 44.]

[(*b*) *Ex gr.* 43 Geo. 3. c. 108; 51 Geo. 3. c. 115; 55 Geo. 3. c. 147; 58 Geo. 3. c. 45; 59 Geo. 3. c. 134; 3 Geo. 4. c. 72 (for promoting building of churches); 1 & 2 Wm. 4. c. 38; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38; 6 & 7 Vict. c. 37; 28 & 29 Vict. c. 42; 36 & 37 Vict. c. 50; 33 & 34 Vict. c. 75, s. 30 (as to school boards); 41 & 42 Vict. c. 68 (as to endowment of bishoprics).]

[(*c*) Ss. 8, 13, sub-s. 1 (a).]

[(*d*) 54 & 55 Vict. c. 73.]

[(*e*) Sect. 3.]

[(*f*) Sect. 5.]

soon as the time limited for the sale of any lands under any such assurance has expired, without completion of the sale of the land, the land unsold is to vest forthwith in the official trustee of charity lands, and the Charity Commissioners are to take all necessary steps for the sale or completion of the sale of such land, to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the Commissioners may make any order under their seal, directing such trustees to proceed with the sale or the completion of the sale of the land, or *removing such trustees and appointing others*, and may provide by such order for the payment of the proceeds of sale to the official trustee of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the administering trustees in or connected with the sale (*a*).

It is further (*b*) provided that "any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses" shall "be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land," but (*c*) the Court or any Judge thereof sitting at Chambers, or the Charity Commissioners may authorise the retention or acquisition by the charity of land so assured or directed to be purchased, if satisfied that such land is required for actual occupation for the purposes of the charity, and not as an investment.

The Act is to apply only to the will of a testator dying after the passing of the Act (5th Aug. 1891) (*d*), but nothing in the Act contained is to limit or affect the exemptions contained in the Act of 1888, or to apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions, or any of them, apply, or to exclude or impair any jurisdiction or authority which might otherwise be exercised by a Court or Judge of competent jurisdiction, or by the Charity Commissioners (*e*).

[Effect of Act.]

9. The Act applies to wills made before, but coming into operation after 5th Aug. 1891, and thus, where a testator who died after the Act, by his will made previously to the Act, gave to a charity

[(*a*) Sect. 6.]

[(*b*) Sect 7. The words "charitable uses" mean the same thing as purposes of the charity in s. 8, so that under a trust to purchase land and build houses thereon to be let to the poor at an undervalue, the effect of striking out the direction to purchase land is not to destroy the continuing trust to let the houses: *Re Sutton*, (1901) 2 Ch. 640.]

[(*c*) Sect. 8.]

[(*d*) Sect. 9.]

[(*e*) Sect. 10.]

such part of his residuary estate "as might by law be given for charitable purposes," the whole estate, including freeholds and leaseholds, was held to pass (*a*).

The provision enabling the assurance of land by will extends to future as well as present interests, and a devise of land to one for life, with remainder to a charity, is therefore good (*b*).

[Personal estate arising from land.]

Proceeds of sale of land subject to an immediate trust for sale are within the exception to the definition of "land" in sect. 3, and the provisions of sects. 5 and 6 have therefore no application to them (*c*). Trustees in such a case are not obliged to sell the land within a year from the testator's death, but may retain it without obtaining the leave of the Court. They are not, however, at liberty to postpone the sale indefinitely (*d*).

A reversionary interest in proceeds of sale of land subject to a trust for sale to take effect immediately upon the determination of a prior life or other limited estate in the land, is not "land," within the Act (*e*); but a share of rents of unsold land payable to a charity during the life of a tenant for life is "land" within the Act, and at the expiration of a year from the testator's death will vest by force of sect. 6 in the official trustee of charity lands (*f*).

[Act of 1888 applicable to gifts *inter vivos*.]

The provision requiring that land assured by will shall be sold within a year is important as differentiating the subject matter of the Act of 1891 from that of the Act of 1888, which relates to charitable gifts free from any such requirement. While, therefore, the formalities and restrictions in sect. 4 of the earlier Act have no application to gifts by will under the later Act, they remain in full force as regards those gifts *inter vivos* to which the earlier Act remains applicable (*g*).]

Perpetuities.

10. A *perpetuity* will no more be tolerated under cover of a trust, than when it displays itself undisguised in a settlement of the legal estate (*h*). "If in equity," said Lord Guildford, "you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of

[(*a*) *Re Bridger*, (1893) 1 Ch. 44; (1894) 1 Ch. (C.A.) 297.]

[(*b*) *Re Hume*, (1895) 1 Ch. (C.A.) 422.]

[(*c*) *Re Sidebottom*, (1902) 2 Ch. (C.A.) 389; *Re Wilkinson*, (1902) 1 Ch. 841; and see *Re Ryland*, (1903) 1 Ch. 467.]

[(*d*) *Re Sidebottom*, (1902) 2 Ch. (C.A.) 389, 393, where it was intimated that if it were shown that the land was in fact being held unsold for an unreasonable time, it would be open to the Attorney-General to bring an action.]

[(*e*) *Re Ryland*, *sup.*]

[(*f*) *Re Ryland*, *sup.*]

[(*g*) *Re Hume*, (1895) 1 Ch. (C.A.) 422.]

(*h*) See *Duke of Norfolk's case*, 3 Ch. Ca. 20, 28, 35, 48.

trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth" (*a*). Thus, if an estate be limited to trustees for 500 years upon the trusts thereinafter declared, and subject thereto in strict settlement, and then the trusts are declared to be to enter and manage the estate during the minority of any tenant for life or in tail, the trusts are void, for the tenant in tail cannot bar them, and they might last for centuries (*b*). [So, if real estate be devised to trustees upon trust to retain a yearly sum out of the rents and profits, and subject thereto, the estate is devised in strict settlement, and the trustees are directed during the continuance of the limitations to accumulate the yearly sum, the trust is void (*c*).]

Restraint on anticipation.

So, again, if a power of appointment amongst issue be contained in a marriage settlement, the donee of the power cannot appoint to the daughters for their sole and separate use *without power of anticipation*, for this would tie up the estate beyond the legal limits. While the appointment, therefore, to the daughters is good, the condition in restraint of alienation is void (*d*). [So a general clause in a will imposing a restraint on anticipation upon the shares of a class of females may be good as to those born

(*a*) *S.C.* 1 Vern. 164.

(*b*) *Floyer* v. *Bankes*, 8 L. R. Eq. 115; and see *Sykes* v. *Sykes*, 13 L. R. Eq. 56, and the cases there cited. [As to the principle of construction to be adopted in order to determine whether a gift is obnoxious to the rule against perpetuity, see *Pearks* v. *Moseley*, 5 App. Cas. 714, 719; *Re Bowen*, (1893) 2 Ch. 491; and see *Re Thompson*, (1906) 2 Ch. 199 (explaining and following *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172, and *Re Hallinan's Trusts*, (1904) 1 I. R. 452) that a gift cannot be void for remoteness if it is certain that within the prescribed period not only will the persons to take be ascertained, but their interests be vested, and the amount or number of their aliquot shares fixed.]

[(*c*) *Cochrane* v. *Cochrane*, 11 L. R. Ir. 361; *Browne* v. *Stoughton*, 14 Sim. 369; and see *Longfield* v. *Bantry*, 15 L. R. Ir. 101. The limitation of legal contingent remainders is further controlled by the rule of law which prevents an estate given to an unborn person for life from being followed by any estate in remainder to a child of such unborn person; and contingent remainders obnoxious to this rule will be void, though they might not transgress the rule commonly known as the rule against perpetuities; *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. (C.A.) 85; and see *Re Frost*, 43 Ch. D. 246; and it has recently been held that this "rule against double possibilities" (as it is called) applies to equitable as well as legal estates in realty; *Re Nash*, (1909) 2 Ch. 450; (1909) W. N. (C.A.) 209; 78 L. J. Ch. 657; but the rule has no application to personal estate; *Re Bowles*, (1902) 2 Ch. 650. Legal contingent remainders and equitable limitations are alike subject to the rule against perpetuities: *Re Ashforth*, (1905) 1 Ch. 535.]

(*d*) See *Armitage* v. *Coates*, 35 Beav. 1, and the cases there cited; and *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Teague's Settlement*, 10 L. R. Eq. 564; [*Re Ridley*, 11 Ch. D. 645; *Herbert* v. *Webster*, 15 Ch. D. 610; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Re Errington*, W. N. (1889), p. 23; and (as to a clause of forfeiture) see *Hodgson* v. *Halford*, 11 Ch. D. 959; *Wainwright* v. *Miller*, (1897) 2 Ch. 255; *Re Gage*, (1898) 1 Ch. 498].

in the testator's life-time, though void as to those born afterwards (*a*).

[Trust for, or power of sale.]

A trust for sale or power of sale which does not come into operation until an epoch which may be too remote, as, for instance, when the testator's gravel-pits are worked out (*b*), is void (*c*); but the interests of the beneficiaries entitled to the proceeds are not necessarily defeated, and their validity must depend on the terms of the gift (*d*); and they will be upheld if the trust for sale is in effect mere machinery for the purposes of division (*e*); and although a power of appointment be void for remoteness, the gift over in default of appointment may stand (*f*).

[Proviso for settlement of a share.]

A proviso for the settlement of shares of beneficiaries, if framed so as to apply separately to each share, may be good as to some shares, though void for remoteness as to others (*g*).]

Strict settlement of chattels.

11. Should a testator devise his real estate in strict settlement, and then bequeath his personal estate to *such tenant in tail* as should first attain twenty-one, then, if the tenant in tail at the testator's death be not adult, the event might not occur for a century, and the trust would be void (*h*). But should a testator bequeath his personal estate upon such trusts as would correspond to the limitations of his real estate, with a proviso that it should not vest absolutely in any tenant in tail unless he attained twenty-one, the trust would be good, for as personal estate cannot descend, the testator must by a tenant in tail have meant a tenant in tail by *purchase* (*i*).

Trust for indemnity.

12. The question often arises in practice whether the trust of one estate to *indemnify* another estate against a perpetual outgoing be not void for perpetuity, but it has been held in Ireland

[(*a*) *Re Ferneley's Trusts*, (1902) 1 Ch. 543.]

[(*b*) *Re Wood; Tullett* v. *Colville*, (1894) 2 Ch. 310; (1894) 3 Ch. (C.A.) 381; and see *Re Blew*, (1906) 1 Ch. 624 (the case of a discretionary trust for maintenance).]

[(*c*) *Goodier* v. *Edmunds*, (1893) 3 Ch. 455; *Re Daveron*, (1893) 3 Ch. 421; *Re Wood*, *ubi sup.*]

[(*d*) *Re Wood*, *ubi sup.*; *Re Daveron*, *ubi sup.*]

[(*e*) *Re Appleby*, (1903) 1 Ch. (C.A.) 565.]

[(*f*) *Re Abbott*, (1893) 1 Ch. 54; and see *Re Bowles*, (1905) 1 Ch. 371, where the case was held to be one of alternative independent gifts within the principle of *Moneypenny* v. *Dering*, 2 D. M. & G. 145, and *Longhead* v. *Phelps*, 2 W. Bl. 704. Where an appointment is *ex facie* void for remoteness it will not raise a case of election: *Re Warren's Trusts*, 26 Ch. D. 208; *Re Oliver's Settlement*, (1905) 1 Ch. 191; *Re Beale's Settlement*, (1905) 1 Ch. 256; *Re Wright*, (1906) 2 Ch. 288, not following *Re Bradshaw*, (1902) 1 Ch. 436.]

[(*g*) *Re Russell*, (1895) 2 Ch. (C.A.) 698; and see *Re Game*, (1907) 1 Ch. 276.]

(*h*) *Gosling* v. *Gosling*, 1 De G. J. & S. 17, *per* L. C.

(*i*) *Gosling* v. *Gosling*, 1 De G. J. & S. 1.

that such a trust is good, and that the Statute of Limitations does not apply to it (*a*).

Restriction on alienation.

13. Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be *alienated* (*b*), or shall not be made subject to the claims of *creditors* (*c*). And if it can only be ascertained that the *cestui que trust* was intended to take a vested interest, the *mode* in which, or the *time* when, the *cestui que trust* was to reap the benefit, is perfectly immaterial, and the entire interest may either be disposed of by the act of the *cestui que trust*, or may enure for the benefit of his creditors by operation of law on his bankruptcy. Thus, if the trust be to apply a fund for a person's "support, clothing, and maintenance" (*d*), or to pay the interest of a fund to a person for life "at such times and in such manner as the trustees shall think proper" (*e*), or "from time to time as and when it shall become due and payable" (*f*) or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best" (*g*), the discretion of the trustees is determined by the bankruptcy of the *cestui que trust*, and the entirety of the life estate enures for the benefit of the creditors. Even where the trustees were directed to pay the interest of a sum "to A. for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise," and so that A. should not have any right, title, claim, or demand, other than the trustees should think proper; and after A.'s decease, to pay the interest to his widow for her life, and after her decease to assign the principal and "all *savings or accumulations* of interest, if any," to the children, the Court thought, that, taking the whole instrument together, the trustees had no power to withhold and accumulate any portion of the interest during the life of A., and therefore, on his bankruptcy, the assignees became absolutely entitled (*h*). The question to be asked in these cases is, On the

Discretionary trust for A., whether determined by A.'s bankruptcy.

(*a*) *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22.

(*b*) *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 R. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 429; *Ware* v. *Cann*, 10 B. & Cr. 433; *Bradley* v. *Peixoto*, 3 Ves. 324; *Hood* v. *Oglander*, 34 Beav. 513; *Re Jones's Will*, W. N. 1870, p. 14; [*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; *Re Wolstenholme*, 29 W. R. 414; 43 L. T. N.S. 752; *Re Rosher*, 26 Ch. D. (C.A.) 801; *Re Dugdale*, 38 Ch. D. 176 (where the cases are considered by Kay, J.); *Re Mabbett*, (1891) 1 Ch. 707; *Re Ross*, (1900) 1 Ch. 162].

(*c*) *Graves* v. *Dolphin*, *Snowden* v. *Dales*, *Brandon* v. *Robinson*, *ubi sup.*; *Bird* v. *Johnson*, 18 Jur. 976; [*Re Fitzgerald*, (1903) 1 Ch. 933; (1904) 1 Ch. (C.A.) 573].

(*d*) *Younghusband* v. *Gisborne*, 1 Coll. 400.

(*e*) *Green* v. *Spicer*, 1 R. & M. 395.

(*f*) *Graves* v. *Dolphin*, 1 Sim. 66.

(*g*) *Piercy* v. *Roberts*, 1 M. & K. 4.

(*h*) *Snowdon* v. *Dales*, 6 Sim. 524.

decease of the *cestui que trust* would his executor have a right to call upon the trustees retrospectively to account for the arrears? (*a*). If he would, then the creditors are prospectively entitled to the payments in *futuro*.

Trusts for maintenance, &c.

14. But where a trust is not exclusively for the benefit of the bankrupt, but of the bankrupt and another person, the creditors will, of course, take only so much as was intended for the bankrupt. Thus, where real and personal estate was vested by a marriage settlement in trustees upon trust to apply the annual produce thereof "for the *maintenance* and *support* of A. B., his *wife and children*, if any, or otherwise, if they thought proper, to permit the same to be received by A. B. for his life," and A. B. became bankrupt, leaving a wife but no children, the Master of the Rolls said: "There could be no doubt of the intention of the settlement, that the wife should be supported out of the property, and" he was "of opinion that so long as the wife and children were maintained by A. B., the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained; that the assignees took everything, subject to what was proper to be allowed for the maintenance of the wife and children, and that it must be referred to the Master to settle a proper allowance" (*b*). And where trustees have an arbitrary power of applying or not applying a fund for the benefit of the bankrupt, or of applying the fund in the alternative, either for the benefit of the bankrupt or of another person, the bankruptcy will have no effect upon the power (*c*). Thus, where a fund was given to trustees upon trust to apply the whole or *such part* of the interest as they should think fit during the life of A., for his *support and maintenance*, and for no other purpose, it was held that nothing passed to the assignee (*d*). So where freehold and leasehold property was vested in trustees upon trust for A. B. for life; but if he became bankrupt or insolvent the trustees were, during his life, to apply the

(*a*) See *Re Sanderson's Trust*, 3 K. & J. 497.

(*b*) *Page* v. *Way*, 3 Beav. 20.

[(*c*) See *Chambers* v. *Smith*, 3 App. Cas. 795, 808, where Lord O'Hagan observed: "If the debtor have a vested property and an absolute claim they will of course pass from him; but if the property and the claim are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions, or deny the effect of that exercise of the discretion which would have bound the debtor."]

(*d*) *Twopeny* v. *Peyton*, 10 Sim. 487; [*Re Bullock*, W. N. (1891) p. 62; 39 W. R. 472, where the gift was in trust to pay to or apply for the benefit of the bankrupt;] and see *Re Sanderson's Trust*, 3 K. & J. 497; [*Re Stanger*, 39 W. R. 455].

annual produce "in and towards the *maintenance, clothing, lodging, and support* of A. B. and his then present or any future *wife and his children*, or *any of them* as the trustees should at their discretion think proper," and A. B. became insolvent, having a wife and children, it was argued that the power in the trustees was destroyed by the insolvency, and that the life estate vested in the assignee; but Vice-Chancellor Knight Bruce held that the trustees had a right under the power to appoint in favour of the insolvent, his wife and children, or any of them in exclusion of any other of them, but that any benefit which the insolvent might take would belong to the assignee (*a*). And even if the trust be for the maintenance of the bankrupt *and* his wife *and* his children in such manner as the trustees may think fit, it seems that the trustees may so exercise the power, that there shall be nothing tangible for the creditors to lay hold of. Thus, where a residuary personal estate was given to the testator's son for life, but if he did any act whereby the interest vested in him would become forfeited to others, the trustees were to apply the annual produce "for the *maintenance* and *support* of the son, and *any wife and child or children* he might have, as the trustees should in their discretion think fit," and the son became bankrupt, having a wife and children, the Vice-Chancellor of England said, "That nothing was of necessity to be *paid*, but the property was to be *applied;* and there might be a maintenance of the son, and of the wife and children, without their receiving any money at all: that the trustees might take a house for their lodging, and give directions to tradesmen to supply the son and the wife and children with all that was necessary for maintenance, and if so, the assignees were not entitled to anything" (*b*), [and though the trust is to pay to or apply the income for the benefit of the son only, and not of his wife and children, the trustees may exercise their discretion as to the application, and only the overplus remaining unapplied will pass under the gift over (*c*). In such cases the assignee of the son will be entitled only to such money or property, if any, as may be paid or delivered, or appropriated for payment or delivery (*d*), by the trustees to the son; but the trustees will be accountable in respect of payments made to him

(*a*) *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Holmes* v. *Penney*, 3 K. & J. 90.

(*b*) *Godden* v. *Crowhurst*, 10 Sim. 642; and see *Kearsley* v. *Woodcock*, 3 Hare, 185; *Wallace* v. *Anderson*, 16 Beav. 533; *In re Landon's Trusts*, 40 L. J. N.S. Ch. 370; [*Re Coleman*, 39 Ch. D. (C.A.) 443; *Re Bullock*, W. N. (1891) p. 62; 39 W. R. 472.]

[(*c*) *Re Bullock*, W. N. (1891) p. 62; 39 W. R. 472.]

[(*d*) *Re Coleman*, 39 Ch. D. (C.A.) 443, 449.]

after they have received notice of bankruptcy or assignment (*a*)]. If there be a power not arbitrary but imperative to apply for the benefit of the bankrupt and another, and the trustees refuse to exercise the power, so that a simple trust arises, the creditors will take a moiety (*b*), and if by the death of the other person the bankrupt becomes the only object of the power, the creditors will take the whole (*c*).

Limitation over on alienation.

15. But though a person cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon A. *until* alienation, bankruptcy, or insolvency, with a limitation over to B. on the happening of either of those events (*d*); or he may give real or personal estate to A. for *life* (*e*), with a *proviso* that on alienation, bankruptcy, or insolvency (*f*), it shall shift over to B.; [and where property was by an instrument dated in 1862, limited to A. for life, or until he should be outlawed or declared bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, his interest was held to cease on the presentation of a petition for liquidation under the Bankruptcy Act, 1869, by a firm of which he was a member, followed by acceptance by the creditors of a composition (*g*)]. And if the trust be for A. for life, remainder to B. for life, or until bankruptcy, and B. becomes bankrupt in the lifetime of A., the clause takes effect (*h*). [And if the trust be for A. for life and the proviso that on his charging or encumbering the property or becoming bankrupt, the gift to him shall be absolutely forfeited, and the subsequent gifts accelerated, the proviso will be good, although there is no person capable of taking under the subsequent gifts (*i*). But a gift of real

[(*a*) *Re Neil; Hemming* v. *Neil*, 62 L. T. N.S. 649; *Re Bullock*, W. N. (1891) p. 62; 39 W. R. 472.]

(*b*) *Rippon* v. *Norton*, 2 Beav. 63.

(*c*) *Wallace* v. *Anderson*, 16 Beav. 533.

(*d*) *Lockyer* v. *Savage*, 2 Stra. 947; *Ex parte Hinton*, 14 Ves. 598; *Oldham* v. *Oldham*, 3 L. R. Eq. 404; *Montefiore* v. *Behrens*, 35 Beav. 95; [*Hatton* v. *May*, 3 Ch. D. 148; *Joel* v. *Mills*, 3 K. & J. 458;] and see *Sharp* v. *Cosserat*, 20 Beav. 470.

(*e*) *Shee* v. *Hale*, 13 Ves. 404; *Cooper* v. *Wyatt*, 5 Mad. 482; *Yarnold* v. *Moorhouse*, 1 R. & M. 364; *Stephens* v. *James*, 4 Sim. 499; *Lewes* v. *Lewes*, 6 Sim. 304; *Ex parte Oxley*, 1 B. & B. 257; *Stanton* v. *Hall*, 2 R. & M. 175; *Hammonds* v. *Barrett*, 21 L. T. N.S. 321; 17 W. R. 1078; *Billson* v. *Crofts*, 15 L. R. Eq. 314; *Re Aylwin's Trusts*, 16 L. R. Eq. 585; and see *Rochford* v. *Hackman*, 9 Hare, 475; *Sharp* v. *Cosserat*, 20 Beav. 470; [*Re Bedson's Trusts*, 28 Ch. D. (C.A.) 523; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633; (1891) 3 Ch. (C.A.) 1].

(*f*) As to what is insolvency, see *Re Muggeridge's Trusts*, Johns. 625; [and as to the effect of a person becoming bankrupt or insolvent in one of the colonies, see *Re Levy's Trusts*, 30 Ch. D. 119].

[(*g*) *Nixon* v. *Verry*, 29 Ch. D. 196.]

(*h*) *Re Muggeridge's Trusts*, Johns. 625.

[(*i*) *Hurst* v. *Hurst*, 21 Ch. D. (C.A.) 278; *Doe* v. *Eyre*, 5 C. B. 713;

estate to A. her heirs and assigns, subject to a proviso determining her estate in the event of her bankruptcy, and limiting the estate over, in that event, to other persons, is an absolute gift to A., and the proviso is void for repugnancy (*a*).]

Limitation over on alienation when brought into operation.

16. A clause divesting the property on bankruptcy is not brought into operation by a deed of inspectorship (*b*), and a like clause on "alienation" (*c*) will extend only to a disposition by the act of the party, and not to a transfer by operation of law, as upon *bankruptcy* (*d*), unless it can be collected from the context that the term was intended by the settlor to have so wide a signification (*e*); and a warrant of attorney to enter up a judgment which is followed by a charging order will not be an act of alienation, unless the charge was immediately in the contemplation of the parties at the time of giving the warrant (*f*); and [even under the law prior to the Married Women's Property Act, 1882] the marriage of a *feme* was not an alienation of a *chose en action* to the extent of her equity to a settlement out of it (*g*); but where real estate was held in trust for A. and her assigns for her life, with remainder over, with a proviso that, if she did anything whereby she might lose the control over the income, the life estate should "cease as fully as it would by her actual decease," and she married, so that the husband obtained the control over the income, the limitation over to the remainderman took effect (*h*). [On the other hand, where the trust was to pay income to A. until he should do some act whereby it "should become vested in some other person," and A. obtained from the

Robinson v. *Wood*, 27 L. J. N.S. Ch. 726; *Donohoe* v. *Mooney*, 27 L. R. Ir. 26.]

[(*a*) *Re Machu*, 21 Ch. D. 838. Upon the general question as to the validity of partial restraints on alienation, see *Re Rosher*, 26 Ch. D. (C.A.) 801; *Re Elliot*, (1896) 2 Ch. 353; *Large's case*, 2 Leon. 82; *Churchill* v. *Marks*, 1 Coll. 441; *Kearsley* v. *Woodcock*, 3 Hare, 185; Co. Lit. 223a; Shep. Touch. 129; *Re Macleay*, 20 L. R. Eq. 186, and cases there cited; Jarm. on Wills, 4th ed. vol. 2, p. 18; 5th ed. pp. 855 *et seq.*; Vaizey on Settlements, 949; Tudor's Real Prop. Cases, 4th ed. 517 *et seq.*]

(*b*) *Montefiore* v. *Enthoven*, 5 L. R. Eq. 35.

[(*c*) Since the Act 33 & 34 Vict. c. 23 (see *ante*, pp. 27, 28) a conviction for felony does not operate as an alienation; *Re Dash*, 57 L. T. N.S. 219.]

(*d*) *Lear* v. *Leggett*, 2 Sim. 479; *S. C.* 1 R. & M. 690; *Whitfield* v. *Prickett*, 2 Keen, 608; *Wilkinson* v. *Wilkinson*, Sir Geo. Coop. R. 259; and see *S. C.* 3 Sw. 528. [But as to a bankruptcy on the debtor's own petition, see *Re Amherst's Trusts*, 13 L. R. Eq. 464.]

(*e*) *Dommett* v. *Bedford*, 6 T. R. 684; *Cooper* v. *Wyatt*, 5 Mad. 482; [see *Ex parte Eyston*, 7 Ch. D. (C.A.) 145.]

(*f*) *Avison* v. *Holmes*, 1 J. & H. 530; and see *Barnett* v. *Blake*, 2 Dr. & Sm. 117; *Montefiore* v. *Behrens*, 35 Beav. 95; [*Re Kelly's Settlement*; *West* v. *Turner*, 59 L. T. N.S. 497.]

(*g*) *Bonfield* v. *Hassell*, 32 Beav. 217.

(*h*) *Craven* v. *Brady*, 4 L. R. Ch. App. 296. [But see now the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75.]

trustee and spent the capital fund, it was held that A.'s interest had not determined, though it might have been otherwise if the words had been "cease to be payable" to A. himself (*a*); and where the trust was for payment of the income to one for life until he should "assign, charge or incumber, or affect to assign, charge or incumber," it was held that under the circumstances this trust had not a retrospective operation so as to include past acts (*b*). The date upon which the dividends vest in the trustee in bankruptcy, and are therefore forfeited as being "vested in some other person," is, under the doctrine of relation back, the date of the act of bankruptcy, not of the adjudication (*c*).] Where the forfeiture is to arise on bankruptcy, no forfeiture is incurred by a bankruptcy which is afterwards annulled, provided the annulment be effected before any beneficial interest could have come to the hands of the assignee (*d*); and where the clause was against "anticipating or otherwise assigning or encumbering" the annual proceeds, and the *cestui que trust* assigned, so far as he lawfully could without a forfeiture, the arrears already accrued, but not the future income, it was held that the assignment being confined to the arrears was valid (*e*); and a power of attorney to receive the income and a charge upon the income will not be a forfeiture, unless it can be proved that the power of attorney and charge were meant to be applied to future income, and not to be confined to arrears already accrued (*f*); and an assignment in *general* words will not comprise a property which if attempted to be assigned would become forfeited (*g*). [Where, however, there

[(*a*) *Re Brewer's Settlement*, (1896) 2 Ch. 503; *Re Baker*, (1904) 1 Ch. 157, where the forfeiture took effect although charges given by the tenant for life had been cancelled and given up before anything became payable to him.]

[(*b*) *West* v. *Williams*, (1899) 1 Ch. (C.A.) 132.]

[(*c*) *Montefiore* v. *Guedalla*, (1901) 1 Ch. 435.]

(*d*) *White* v. *Chitty*, 1 L. R. Eq. 372; *Lloyd* v. *Lloyd*, 2 L. R. Eq. 722; *Re Parnham's Trust*, 13 L. R. Eq. 413; 46 L. J. N.S. Ch. 80; *Trappes* v. *Meredith*, 9 L. R. Eq. 229; [*Samuel* v. *Samuel*, 12 Ch. D. 152; *Ancona* v. *Waddell*, 10 Ch. D. 157; *Hurst* v. *Hurst*, 21 Ch. D. (C.A.) 278; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. N.S. 8; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633; affirmed, (1891) 3 Ch. 1; *Re Loftus Otway*, (1895) 2 Ch. 235, where Stirling, J., after dealing with the cases, and observing upon the difference of opinion between Lord Hatherly in *White* v. *Chitty* and Sir George Jessel in *Samuel* v. *Samuel* as to the point of time at which the annulment was sufficient to prevent the forfeiture, said that it would be right to follow the view taken in *White* v. *Chitty*, if it were necessary so to decide; and see *Chapman* v. *Perkins*, (1905) C.A. (H.L.) 106, affirming C.A. (1904) 1 Ch. 431 (where words of futurity as to marriage of beneficiaries were held not to apply to marriage in the testator's lifetime).]

(*e*) *Re Stulz's Trusts*, 4 De G. M. & G. 404; *S. C.* 1 Eq. Rep. 334.

(*f*) *Cox* v. *Bockett*, 35 Beav. 48.

(*g*) *Re Waley's Trust*, 3 Eq. Rep. 380; and see *Fausset* v. *Carpenter*, 2 Dow & Cl. 232; 5 Bligh, N.S. 75; St Leonard's H. L. Cases, 76.

was a residuary gift to A. for life, with remainder to B., with a general provision against alienation by B. in A.'s lifetime, and a mortgage was made by B., "subject, nevertheless, to the said proviso or condition in the will contained," it was held by Jessel, M.R., that there was no forfeiture, inasmuch as the restriction meant in substance: "I charge if I can charge, and I do not if I cannot charge"; and, consequently, as B. had no power to charge, the property was never charged at all (*a*). But if a memorandum of charge be made and accepted by the person in whose favour it is made, it will be effectual to create a forfeiture, although no claim is made under it, and a disclaimer of the charge after it has once been accepted will not avail to prevent the forfeiture (*b*).

An assignment of the assignor's life estate to trustees for the benefit of the assignor, until he otherwise directs, has been held not to create a forfeiture so long as no direction is given by the assignor inconsistent with his actual enjoyment of the life estate (*c*).

Where the forfeiture of an annuity was to arise on the annuitant doing or suffering anything which would deprive him of the right to receive the annuity, a garnishee order served on the trustees was held not to create a forfeiture, as unless the annuity was receivable, the trustee was not the debtor of the annuitant, and the garnishee order was ineffectual, while on the other hand if it was receivable any direction divesting it would be void for repugnancy (*d*); and an assignment of a life interest to trustees upon trust for the assignor for life but with power to them to receive the income as his attorneys, and to pay expenses of management, was held not to be a disposition or attempted disposition of the life interest (*e*). Where the gift was to a married woman for life for her separate use, with restraint on anticipation, and from and after her decease, or "on her anticipating" the income then over, it was held that anticipating could not be read as "attempting to anticipate," and, therefore, an assignment of the life interest being wholly ineffectual, did not cause a forfeiture (*f*); but where the gift over was on "attempting" to assign, a purported assignment, void in law, was held to work a forfeiture (*g*). Where the gift over was in case the

[(*a*) *Samuel* v. *Samuel*, 12 Ch. D. 152; and see *Re Sheward*, (1893) 3 Ch. 502.]

[(*b*) *Hurst* v. *Hurst*, 21 Ch. D. (C.A.) 278.]

[(*c*) *Lockwood* v. *Sikes*, 51 L. T. N.S. 562.]

[(*d*) *Re Greenwood*, (1901) 1 Ch. 887, dissenting from *Bates* v. *Bates*, W. N. (1884) p. 129; and see *Re Mair*, (1909) 2 Ch. 280.]

[(*e*) *Re Tancred's Settlement*, (1903) 1 Ch. 715.]

[(*f*) *Re Wormald*, 43 Ch. D. 631.]

[(*g*) *Re Porter*, (1892) 3 Ch. 481; and see *Adams* v. *Adams*, (1892) 1 Ch. 369, 376.

beneficiary was "under legal disability" at the time when the gift took effect, it was held that a general disability imposed by the law, such as bankruptcy, or, possibly, felony, was meant, and he having procured *himself* to be made bankrupt, and the bankrupcty having been annulled as a mere device and trick, there was no forfeiture (*a*).

[Limitation over affecting accruing income only.]

A trust of a similar but different kind arises where the limitation over on alienation is attached to the accruing income only. In such a case the moment of time at which the limitation over takes effect (*ex. gr.*, whether on receipt by the trustees, actual receipt by the beneficiary, or any other time) must be ascertained from the terms of the gift, and the destination of each instalment of income determined accordingly (*b*).]

[Insolvency.]

17. *Insolvency*, while it existed, was not a process *in invitum*, but the act of the insolvent himself, unless it was on the petition of a creditor (*c*), and therefore came within the meaning of a restraint against "alienation" (*d*). But a mere declaration of insolvency to lay a foundation for a bankruptcy was not an alienation or attempt at alienation (*e*). Under the Bankruptcy Act, 1869, a petition for liquidation was a voluntary parting with the bankrupt's interest (*f*); [and a debtor's petition under the Bankruptcy Act, 1883, will have the same effect (*g*)].

Limitation over on bankruptcy of settlor himself.

18. A person cannot settle *his own* property on *himself*, with a limitation over in the event of his own bankruptcy (*h*). But a husband may on his marriage [or, it seems, by a post-nuptial settlement (*i*)], thus settle a fund of his own to the extent of the wife's fortune received by him, for this, though apparently a settlement by him, is, in substance, a settlement of money advanced by the wife (*j*) [and identically brought into settlement by her (*k*)], and

[(*a*) *Re Carew*, (1896) 2 Ch. (C.A.) 311.]

[(*b*) *Re Sampson*, (1896) 1 Ch. 630.]

(*c*) 1 & 2 Vict. c. 110, s. 36; see *Pym* v. *Lockyer*, 12 Sim. 394.

(*d*) *Shee* v. *Hale*, 13 Ves. 404; *Brandon* v. *Aston*, 2 Y & C. C. Ca. 24; *Churchill* v. *Marks*, 1 Coll. 441; *Martin* v. *Maugham*, 14 Sim. 230; *Townsend* v. *Early*, 34 Beav. 23.

(*e*) *Graham* v. *Lee*, 23 Beav. 388.

(*f*) *Re Amherst's Trusts*, 13 L. R. Eq. 464.

[(*g*) *Re Cotgrave*, (1903) 2 Ch. 705.]

(*h*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Ex parte Hill*, 1 Cooke's Bank. Law, 251; *Ex parte Bennet*, Ib. 253; *In re Murphy*, 1 Sch. & Lef. 44; *In re Meaghan*, Ib. 179; *Ex parte Hodgson*, 19 Ves. 206; *Re Casey's Trust*, 3 Ir. Ch. Rep. 419, 4 Ir. Ch. Rep. 247; *Clarke* v. *Chambers*, 8 Ir. Ch. Rep. 26; *Murphy* v. *Abraham*, 15 Ir. Ch. Rep. 371; [*Ex parte Stephens*, 3 Ch. D. 807; *Mackintosh* v. *Pogose*, (1895) 1 Ch. 505; *Re Brewer's Settlement*, (1896) 2 Ch. 503.]

[(*i*) *Mackintosh* v. *Pogose*, (1895) 1 Ch. 505.]

(*j*) *Ex parte Cooke*, 8 Ves. 353; *Higginson* v. *Kelly*, 1 B. & B. 252; *Ex parte Verner*, ib. 260; *In re Meaghan*, 1 Sch. and Lef. 179; *Ex parte Hodgson*, 19 Ves. 206; [*Corr* v. *Corr*, 3 L. R. Ir. 435, 438; *Re Callan's Estate*, 7 L. R. Ir. 102]. But see *Ex parte Hill*, 1 Cooke's Bank. Law, 251, and compare *Ex parte Hodgson*, 19 Ves. 208.

[(*k*) *Mackintosh* v. *Pogose*, *ubi sup.*; *Whitmore* v. *Mason*, 2 Jo. & H. 204.]

indeed, a person may on marriage, without regard to the wife's fortune, limit his own property to himself for life, or until *alienation*, [either voluntary (*a*) or involuntary by operation of law in favour of a particular creditor (*b*),] and then over in favour of the wife or children, for they are purchasers for value, and there is no fraud upon any one.

Direction to purchase presentation for a particular person.

19. It is not unusual to find a clause in a *will* directory to trustees to purchase a *presentation* in favour of some particular object; but, it seems, if the purchase be made with the *intention* of presenting the *cestui que trust*, though the patron himself was ignorant of the purpose in view (*c*), it falls within the enactment against simony (*d*). A patron is forbidden to present for money, either *directly* or *indirectly;* and, the object being determined upon at the time of the purchase, the construction put upon the transaction by the Court is, that the patron presents *indirectly* by selling to a person who purchases with the sole intention of presenting.

Purchase of advowson.

20. The purchase of an *advowson* upon the footing that immediate possession shall be given is clearly simoniacal; and yet, notwithstanding the stringent words of the Acts against simony, and of the declaration to be made by the clerical purchaser, such transactions are of too frequent occurrence. As any stipulation for the resignation of the present incumbent would be illegal and could not be enforced, the purchaser is obliged to rely upon the honour of the vendor, the purchase-money in the meantime being impounded in the hands of trustees, to be paid over upon the intentions of the parties being carried into effect.

Insurances for life.

21. It has been ruled that the statue relating to *insurances* on lives does not prohibit an insurance on the life of A. in the name of B. *upon trust for A.* when both names appear upon the policy (*e*). But an insurance on the life of A. by B., a creditor

(*a*) *Knight* v. *Browne*, 7 Jur. N.S. 894; *Brooke* v. *Pearson*, 27 Beav. 181; and see *Phipps* v. *Lord Ennismore*, 4 Russ. 131; *Synge* v. *Synge*, 4 Ir. Ch. Rep. 337; [*Re Callan's Estate*, 7 L. R. Ir. 102; *Re Brewer's Settlement*, (1896) 2 Ch. 503.]

[(*b*) *Re Detmold*, 40 Ch. D. 585; and see *Re Johnson Johnson*, (1904) 1 K. B. 134. It has been held that there is nothing obnoxious to the bankruptcy law in articles of association of a company which *bonâ fide* provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and is not shewn to be less than the fair price which might be otherwise obtained: *Borland's Trustee* v. *Steel*, (1901) 1 Ch. 279.]

(*c*) *King* v. *Trussel*, 1 Sid. 329.

(*d*) *Kitchen* v. *Calvert*, Lane, 102, *per* Baron Snig; *Whinchcombe* v. *Pulleston*, Noy, 25, *per* Lord Hobart; Godbolt, 390; and see Fearne's P. W. 404; but see *Fox* v. *Bishop of Chester*, 6 Bing. 1; *Cowper* v. *Mantell*, 22 Beav. 231; *Id. qu.*

(*e*) *Collett* v. *Morrison*, 9 Hare, 162.

not on his own account, but as a trustee for C., who has no interest in the life, would, it is considered, be void.

Income tax.

22. The Income Tax Act (*a*) avoids all contracts or agreements by which one person undertakes to pay the *income tax* of another; but this does not prevent a settlor from vesting an estate in trustees upon trust to pay "all taxes affecting the lease" meaning inclusively the income tax, and subject thereto for A. for life (*b*).

Splitting votes.

23. Fictitious, fraudulent, or collusive conveyances for the purpose of *creating votes* for members of parliament—as when the conveyance is in form only, and there is a private arrangement between the parties that no interest shall pass—are null and void; but if A., *bonâ fide* and without any secret understanding in derogation of the deed, though for the purpose of multiplying votes, convey to B. in trust for a number of persons as tenants in common, that they may thereby acquire a qualification, the deed is unimpeachable (*c*).

Immoral trusts.

24. Trusts adverse to the foundation of all *religion* and subversive of all *morality* are, of course, void, and not enforceable by the Court (*d*).

[Superstitious purposes.]

[25. Trusts for superstitious purposes, as for saying masses or requiems for the souls of the dead, are void (*e*).]

Consequences to the settlor of creating a trust with an unlawful purpose.

26. Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate (*f*).

(*a*) 5 & 6 Vict. c. 35, s. 73.

(*b*) *Lord Lovat* v. *Duchess of Leeds* (No. 1), 2 Dr. & Sm. 62; *Festing* v. *Taylor*, 32 L. J. N.S., Q. B. 41; 3 B. & S. 217; [*Re Bannerman's Estate*, 21 Ch. D. 105; and see *Peareth* v. *Marriott*, 21 Ch. D. 183; 22 Ch. D. (C.A.) 182; *Gleadow* v. *Leetham*, 22 Ch. D. 269.]

(*c*) *Thornily* v. *Aspland*, 2 C. B. 160; *Alexander* v. *Newman*, 2 C. B. 122; *May* v. *May*, 33 Beav. 81; and see *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Ashworth* v. *Hopper*, 1 C. P. D. 178.

(*d*) See *Thornton* v. *Howe*, 31 Beav. 14; [and see *Smith* v. *White*, L. R. 1 Eq. 626.]

[(*e*) *West* v. *Shuttleworth*, 2 My. & K. 684; *Heath* v. *Chapman*, 2 Drew. 417; *Re Blundell's Trusts*, 30 Beav. 360; *Re Fleetwood*, 15 Ch. D. 594; *Re Elliott*, 39 W. R. 297; and see *Re Michel's Trust*, 28 Beav. 39; but in Ireland a bequest for masses is not illegal, though it may be void for perpetuity; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12, 15; *Perry* v. *Tuomey*, Ib. 480; *Dorrian* v. *Gilmore*, 15 L. R. Ir. 69; *Small* v. *Torley*, 27 L. R. Ir. 388.]

(*f*) *Cottington* v. *Fletcher*, 2 Atk. 155; see Lord Eldon's remarks in *Muckleston* v. *Brown*, 6 Ves. 68; and see *Chaplin* v. *Chaplin*, 3 P. W. 233; *Hamilton* v. *Ball*, 2 Ir. Eq. Rep. 191; *Groves* v. *Groves*, 3 Y. & Jer. 163; *Ottley* v. *Browne*, 1 B. & B. 360; *Davies* v. *Otty* (No. 2), 35 Beav. 208; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 473; *Barton* v. *Muir*, 6 L. R. P. C. 134; [*Re Great Berlin Steamboat Company*, 26 Ch. D. 616]. In *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657, the words "*all other the children he might there-*

Property settled with an unlawful purpose may be recovered by persons claiming under the settlor.

27. But a distinction was taken by Lord Eldon between a bill filed by the author of the fraud himself, and by a person taking through him, but not a party to the fraud (*a*), and this distinction is supported by other authority (*b*). And the settlor himself may take proceedings for recovering the property, where the illegal purpose failed to take effect, so that no trust arose, and, the trustees having paid no consideration, the equitable interest resulted (*c*).

[Existence of *cestui que trust.*]

28. [A trust may take effect and be recognised by the Court, although there is no person who can, as *cestui que trust*, directly enforce the execution of it. Thus a devise on trust for the maintenance of the testator's horses and dogs was held valid, although not a charity, and although, upon the terms of the will, the Court thought that the execution of it could not be enforced by any one (*d*). So, as we have seen, where there is a discretionary trust to apply money for the benefit of a particular person, though the *cestui que trust* cannot enforce the payment of any part of the money to him, yet the trustee can so apply it, and the persons interested in remainder are entitled only to the unapplied surplus (*e*). And although a trust for keeping up family tombs is in general void as tending to a perpetuity (*f*), yet a direction to an executor to

after have by her," were probably held to mean legitimate children in case the settlor married the person named, who, it is presumed, had died before the suit.

(*a*) *Muckleston* v. *Brown*, 6 Ves. 68.

(*b*) *Matthew* v. *Hanbury*, 2 Vern. 187; *Brackenbury* v. *Brackenbury*, 2 J. & W. 391; *Joy* v. *Campbell*, 1 Sch. & Lef. 328, see 335, 339; *Miles* v. *Durnford*, 2 De G. M. & G. 643; and see *Phillpotts* v. *Phillpotts*, 110 C. B. 85; *Groves* v. *Groves*, 3 Y. & Jer. 163; *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482. See a classification of the cases in reference to cohabitation bonds, 3 Mac. & G. note (*c*) page 100.

(*c*) *Symes* v. *Hughes*, 9 L. R. Eq. 475; *Manning* v. *Gill*, 13 L. R. Eq. 485; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469; *Dawson* v. *Small*, 18 L. R. Eq. 114; *Taylor* v. *Bowers*, 1 Q. B. D. 291.

[(*d*) *Re Dean; Cooper-Dean* v. *Stephens*, 41 Ch. D. 552, 556, *per* North, J.; *Mitford* v. *Reynolds*, 16 Sim. 105; *Pettingall* v. *Pettingall*, 11 L. J. Ch. 176. It was stated by the learned author of this work that "a trust must be for the benefit of some person or persons, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void," the cases cited in support of this proposition being those in note (*f*) *infra*, which, however, mainly turned on the question of perpetuity. In *Cooper-Dean* v. *Stephens*, it is to be noticed that the testator bequeathed his horses and dogs to the trustees themselves, so that it could not be contended that any trust was enforceable against them by the owner of the horses and dogs. They appear to have held upon a trust for the maintenance of particular chattels belonging to themselves, but upon a resulting trust as to unapplied surplus.]

[(*e*) *Re Bullock*, W. N. (1891) p. 62; *Re Coleman*, 39 Ch. D. (C.A.) 443, and other cases, *ante*, p. 113.]

[(*f*) *Rickard* v. *Robson*, 31 Beav. 244; *Lloyd* v. *Lloyd*, 2 Sim. N.S. 255; *Thomson* v. *Shakespeare*, Johns. 612; 1 De G. F. & J. 399; *Fowler* v. *Fowler*, 33 Beav. 616; *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *Hunter* v. *Bullock*, 14 L. R. Eq. 45; *Dawson* v. *Small*, 18 L. R. Eq. 114; *Re Williams*, 5 Ch. D. 735; *Re Birkett*, 9 Ch. D. 576; *Re Vaughan*, 33 Ch. D. 187;

apply a sum of money in erecting a monument to a person already deceased may be valid (*a*), although it is difficult to say who would be the *cestui que trust* to enforce it (*b*), and] a trust for keeping in repair a painted window or monument in a church is valid as a charitable gift, for it is for the interest of the public that the ornaments of the church should not be allowed to fall into decay (*c*). [So a trust for repairing and keeping in repair a parish churchyard has also been upheld as a good charitable gift (*d*), a gift for keeping in good order burial grounds restricted to the Society of Friends was held to be for advancement of religion, and therefore charitable (*e*), and a bequest to a charity on condition that they keep the testator's tomb in repair, with a gift over to another charity on non-compliance, is good, for the rule against perpetuities is not infringed, and there is no rule of law which invalidates a condition creating a perpetual inducement to do that which is lawful (*f*).]

Personalty bequeathed to charity.

29. If a testator [dying before the recent Act (*g*)] bequeath his personalty generally to such charitable purposes as the trustees should think proper, the trustees can exercise the *power* as to the *pure personalty* (*h*). [But the trustees cannot under the power apply the impure personalty to charitable institutions authorised to hold property of that description, unless the testator has indicated in the will that charities of that nature are among the objects intended to be benefited (*i*).

[Trust partly for a lawful and partly for an unlawful purpose.]

30. If property be given upon trust to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, if the amount intended to be applied for the unlawful purpose cannot be so far ascertained as to make it clear that there would be a residue applicable to the lawful purpose, the whole gift will fail (*j*); but the mere fact that the

Re Tyler, (1891) 3 Ch. 252; *Re Rogerson*, (1901) 1 Ch. 715; see *Gott* v. *Nairne*, 3 Ch. D. 278; and so a gift of all the income of the testator's estate for the purposes of a library, *Re Swain*, (1908) W. N. 209.]

[(*a*) *Mussett* v. *Bingle*, W. N. 1876, p. 170.]

[(*b*) *Re Dean*, 41 Ch. D. 552, 557, *per* North, J.]

(*c*) *Hoare* v. *Osborne*, 1 L. R. Eq. 585; *Re Rigley's Trust*, 15 W. R. 190; [*Re Vaughan*, 33 Ch. D. 187; and so a gift for the erection of headstones to a class of persons in a churchyard, as contributing to the decency and repair of the churchyard: *Re Pardoe*, (1906) 2 Ch. 84].

[(*d*) *Re Vaughan*, 33 Ch. D. 187.]

[(*e*) *Re Manser*, (1905) 1 Ch. 68.]

[(*f*) *Re Tyler*, (1891) 3 Ch. 252; *Christ's Hospital* v. *Grainger*, 1 M. & G. 460; and see *ante*, p. 18.]

[(*g*) 54 & 55 Vict. c. 73, see *ante*, p. 106.]

[(*h*) *Lewis* v. *Allenby*, 10 L. R. Eq. 668; *Re Clark*, 52 L. T. N.S. 406; 54 L. J. N.S. Ch. 1080.]

[(*i*) *Re Clark*, 52 L. T. N.S. 406; *Lewis* v. *Allenby*, 10 L. R. Eq. 668; *Re Piercy*, (1895) 1 Ch. 83; (1898) 1 Ch. (C.A.) 565.]

[(*j*) *Chapman* v. *Brown*, 6 Ves. 404; *Re Birkett*, 9 Ch. D. 576; *Limbrey* v. *Gurr*, 6 Mad. 151; *Cramp* v. *Playfoot*,

amount to be applied for the unlawful purpose has not been *expressly* stated in the gift will not make the whole gift void, and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and thus uphold the gift (*a*). And there are cases which lend some support to the view that where the lawful purpose is charitable, the whole of the property is available for the lawful purpose (*b*).]

4 K. & J. 479; *Fowler* v. *Fowler*, 33 Beav. 616; *Re Taylor*, W. N. (1888) p. 32; 58 L. T. N.S. 538. But see *Re Williams*, 5 Ch. D. 735.]

[(*a*) *Mitford* v. *Reynolds*, 1 Ph. 185; *Re Rigley's Trust*, 15 W. R. 190; *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *The Magistrates of Dundee* v. *Morris*, 3 Macq. 134; *Re Vaughan*, 33 Ch. D. 187; and see *Dawson* v. *Small*, 18 L. R. Eq. 114; *Hunter* v. *Bullock*, 14 L. R. Eq. 45; *Re Williams*, 5 Ch. D. 735; *Champney* v. *Davy*, 11 Ch. D. 949; *Re Birkett*, 9 Ch. D. 576; and see *Re Allen*, (1905) 2 Ch. 400, where the gift was for "charitable educational or other institutions" in the town of K., and an intention being inferred to limit the gift to general or public purposes for the inhabitants of the town, it was held to be charitable and good.]

[(*b*) *Fisk* v. *Attorney-General*, *Dawson* v. *Small*, *Hunter* v. *Bullock*, *Re Williams*, *Re Birkett*, *Re Vaughan*, *ubi sup.*, all of which were cases of trusts for the maintenance of family tombs out of the income of a fund, and for the application of the surplus for a charitable purpose. It is difficult to see upon what principles these cases rest; and in *Re Birkett*, the late M.R., Sir G. Jessel, sitting as a judge of first instance, intimated that had the case been unfettered by authority, he should have arrived at a different conclusion. In *Fisk* v. *Attorney-General*, the case was argued on the footing that the whole fund was given for the lawful purpose *charged* with a portion for an unlawful purpose, and the charge failing, the gift of the whole for the lawful purpose was good; and this would seem to have been the view adopted by V. C. Wood, for he observed, p. 527: "I think I ought, in this instance (if the gift of the residue had been exclusive of the amount required for the repair of the grave), to have ascertained the amount required for the void purpose, but the better construction is, that the whole of the gift is to be taken by the rector and church-wardens."

So again in *Hunter* v. *Bullock* and *Dawson* v. *Small*, both before V. C. Bacon, the trust for keeping up the tombs was treated as being merely honorary: that is, "an obligation either to be performed or not, as the persons to whom the custody of the money was given thought fit," and the gift for the lawful purpose was held to be "certain in amount" (*i.e.* of the whole income), "subject only to the fulfilment of the honorary trust."

In *Re Williams*, *Re Birkett*, and *Re Vaughan*, V. C. Malins, the M.R., and North, J., followed the previous decisions. In *Re Rogerson*, (1900) 1 Ch. 715, £1000 was given in trust out of the income first, to maintain a tomb, and next to distribute among poor persons in certain alms-houses, and it was held by Joyce, J., that, the gift for the tomb being invalid, the whole income went to the poor persons.]

CHAPTER VIII

IN WHAT LANGUAGE A TRUST MUST BE DECLARED

A PERSON may declare a trust either directly or indirectly: the former by creating a trust *eo nomine*, in the form and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention, which the Court will effectuate through the medium of an implied trust (I).

SECTION I

OF DIRECT OR EXPRESS DECLARATIONS OF TRUST

General rule.

1. In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. And equitable fee may be created without the word "heirs," and an equitable entail without the words "heirs of the body" (*a*), provided words be used which, though not technical,

(*a*) See Shep. Touch. by Preston, 106; [and see *Re Buckton*, (1907) 2 Ch. 408, where a gift to a person for life and then "to his sons and their sons in succession" was held to give an estate tail].

Distinction between Implied trusts, Trusts by operation of law, and Constructive trusts.

(1) The Terms *Implied Trusts*, *Trusts by Operation of Law*, and *Constructive Trusts*, appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed:—An *implied* trust is one declared by a party not directly, but only by implication; as where a testator devises an estate to A. and his heirs, *not doubting* that he will thereout pay an annuity of 20*l.* per annum to B. for his life, in which case A. is a trustee for B. to the extent of the annuity. *Trusts by operation of law* are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either—1. *Resulting* trusts, as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or, 2. *Constructive* trusts, which the Court elicits by a construction put upon certain *acts* of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease.

are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument (*a*).

Equitable fee may be devised without the word heirs applied to it.

2. If an estate be *devised* unto and to the use of A. *and his heirs*, upon trust for B. without any words of limitation, B. takes the equitable fee; for the whole estate passed to the trustees, and whatever interest they took was given in trust for B. (*b*). But if an estate be conveyed by *deed* unto and to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply without the word *heirs*, [or, in deeds executed since the 31st December 1881, the words "in fee simple" or "in tail" (*c*)], the children by analogy to legal limitations take an estate for life only (*d*). Should *renewable leaseholds for lives* be conveyed by deed to trustees and their heirs upon trust for A., it has been held that from the nature of an estate *pur autre vie*, A. takes the absolute interest (*e*).

Case of a deed.

Force of technical terms.

3. But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense (*f*). Lord Hardwicke indeed once added the qualification, "*unless the intention of the testator or author of the trust plainly appeared to the contrary* (*g*)." But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed (*h*).

[(*a*) *Re Tringham's Trusts*, (1904) 2 Ch. 487; *Re Oliver's Settlement*, (1905) 1 Ch. 191.]

(*b*) *Moore* v. *Cleghorn*, 10 Beav. 423; affirmed on appeal, 12 Jurist, 591; *Knight* v. *Selby*, 3 Man. & Gr. 92; *Challenger* v. *Sheppard*, 8 T. R. 597; *Yarrow* v. *Knightly*, 8 Ch. D. (C.A.) 736; and see *Doe* v. *Cafe*, 7 Exch. 675; *Watkins* v. *Weston*, 32 Beav. 238; 3 De G. J. & Sm. 434; *Ryan* v. *Keogh*, 4 Ir. Eq. 357; *Hodson* v. *Ball*, 14 Sim. 558.

[(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51.]

(*d*) *Holliday* v. *Overton*, 14 Beav. 467; 15 Beav. 480; 16 Jur. 751; *Lucas* v. *Brandreth* (No. 2), 28 Beav. 274; *Tatham* v. *Vernon*, 29 Beav. 604; [*Lysaght* v. *M'Grath*, 11 L. R. Ir. 142; *Re Whiston's Settlement*, (1894) 1 Ch. 661; *Dearberg* v. *Letchford*, 72 L. T. N.S. 489;] *Middleton* v. *Barker*, 29 L. T. N.S. 643; [*Re Bennett's Estate*, (1898) 1 I. R. 185; *Re Irwin*, (1904) 2 Ch. 752, referring to *Re Hudson*, 72 L. T. 892; *Rodgers* v. *Houston*, (1909) 1 I. R. 319 (not following *Meyler* v. *Meyler*, 11 L. R. Ir. 522).]

(*e*) *M'Clintock* v. *Irvine*, 10 Ir. Ch. Rep. 481; *Brenan* v. *Boyne*, 16 Ir. Ch. Rep. 87; *Betty* v. *Elliott*, Ib. 110, note; *Re Bayley*, 16 Ir. Ch. Rep. 215; [*Currin* v. *Doyle*, 3 L. R. Ir. 265;] and see *post*, Chap. XXVIII. s. 1.

(*f*) *Wright* v. *Pearson*, 1 Eden, 125, *per* Lord Henley; *Austen* v. *Taylor*, 1 Eden, 367, *per eundem*; *Synge* v. *Hales*, 2 B. & B. 507, *per* Lord Manners; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 571, *per* Lord Eldon; *Lord Glenorchy* v. *Bosville*, Cas. *t.* Talb. 19, *per* Lord Talbot; *Bale* v. *Coleman*, 8 Vin. 268, *per* Lord Harcourt; [*Meyler* v. *Meyler*, 11 L. R. Ir. 522].

(*g*) *Garth* v. *Baldwin*, 2 Ves. 655.

(*h*) *Wright* v. *Pearson*, 1 Eden, 125; *Austen* v. *Taylor*, Ib. 367; and see *Brydges* v. *Brydges*, 3 Ves. 125; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 571.

Rule in Shelley's case applicable to trusts.

4. As the *rule in Shelley's case* is not one of construction, that is, of intention, but of law, and was established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers, would be introduced into feudal tenures, it might be thought that, as trusts are wholly independent of tenure, they ought not to be affected by the operation of the rule; and the cases of *Withers* v. *Allgood* (*a*), and *Bagshaw* v. *Spencer* (*b*), seem to lend some countenance to the doctrine. But not to mention that Lord Hardwicke himself appears, in *Garth* v. *Baldwin* (*c*), to have doubted the position advanced by him in *Bagshaw* v. *Spencer*, other subsequent authorities have now established the principle, that although the rule may not be equally *applicable* to trusts, it shall be equally *applied* (*d*).

But in order to vest the fee in the ancestor under this rule, the word "heir" must be used, not in the sense of *persona designata*, *i.e.* a particular individual, but as a term of succession so as to transmit the estate to the heir for the time being for ever. If, therefore, land be devised to a trustee in trust for A. for life, and after his decease in trust for the person who shall then be his heir or heiress and his or her heirs, in this case A. takes a life estate only, and the heir or heiress takes the fee simple by purchase (*e*); and of course the rule does not apply, if the legal estate be vested in trustees for the life of A. *in trust* for him, and

(*a*) Cited in *Bagshaw* v. *Spencer*, 1 Ves. sen. 150; 1 Coll. Jur. 403.

(*b*) 1 Ves. sen. 142; 1 Coll. Jur. 378.

(*c*) 2 Ves. 646.

(*d*) *Wright* v. *Pearson*, 1 Eden, 128; *Brydges* v. *Brydges*, 3 Ves. 120; *Jones* v. *Morgan*, 1 B. C. C. 206; *Webb* v. *Earl of Shaftesbury*, 3 M. & K. 599; *Roberts* v. *Dixwell*, 1 Atk. 610; West, 536; *Britton* v. *Twining*, 3 Mer. 176; *Spence* v. *Spence*, 12 C. B. N.S. 199; *Cooper* v. *Kynock*, 7 L. R. Ch. App. 398; *Collier* v. *Walters*, 17 L. R. Eq. 252; *Hervey* v. *Hervey*, W. N. 1874, p. 41; *Drew* v. *Maslen*, W. N. 1874, p. 65; *Batteste* v. *Maunsell*, 10 Ir. R. Eq. 97, on App. 314; [*Re White and Hindle's Contract*, 7 Ch. D. 201; *Re Youman's Will*, (1901) 1 Ch. 720]. *Coape* v. *Arnold*, 2 Sm. & Gif. 311, may appear to militate against the general rule, but the true ground of the decision was this: The codicil was made for a particular purpose, viz. for securing the jointure, and as it confirmed the will in all other respects, the testator's intention evidently was, that after securing the jointure, the trustees of the codicil should convey the estate to the uses declared by the will. It was, therefore, an executory trust, and the question was not whether in mere equitable estates a life interest resulting to the heir-at-law would unite with a limitation to the heirs of his body, but whether, according to the true construction of the will, the settlement was not meant to be executed in such a form as to make the heirs of his body purchasers. In this light the question was one of intention, and not of legal operation. The case was subsequently affirmed on appeal by Lord Cranworth, and it is conceived substantially, though not in terms, upon the ground above indicated as the true principle: see 4 De G. M. & G. 574.

(*e*) *Greaves* v. *Simpson*, 12 Jur. N.S. 609; [and see *Foxwell* v. *Van Grutten*, (1897) A.C. 658, 663, 680, 685].

the *legal remainder* after the death of A. be limited to the heirs of A.'s body, for here, as the life estate and the remainder are of different qualities (viz. one equitable and the other legal), they cannot unite (*a*).

Trusts executed and trusts executory distinguished.

5. We have said, that if technical words be employed, they must be taken in their legal and technical sense; but as to this a distinction must be drawn between trusts *executed* and trusts that are only *executory*; for to trusts executed the position is strictly applicable, but in the case of trusts that are executory it must be received with considerable allowance.

A trust *executed* is where the limitations of the equitable interest are complete and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period (*b*).

The two confounded by Lord Hardwicke in Bagshaw *v.* Spencer.

The distinction we are considering was very early established, and was recognised successively by Lord Cowper (*c*), Lord King (*d*), Lord Talbot (*e*), and by no one more frequently than by Lord Hardwicke himself (*f*); yet in *Bagshaw* v. *Spencer* (*g*) Lord Hardwicke almost denied that any such distinction existed. But in a subsequent case (*h*) his Lordship felt himself called upon to offer some explanation. "He did not mean," he said, "in *Bagshaw* v. *Spencer*, that no weight was to be laid on the distinction, but that, if it had come recently before him, he should then have thought there was little weight in it, although he should have had that deference for his predecessors, as not to lay it out of the case, not intending to say that all which his predecessors did was wrong founded, which he desired might be remembered."

The distinction now established.

But whatever doubts may formerly have existed upon the subject, they have long since been dispelled by the authority of succeeding judges. "The words executory trust," said Lord Northington, "seem to me to have no fixed signification. Lord King describes an executory trust to be, where the party must

(*a*) *Collier* v. *M'Bean*, 34 Beav. 426.

(*b*) See *Egerton* v. *Earl Brownlow*, 4 H. L. Cases, 210; *Tatham* v. *Vernon*, 29 Beav. 604.

(*c*) *Bale* v. *Coleman*, 8 Vin. 267; *Earl of Stamford* v. *Sir John Hobart*, 3 B. P. C. 33.

(*d*) *Papillon* v. *Voice*, 2 P. W. 471.

(*e*) *Lord Glenorchy* v. *Bosville*, Cas. *t.* Talb. 2.

(*f*) *Gower* v. *Grosvenor*, Barnard, 62; *Roberts* v. *Dixwell*, 1 Atk. 607; *Baskerville* v. *Baskerville*, 2 Atk. 279; *Marryat* v. *Townly*, 1 Ves. 102; *Read* v. *Snell*, 2 Atk. 648; *Woodhouse* v. *Hoskins*, 3 Atk. 24.

(*g*) 1 Ves. 152; and see *Hopkins* v. *Hopkins*, 1 Atk. 594.

(*h*) *Exel* v. *Wallace*, 2 Ves. 323. And Lord Henley once said he believed Lord Hardwicke had at last renounced his opinion, *Bastard* v. *Proby*, 2 Cox, 8.

come to this Court to have the benefit of the will. But that is the case of every trust. The true criterion is this. Wherever the assistance of this Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations; but where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law" (*a*). And Lord Eldon observed: "Where there is an executory trust, that is, where the testator has directed something to be done, and has not himself completed the devise, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the Court enquires what it is itself to do, and it will mould what remains to be done, so as to carry that intention into execution" (*b*). [And in a modern case Sir G. Jessel, M.R., observed: "It is called an executory trust, where the testator, instead of expressing exactly what he means—that is, filling up the terms of the trust, tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect: 'Now there are my intentions, do your best to carry them out'" (*c*).]

Executory trusts in marriage articles distinguished from the like trusts in wills.

6. We proceed to the enquiry to what extent in executory trusts a latitude of construction is admissible; and to draw the line correctly, we must again distinguish between executory trusts in *marriage articles*, where the Court has a clue to the intention from the very nature of the contract, and executory trusts in *wills*, where the Court knows nothing of the object in view *à priori*, but in collecting the intention must be guided solely by the language of the instrument.

Occasionally confounded.

This distinction was at first but very imperfectly understood. Because executory trusts under wills admitted a degree of latitude, it was held by some that they were to be treated precisely on the same footing as executory trusts in marriage articles; while, because trusts under wills did not admit an equal latitude of construction, it was held by others that they were not to be distinguished from trusts executed (*d*). Even Lord Eldon once observed: "There is

(*a*) *Austen* v. *Taylor*, 1 Eden, 366, 368; and see *Stanley* v. *Lennard*, Ib. 95; *Wright* v. *Pearson*, Ib. 125.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 570; and see *Coape* v. *Arnold*, 4 De G. M. & G. 585.

[(*c*) *Miles* v. *Harford*, 12 Ch. D. 691, 699.]

(*d*) See *Bale* v. *Coleman*, 8 Vin. 267.

no difference in the execution of an executory trust created by will, and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity" (*a*). But Lord Manners said he could not assent to this doctrine (*b*); and Lord Eldon some time after took an opportunity of correcting himself (*c*).

Distinction drawn by Sir W. Grant.

The distinction we are considering has been put in a very clear light by Sir W. Grant. "I know of no difference," he said, "between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. Where the object is to make a provision by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the *agreement* be to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention. But if a *will* directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement" (*d*).

"Heirs of the body" in articles construed first and other sons.

7. To apply the foregoing distinction to the cases that have occurred: if in *marriage articles* the real estate of the husband or wife be limited to the *heirs of the body*, or the *issue* (*e*) of the contracting parties, or either of them, or to the heirs of the body, or issue and their heirs (*f*), so that heirs of the body, or issue, if taken in their ordinary legal sense, would enable one or other of the parents to defeat the provision intended for the children, these words will then be construed in equity to mean first and other sons; and the settlement will be made upon them successively in tail, as purchasers (*g*).

Distinction where the settlement was after the marriage, and where before it.

If the settlement has been already made, then, provided the

(*a*) *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 227, 230; and see *Turner* v. *Sargent*, 17 Beav. 519.

(*b*) *Stratford* v. *Powell*, 1 B. & B. 25; *Synge* v. *Hales*, 2 B. & B. 508.

(*c*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 574.

(*d*) *Blackburn* v. *Stables*, 2 V. & B. 369; and see *Maguire* v. *Scully*, 2 Hog. 113; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 18; 4 Ir. Eq. Rep. 375; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543; *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. 117.

(*e*) *Dod* v. *Dod*, Amb. 274; *Grier* v. *Grier*, 5 L. R. H. L. 688.

(*f*) *Phillips* v. *James*, 2 Drew. & Sm. 404.

(*g*) *Handick* v. *Wilkes*, 1 Eq. Ca. Ab. 393; *Trevor* v. *Trevor*, 1 P. W. 622; *Jones* v. *Langton*, 1 Eq. Ca. Ab. 392; *Cusack* v. *Cusack*, 5 B. P. C. 116; *Griffith* v. *Buckle*, 2 Vern. 13; *Stonor* v. *Curwen*, 5 Sim. 269, *per* Sir L. Shadwell; *Davies* v. *Davies*, 4 Beav. 54; *Rochford* v. *Fitzmaurice*, *ubi sup.*

execution of it was after the marriage, it will be rectified by the articles (*a*); but if the execution of it was prior to the marriage, the Court will presume the parties to have entered into a different agreement (*b*), unless the settlement expressly state itself to be made in pursuance of the articles, when that presumption will be rebutted, and the settlement will be rectified (*c*); or unless it can be otherwise shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from mistake (*d*).

Limitation of the husband's property to the heirs of the body of the wife.

Under the law as it stood prior to the Fines and Recoveries Act (*e*), a strict settlement was not decreed, where the property of the *husband* was limited to the heirs of the body of the *wife*; for this created an entail which neither husband nor wife could bar without the concurrence of the other, and the intent might have been, that the husband and the wife *jointly* should have the power of destroying the entail (*f*); but it is conceived, that as to articles executed subsequently to the Act referred to, the case would be otherwise (*g*).

Where the settlement also contains a limitation to the parent for life, with remainder to first and other sons in tail.

Nor will the Court read heirs of the body as first and other sons, where such a construction is negatived by anything in the articles themselves: as if one part of an estate be limited to the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, and another part be given to the husband for life, remainder to the heirs male of his body; for, as it appears the parties knew how a strict settlement should be framed, the limitation of part of the estate in a different mode could only have proceeded from a different intention (*h*).

Heirs female.

8. It was formerly argued, that *daughters* in marriage articles were not entitled to the same consideration as sons, on the ground

(*a*) *Streatfield* v. *Streatfield*, Cas. *t.* Talb. 176; *Warrick* v. *Warrick*, 3 Atk. 193, *per* Lord Hardwicke; *Legg* v. *Goldwire*, Cas. *t.* Talb. 20, *per* Lord Talbot; *Burton* v. *Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Ab. 393, overruled.

(*b*) *Legg* v. *Goldwire*, Cas. *t.* Talbot, 20; and see *Warrick* v. *Warrick*, 3 Atk. 291. [Whether the principle of *Legg* v. *Goldwire* extends to antenuptial settlements in part executory, *quære*; *Re Gundry*, (1898) 2 Ch. 504.]

(*c*) *Honor* v. *Honor*, 1 P. W. 123; *Roberts* v. *Kingsley*, 1 Ves. 238; *West* v. *Errissey*, 2 P. W. 349; but not it seems against a purchaser, *Warrick* v. *Warrick*, 3 Atk. 291.

(*d*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 565.

(*e*) See 3 & 4 W. 4 c. 74, ss. 16, 17.

(*f*) *Howel* v. *Howel*, 2 Ves. sen. 358; *Whately* v. *Kemp*, cited 1b.; *Honor* v. *Honor*, 1 P. W. 123; *Green* v. *Ekins*, 2 Atk. 477, *per* Lord Hardwicke; *Highway* v. *Banner*, 1 B. C. C. 587, *per* Sir L. Kenyon; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 555, *per* Lord Hatherley.

(*g*) *Rochford* v. *Fitzmaurice*, 2 Drur. & War. 19.

(*h*) *Howel* v. *Howel*, 2 Ves. sen. 359; and see *Powell* v. *Price*, 2 P. W. 535; *Chambers* v. *Chambers*, Fitzgib. Rep. 127; *S. C.* 2 Eq. Ca. Ab. 35; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws, 174.

that they do not, like sons, continue the name of the family, and are generally provided for, not by the estate itself, but by portions out of the estate; but it is now clearly settled that, as they are purchasers under the marriage, and are entitled to some provision, the Court will in their favour construe heirs female to mean daughters (*a*); and unless the articles themselves make an express provision for them by way of portion, &c. (*b*), will hold daughters, as well as sons, to be included under the general term of heirs of the body (*c*), or issue (*d*). And the settlement will be executed on the daughters, in default of sons, as tenants in common in tail general, with cross remainders between them (*e*).

Limitation of chattels to heirs of the body.

9. If *chattels* be articled to be settled on the parents for life, and then on the *heirs of the body* of either, or both, it seems the chattels will not vest absolutely in the parents, but in the eldest son as the heir, though taking by purchase, and if there be no son, in the daughters as co-heiresses (*f*); and for the son or daughters to take, it is not necessary that they should survive the parents and become the actual heirs (*g*), unless there be words in the articles to give it to the heirs of the body living at the death of the surviving parent, as "if the parent die without *leaving* heirs of the body" (*h*).

Articles to settle chattels on same trusts as real estate.

10. Again, if in *marriage articles*, a party covenant to settle *personal estate* upon the trusts, and for the intents and purposes upon and for which the freeholds are settled, the Court will not apply the limitations to the personal estate literally, the effect of which would be to vest the absolute interest in remainder in the first son on his birth, but will insert a proviso that will have the effect, at least to a certain extent, of making the personal estate follow the course of the real.

Limitations over on dying under 21, or under 21 without issue.

Sir Joseph Jekyll said, the practice of conveyancers was to insert a limitation over on "dying under 21" (*i*): but Lord Hardwicke conceived the common limitation over to be on "dying under 21 without issue" (*j*). In *The Duke of Newcastle*

(*a*) *West* v. *Errissey*, 2 P. W. 349.
(*b*) *Powell* v. *Price*, 2 P. W. 535; and see Mr Fearne's observations, Conting. Rem. 103.
(*c*) *Burton* v. *Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Ab. 393, *per* Lord Cowper.
(*d*) *Hart* v. *Middlehurst*, 3 Atk. 371; and see *Maguire* v. *Scully*, 2 Hog. 113; *S. C.* 1 Beat. 370.
(*e*) *Marryat* v. *Townly*, 1 Ves. 106; *Phillips* v. *James*, 4 Drew. & Sm. 404.
(*f*) *Hodgeson* v. *Bussey*, 2 Atk. 89; *S. C.* Barn. 195. See *Bartlett* v. *Green*, 13 Sim. 218.
(*g*) *Theebridge* v. *Kilburne*, 2 Ves. 233.
(*h*) *Read* v. *Snell*, 2 Atk. 642.
(*i*) *Stanley* v. *Leigh*, 2 P. W. 690.
(*j*) *Gower* v. *Grosvenor*, Barn. 63; *S. C.* 5 Mad. 348.

v. *The Countess of Lincoln* (*a*), leaseholds were articled to be settled to the same uses as the realty, viz. to A. for life, remainder to A.'s first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, having had a son who lived only nine months. Lord Loughborough held that the leaseholds had not vested absolutely in the deceased son of A., and ordered a proviso to be inserted in the settlement, that they should not vest absolutely in any son of B., who should not attain 21 or *die under that age leaving issue male.* From this decision an appeal was carried to the House of Lords (*b*); but before the cause could be heard, a son of B. having attained 21, the decree was, that the son of B. had become absolutely entitled. Thus the House of Lords decided that the absolute interest had not vested in the first tenant in tail on his birth; but what proviso ought to have been inserted, whether a limitation over "on dying under 21," or "on dying under 21 without issue male," the House in the event was not called upon to determine. The order of the House of Lords in this case was made with the approbation of Lord Ellenborough and Lord Erskine (who took part in the debate), and also of Lord Thurlow (*c*). But Lord Eldon denied before the House that there was any distinction between articles and wills, and therefore relying upon *Foley* v. *Burnell* and *Vaughan* v. *Burslem*, two cases upon wills decided by Lord Thurlow, he said, had the cause come originally before him, he should have decreed the absolute interest to have vested in the eldest child upon birth; that assignments had been made of leasehold property under a notion that a son when born would take an absolute interest; and, were the House to sanction the decree of Lord Loughborough, it would shake a very large property (*d*). However, his Lordship conceived that Lord Hardwicke's doctrine was originally the best, and therefore, recollecting the opinion of that great Judge, the opinion of Sir Joseph Jekyll, and the decision of the Court below, and knowing the concurrent opinions of Lord Ellenborough and Lord Erskine, and also the opinion of Lord Thurlow (whose present sentiments, however, he could not reconcile with the cases of *Foley* v. *Burnell* and *Vaughan* v. *Burslem*, formerly decided by his Lordship) (*e*), he bowed to all these

(*a*) 3 Ves. 387, see the observations pp. 394, 397; and see *Scarsdale* v. *Curzon*, 1 J. & H. 51, 54.
(*b*) 12 Ves. 218.
(*c*) 12 Ves. 237.
(*d*) 12 Ves. 236, 237.
(*e*) See *post* p. 139, note (*d*). Lord Eldon could not reconcile Lord Thurlow's opinion with these cases, because his Lordship refused to admit the distinction between articles and wills.

authorities; and, though he was in some degree dissatisfied with the determination, he, nevertheless, would not move an amendment (*a*).

Personalty cannot be knit to realty entirely.

It must be observed that a settlement of the personalty cannot be made exactly analogous to a settlement of the realty, whether the limitation adopted be "on dying under 21," or "on dying under 21 without issue." For if the former be supposed, then, the object of the articles being to knit the personal estate to the freehold, if the son die under age leaving issue who will succeed to the freehold, the two estates will go in different directions. But if the limitation over be "on dying under 21 without issue," then, if the son die leaving issue, such issue may die under age and unmarried, when the personalty will go to the son's personal representative, while the freeholds will devolve on the second son (*b*).

Joint tenancy in articles construed tenancy in common.

11. Again, in *marriage articles* as *joint tenancy* is an inconvenient mode of settlement on the children of the marriage (for during their minorities no use can be made of their portions, as the joint tenancy cannot be severed) (*c*), the Court will rectify the articles by the presumed intent of the contract, and will permit words that would be construed a joint tenancy at law to create in equity a tenancy in common (*d*).

Words supplied in articles.

12. In other cases the Court has varied the literal construction by supplying words, as where the agreement was to lay out 200*l.* in the purchase of 30*l.* a year, to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and, until the settlement should be made, the 200*l.* was to be applied to the separate use of the wife; and, if no settlement were executed during their joint lives, the 200*l.* was to go to the wife, if living, but, if she died before her husband, then to her brother and sister; and the wife died before her husband, but left issue; it was held the brother and sister had no claim to the fund, the words "if she died before her husband" intending plainly if she so died "without

(*a*) *The Countess of Lincoln* v. *The Duke of Newcastle*, 12 Ves. 237, and see *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

(*b*) *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 228, 229.

(*c*) *Taggart* v. *Taggart*, 1 Sch. & Lef. 88, *per* Lord Redesdale; and see *Rigden* v. *Vallier*, 2 Atk. 734, and *Marryat* v. *Townly*, 1 Ves. 103. [But it would seem that an instrument executed by an infant, though voidable, severs the joint tenancy until it is avoided, but that if the infant when of age avoids the instrument, the joint tenancy will arise again; *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; *Whittingham's* Case, 8 Rep. 42b; Coke on Litt. 337a, 337b; but see *May* v. *Hook*, Coke on Litt. 246a, note (1), and Simpson on Infants, 2nd ed. p. 24.]

(*d*) *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; *Mayn* v. *Mayn*, 5 L. R. Eq. 150; [*L'Estrange* v. *L'Estrange*, (1902) 1 I. R. 372].

leaving issue" (*a*). [The Court has also in a *modern* settlement supplied a hotchpot clause (*b*).]

Vague provision.

13. It has been held in marriage articles that a trust to *provide suitably* for the settlor's younger children is not too vague to be executed, but the Court will direct an enquiry what the provision should be (*c*).

How "heirs of the body" construed in executory trusts in wills.

14. Next as to *wills;* and here, as no presumption arises *à priori,* that "*heirs of the body*" were intended as words of purchase, if the executory trust of real estate be to "A. and the heirs of his body" (*d*), or to "A. and the heirs of his body and their heirs" (*e*), or to "A. for life, and after his decease to the heirs of his body" (*f*), the legal and ordinary construction will be adopted, and A. will be tenant in tail. So, where the estate was directed to be settled on the testator's "daughter and her children, and, if she died without issue," the remainder over, the Court said that, by an immediate devise of the land in the words of the will, the daughter would have been tenant in tail, and in the case of a voluntary devise the Court must take it as they found it, though upon the like words in marriage articles it might have been otherwise (*g*).

"A. for life, and heirs male of his body, and their heirs male successively."

And where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively one after another as they should be in seniority of age and priority of birth, every elder and the heirs male of his body to be preferred before every younger," Lord Cowper said the nephew took by a voluntary devise, and, although executory, it was to be taken in the very words of the will as a devise, and was not to be supported or carried further in a Court of Equity than the same words would operate at law in a voluntary conveyance (*h*). The decision that the nephew was tenant in tail went apparently upon the ground that the words, "and the heirs male of the body of every such heir male,

(*a*) *Kentish* v. *Newman*, 1 P. W. 234; and see *Targus* v. *Puget*, 2 Ves. 194; *Master* v. *De Croismar*, 11 Beav. 184; *Martin* v. *Martin*, 2 R. & M. 507.

[(*b*) *Miller* v. *Gulson*, 13 L. R. Ir. 408, 428, distinguishing *Lees* v. *Lees*, 5 Ir. R. Eq. 549.]

(*c*) *Brenan* v. *Brenan*, 2 Ir. R. Eq. 266.

(*d*) *Harrison* v. *Naylor*, 2 Cox, 274; *Bagshaw* v. *Spencer*, 1 Ves. 151, *per* Lord Hardwicke; *Marshall* v. *Bousfield*, 2 Mad. 166.

(*e*) *Marryat* v. *Townly*, 1 Ves. 104, *per* Lord Hardwicke.

(*f*) *Blackburn* v. *Stables*, 2 V. & B. 370, *per* Sir W. Grant; *Seale* v. *Seale*, 1 P. W. 290; *Meure* v. *Meure*, 2 Atk. 266, *per* Sir J. Jekyll.

(*g*) *Sweetapple* v. *Bindon*, 2 Vern. 536.

(*h*) *Legatt* v. *Sewell*, 2 Vern. 551.

severally and successively, &c.," were all included in the notion of an entail, and *expressio eorum, quæ tacite insunt, nihil operatur.*

"Proper entail on the heir male."

And in a more recent case, where the executory trust was for A. generally, with a direction that the trustees should not give up their trust till "a *proper entail* was made to the heir male by him," it was determined that A. took an estate tail (*a*). However, in another case, where the devise was extremely similar, viz. to A. with a direction that the estate should be *entailed* on his heir male, Lord Eldon, on the assumption that it was an executory trust, and not a legal devise, considered the entail so doubtful that he would not compel a purchaser to accept a title under it (*b*).

Heirs of the body construed to mean sons, even in wills, where any expression of intention to that effect.

15. But "heirs of the body" will in the case of executory trusts in wills as well as in articles be read first and other sons, provided the testator expressly manifest such an intention, as if he direct a settlement on A. for life "without impeachment of waste" (*c*), or with a limitation to preserve contingent remainders (*d*), or if he desire that "care be taken in the settlement that the tenant for life shall not bar the entail" (*e*), or otherwise show that the direction to settle on A. and the heirs of his body was not meant to give him a power of disposition over the estate (*f*); and in one case "heirs of the body" was so construed, where a testator had devised to the separate use of a *feme covert* for life, so as she alone should receive the rent, and the husband should not intermeddle therewith, and *after her decease* in trust for the heirs of her body; for, from the limitation to the heirs immediately after the wife's decease, coupled with the direction that the husband should not intermeddle with the estate, the Court collected the intention of excluding the husband's curtesy, an object which could only be accomplished

(*a*) *Blackburn* v. *Stables*, 2 V. & B. 367; recognised in *Marshall* v. *Bousfield*, 2 Mad. 166; and see *Dodson* v. *Hay*, 3 B. C. C. 405.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; and see *Woolmore* v. *Burrows*, 1 Sim. 512; *Sealey* v. *Stawell*, 9 Ir. R. Eq. 499.

(*c*) *Lord Glenorchy* v. *Bosville*, Cas. t. Talbot, 3.

(*d*) *Papillon* v. *Voice*, 2 P. W. 471; and see *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 158.

(*e*) *Leonard* v. *Lord Sussex*, 2 Vern. 526.

(*f*) *Thompson* v. *Fisher*, 10 L. R. Eq. 207. It is presumed that the Court attributed an intention to this effect, for if the Court directed a strict settlement, merely on the ground that the trust was executory, it would conflict with the authorities, and with the canon laid down in the House of Lords, that in the case of a *will* or *deed of gift* the intention that the very words mentioned in the instrument as proper for the *more complete conveyance* are not to be used, must be plainly manifested by the *first* instrument, and will not be assumed *merely because the trust is executory*; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 555, *per* L.C.; and see *Duncan* v. *Bluett*, 4 Ir. R. Eq. 469.

by giving to "heirs of the body" the construction of words of purchase (*a*).

"A. and the heirs of his body, as counsel shall advise," &c.

And a direction to settle on A. and the heirs of the body "as counsel shall advise" (*b*), or "as the executors shall think fit" (*c*), is strong collateral evidence that something more was intended than a simple estate tail.

Rule in Shelley's case not applicable where the life estate is to the separate use.

Sir L. Shadwell thought that if a testator directed an estate to be settled on a *feme covert* for life, for her *separate use*, and at her death on her *issue*, the feme would not be tenant in tail, for the separate use requiring the life estate to be vested in trustees (*d*), the equitable estate in the feme could not unite with the legal estate in the issue, and therefore the rule in Shelley's case would not apply (*e*).

Trevor *v.* Trevor.

Where the trust was to settle on A. for life, *without impeachment of waste*, with remainder to his issue in tail mail, in *strict settlement*, the Court directed the estates to be settled on A. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the daughters, as tenants in common in tail male, with cross remainders in tail male, and proper limitations to trustees were inserted to preserve contingent remainders (*f*). But where a testator devised an estate to C. for life, and on her death to be "strictly entailed on her eldest son J.," the Court directed a settlement on C. for life, with remainder to J. for life, with remainder to his first and other sons successively in tail general, with remainder to his daughters as tenants in common in tail general, &c. (*g*).

"Heirs of the body" and "issue" not of the same import.

16. We may here remark that "*heirs of the body*" and "*issue*" are far from being synonymous expressions. The former are properly words of limitation, whereas the latter term is in its primary sense a word of purchase. In several cases the Court appears to have ordered a strict settlement from the use of the term "issue," where, had the expression been "heirs of the body," the estate would probably have been construed an estate tail (*h*).

(*a*) *Roberts* v. *Dixwell*, 1 Atk. 607; *S. C.* West's Rep. *t.* Lord Hardwicke, 536.

(*b*) *White* v. *Carter*, 2 Eden, 366; reheard, Amb. 670.

(*c*) *Read v. Snell*, 2 Atk. 642.

[(*d*) See now the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.]

(*e*) See *Stonor* v. *Curwen*, 5 Sim. 268; *Earl of Verulam* v. *Bathurst*, 13 Sim. 386; *Coape* v. *Arnold*, 2 Sm. & Gif. 311; 4 De G. M. & G. 574.

(*f*) *Trevor* v. *Trevor*, 13 Sim. 108; affirmed on this point, 1 H. of L. Ca. 239; and see *Coape* v. *Arnold*, 2 Sm. & Gif. 311; 4 De G. M. & G. 574.

(*g*) *Sealey* v. *Stawell*, 9 I. R. Eq. 499.

(*h*) *Ashton* v. *Ashton*, cited in *Bagshaw* v. *Spencer*, 1 Coll. Jur. 402; *Meure* v. *Meure*, 2 Atk. 265; and see *Horne* v. *Barton*, G. Coop. 257; *Dodson* v. *Hay*, 3 B. C. C. 405; *Stonor* v. *Curwen*, 5 Sim. 264; *Crozier* v. *Crozier*,

17. Of course, *daughters* as well as sons will be included under "heirs of the body" (*a*), or "issue" (*b*); for they equally answer the description, and are equally objects of bounty; and where these words are construed as words of purchase, the settlement will be made upon the daughters in default of sons, as tenants in common in tail, with cross remainders between or amongst them (*c*). Daughters included in "heirs of the body" and "issue."

18. In executing a strict settlement the Court, unless there be some special words which point to the contrary, will not make the tenant for life dispunishable for *waste* (*d*), and a direction to settle to the separate use without power of anticipation is inconsistent with a life estate without impeachment of waste (*e*). Waste.

Before the Real Property Act, 1845 (8 & 9 Vict. c. 106), the Court took care that proper limitations to *trustees* should be inserted after the life estates for the preservation of contingent remainders (*f*); and although, by the effect of the Act referred to, contingent remainders are no longer destructible by the *forfeiture, merger, or surrender of the previous life estate*, the limitations to trustees to preserve may still, it is conceived, be properly interposed, with the view of affording a convenient means of protecting the interests of contingent remaindermen in the event of wilful waste or destruction being committed by the tenant for life before any remainderman comes *in esse* (*g*). Limitation to preserve contingent remainders.

19. In a case occurring before the Fines and Recoveries Act (3 & 4 W. 4. c. 74), where the testator had shown an anxious wish that the power of defeating the entail should be as much restricted as possible, the Court, instead of giving the first freehold to the tenant for life, which would have enabled him to make a tenant to the præcipe, ordered the freehold during his life to be vested in *trustees* in trust for him (*h*). First freehold in trustees.

However, in a case occurring after the Fines and Recoveries Act, where an estate was vested in a trustee upon trust to Protector.

2 Conn. & Laws. 311; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 158; *Bastard* v. *Proby*, 2 Cox, 6; *Haddesley* v. *Adams*, 22 Beav. 276.

(*a*) *Bastard* v. *Proby*, 2 Cox, 6.

(*b*) *Meure* v. *Meure*, 2 Atk. 265; *Ashton* v. *Ashton* cited in *Bagshaw* v. *Spencer*, 1 Coll. Jur. 402; *Trevor* v. *Trevor*, 13 Sim. 108.

(*c*) *Meure* v. *Meure*, 2 Atk. 265; *Bastard* v. *Proby*, 2 Cox, 6; *Ashton* v. *Ashton*, and *Trevor* v. *Trevor*, *ubi sup.*; *Murryat* v. *Townly*, 1 Ves. sen. 105.

(*d*) *Stanley* v. *Coulthurst*, 10 L. R. Eq. 259; *Davenport* v. *Davenport*, 1 H. & M. 779.

(*e*) *Clive* v. *Clive*, 7 L. R. Ch. App. 433.

(*f*) *Harrison* v. *Naylor*, 2 Cox, 247; *S. C.* 3 B. C. C. 108; *Woolmore* v. *Burrows*, 1 Sim. 512; *Baskerville* v. *Baskerville*, 2 Atk. 279; *Trevor* v. *Trevor*, 13 Sim. 108; *Stamford* v. *Hobart*, 3 B. P. C. 31; and see *Hopkins* v. *Hopkins*, 1 Atk. 593.

(*g*) *Garth* v. *Cotton*, 1 Ves. 554.

(*h*) *Woolmore* v. *Burrows*, 1 Sim. 512, see 527.

execute a strict settlement on Lady Le Despencer and her family, and the Master, to whom a reference was directed, approved of a settlement on Lady Le Despencer for life, &c., but refused to appoint a *protector* under the 32nd section of the Act, the Court held that, though in certain cases it might be advisable to appoint a protector, there should be special circumstances to warrant it; that the trustee was the "settlor" within the meaning of the 32nd section, and had the power to appoint a protector; and as he did not desire it, the Court, unless there were good reasons to the contrary, would not control his discretion; that a protector under the Act was an irresponsible person, and was at liberty to act from caprice, ill-will, or any bad motive, and might even take a bribe for consenting to bar the entail, without being amenable to the Court, and therefore, on the whole, it was better not to clog the settlement with a protector (*a*).

Gavelkind lands.

20. Where *gavelkind* lands are the subject of the executory trust, the circumstance of the custom will not prevent the settlement being made upon the first and other sons successively, for the heirs take not by custom, but under the construction of a Court of Equity, which must be guided by the rules of the Common Law (*b*).

Where the testator directs a settlement, but formally declares the limitations.

21. Where the Court enlarges and rectifies the will it does so on the ground of the limitations having been imperfectly declared; but if a testator direct a settlement, and be *his own conveyancer*, that is, declare the limitations himself, intending them to be *final*, the hands of the Court are bound, and the words must be taken in their natural sense (*c*). Thus, where a testator devised to A. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainders over, and then directed the residue of his personal estate to be laid out in the purchase of lands, and declared that the lands when purchased "should remain and continue to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before limited and declared of and concerning his lands and premises thereinbefore devised, or as near thereto as might be, and the deaths of parties would admit," Lord Northington said that the testator had referred no settlement to his trustees to

(*a*) *Bankes* v. *Le Despencer*, 11 Sim. 508.
(*b*) *Roberts* v. *Dixwell*, 1 Atk. 607.
(*c*) *Franks* v. *Price*, 3 Beav. 182; and see *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 21; *Doncaster* v. *Doncaster*, 3 K. & J. 26.

complete, but had declared his own uses and trusts, which being declared, there was no instance where the Court had proceeded so far as to alter or change them (*a*). However, the decision to which his Lordship came seems not to have met with the entire approbation of Lord Eldon (*b*).

Executory trusts of chattels in wills.

22. In the cases relating to executory trusts of *chattels* in wills, the bequest, instead of being direct, has generally been by way of reference to a previous strict settlement of realty.

The law upon this subject was for a long time in a very unsatisfactory state, but the result of the cases (*c*) at the present day appears to be that where a testator devises land in strict settlement, and then bequeaths heir-looms to be held by or in trust for the parties entitled under the limitations of the real estate, or without making any bequest, directs or expresses a desire that the heir-looms shall be held upon the like trusts, even though the testator should add the words "as far as the rules of law and equity will permit," the use of the heir-looms will belong to the tenant for life of the real estate for his life, and the property of the heir-looms will vest absolutely in the first tenant in tail immediately on his birth, though he afterwards die an infant. The Court, in these cases, either regards the trusts as executed, and not of a directory character, or if the trusts be executory, the Court considers it has no authority in making a settlement to insert a limitation over on the tenant in tail dying under 21. However, there is no unlawfulness in such a limitation, so that if a bequest of heir-looms in a will be clearly executory, and the testator manifests a distinct intention that a settlement shall be made of the heir-looms, and that such clauses shall be inserted as will render them inalienable for as long a period as the law will permit, the Court would, no doubt, execute the intention by settling the heir-looms, and inserting a limitation by which the absolute interest in the first tenant in tail should by his death under 21, or by his death under 21 without issue, be carried over to the person next entitled in remainder (*d*). But if heir-looms be assigned or bequeathed to

(*a*) *Austen* v. *Taylor*, 1 Eden, 368.

(*b*) See *Green* v. *Stephens*, 17 Ves. 76; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 572.

(*c*) *Scarsdale* v. *Curzon*, 1 Johns. & Hem. 40, and the cases there cited and commented upon; and see *Stratford* v. *Powell*, 1 B. & B. 1; *Doncaster* v. *Doncaster*, 3 K. & J. 26; *Christie* v. *Gosling*, 1 L. R. H. L. 279; *Harrington* v. *Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87; [*Angerstein* v. *Angerstein*, (1895) 2 Ch. 883].

(*d*) See the observations of Lord Loughborough in *Foley* v. *Burnell*, 1 B. C. C. 284, and of Lord Thurlow in *Vaughan* v. *Burslem*, 3 B. C. C.

trustees, not upon trust simply for the persons entitled under the limitations of the real estates, which, notwithstanding the words "so far as the rules of law and equity will permit," would vest them absolutely in the first tenant in tail who came into being, but upon trust, "as far as the rules of law and equity will permit," for the persons successively entitled to the *actual freehold* (in the sense of the *freehold in possession*), with a proviso that no *child* of a person made tenant for life shall take absolutely unless he attains 21, here, though the trust be executed and not executory, the absolute vesting is coupled with the *possession*, and is therefore suspended until the death of the tenant for life, and will then vest in the child who, after his death, shall first fulfil the requisite of being tenant in tail in possession and attaining the age of 21 years (*a*).

In one case a testator gave certain jewels to his nephew John, "to be held as heir-looms by him, and by his eldest son on his decease, and to descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law and equity would permit." John died in 1866, leaving an eldest son, the plaintiff (born in testator's lifetime), and the Court [held that a valid executory trust was created, and] declared that the jewels were in trust for John for life, and on his death for plaintiff for his life, and on his death for his eldest son, to be vested at 21, and if he died in the lifetime of plaintiff, or after his death but under 21, leaving an eldest son born before the death of plaintiff, then in trust for such eldest son, to be vested at 21 (*b*), with an ultimate trust in favour of John (*c*).

Where freeholds and chattels real were devised to trustees in trust for the testator's son for life, with a direction that, if he married, the trustees should settle and secure the premises as a *jointure to the wife* for her life, and to the *issue* share and share alike; and the son died, having *married twice*, but having had issue by the first wife, viz. three daughters, the Court directed

p. 106; and of V. C. Wood in *Scarsdale* v. *Curzon*, 1 J. & H. 40; *Sackville-West* v. *Viscount Holmsdale*, 4 L. R. H. L. 543.

(*a*) *Scarsdale* v. *Curzon*, 1 J. & H. 40, and cases there considered; *Christie* v. *Gosling*, 1 L. R. H. L. 279; *Harrington* v. *Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87; [*Re Johnston, Cockerell* v. *Essex*, 26 Ch. D. 538; *Angerstein* v. *Angerstein*, (1895) 2 Ch. 883 (where the words were "actual possession"); *Re Fothergill's Estate*, (1903) 1 Ch. 149, citing *Potts* v. *Potts*, 3 J. & Lat. 368, 369; *Re Lord Chesham's Settlement*, (1909) 2 Ch. (C.A.) 329 (where the will indicated an intention that heir-looms should belong to the *possessor* of the mansion-house), following *Re Lord Chesham's Estate*, 31 Ch. D. 466].

(*b*) *Shelley* v. *Shelley*, 6 L. R. Eq. 540.

(*c*) *S. C.* 6 L. R. Eq. 550.

a settlement of the whole on the second wife for life by way of jointure, with remainder to the three daughters as to the freeholds as tenants in common in tail, with cross remainders between them, and as to the chattels real, as tenants in common absolutely (*a*). [And where a testator directed that the shares of his daughters in his personal estate, in case of their respective marriages, should be assigned to trustees for the benefit of the daughter or daughters so marrying for life, and after her or their deceases for the use of her or their intended husband or husbands for his or their life or lives, and after their decease respectively for the children of such marriage or respective marriages, with a gift over in the event of a daughter dying "without leaving any issue her surviving," it was held that, as the gift over showed an intention on the part of the testator to include children of a future marriage, so the executory trust authorised a settlement of a daughter's share on her for life with remainder to *any* husband, and that a *second husband* was accordingly entitled to a life interest (*b*).

Where freeholds were settled by will in strict settlement with a shifting clause in certain events, and the testator gave leaseholds to trustees "upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes and directions as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisoes and directions in the will declared and contained concerning the freeholds," it was held that the trust as to the leaseholds was executory, and that assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection (*c*).]

Trust to correspond with limitations of peerage.

In another case (*d*) a testatrix devised real and personal estate to trustees in trust for A. for life, with remainders over in tail. A peerage was afterwards granted to A. for life, with remainder to B., her second son, in tail male; and then the testatrix by a codicil directed the trustees to settle the real and personal estate "in a course of entail to correspond as nearly as might be with the limitations of the barony, in such manner and form and with such powers as the trustees should consider proper or their

(*a*) *Mason* v. *Mason*, 5 Ir. R. Eq. 288.

[(*b*) *Nash* v. *Allen*, 42 Ch. D. 54.]

[(*c*) *Miles* v. *Harford*, 12 Ch. D. 691. The shifting clause was, in this case, held to be divisible, and, in the events which had happened, not void.]

(*d*) *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543; reversing *West* v. *Viscount Holmesdale*, 3 L. R. Eq. 474.

counsel should advise," and it was held that the object of making provision for the holders of a peerage, and the object of making provision for the children of a marriage, appeared so analogous, that it was the duty of the Court, in the former as well as the latter case, to prevent, as far as possible, the defeat of the object; and accordingly the real estate was directed to be settled on A.'s second son for life, without impeachment of waste, with remainders to his first and other sons in tail male, &c., with power to the tenant for life of jointuring and charging portions, and the personal estate was directed to be settled so as to go along with the real estate in the nature of heir-looms, so far as the rules of law and equity would allow, but so as not to vest in any tenant in tail by purchase who died under 21 without leaving issue inheritable under the entail.

[A bequest of chattels to a peer and his successors, or to a peer and his successors "to be enjoyed with and to go with the title," is not sufficient to create an executory trust, or any binding obligation affecting the legatee (*a*). So under a bequest of chattels to trustees "upon trust to permit and suffer the property to go, and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the title, in the nature of heir-looms," the first person who succeeds to the honours take the chattels absolutely (*b*); and under a bequest of diamonds to Viscount H. "until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title," successively as they shall in turn succeed, "my intention being that the said diamonds shall descend as heir-looms so far as the rules of law and equity will permit," on the death of Viscount H. his successor in the title became absolutely entitled to the diamonds (*c*). But in *Montagu* v. *Lord Inchiquin* (*d*), where there was a gift of family diamonds to Lucius Baron Inchiquin, and the testatrix added, "and I direct the said diamonds to be delivered to Lord Inchiquin free of duty, and I make the above bequest to Lord Inchiquin as head of the existing family, and so far as I lawfully can, I direct that the said diamonds shall be deemed heir-looms in the family of Inchiquin, and shall be

[(*a*) *Re Johnston*, 26 Ch. D. 538.]

[(*b*) *Re Viscount Exmouth*, 23 Ch. D. 158; *Tollemache* v. *Earl of Coventry*, 2 Cl. & Fin. 611.]

[(*c*) *Re Hill*, (1902) 1 Ch. (C.A.) 807. So under a trust for heir-looms to go with a barony, the first successor to the barony took absolutely, notwithstanding that the trustees were directed to permit the heir-looms to be worn and used by his wife for the time being; *Re Gerard*, (1906) W.N. 21.]

[(*d*) *Montagu* v. *Lord Inchiquin*, 23 W. R. 592; 32 L. T. N.S. 427.]

held and enjoyed by the person for the time being bearing the title of Baron Inchiquin," V. C. Hall held that the clause was not executory, that the gift did not lapse by the death of Lucius Baron Inchiquin, in the lifetime of the testatrix, but took effect in favour of the person who should be baron at the death of the testatrix, and that a disposition of chattels to follow a dignity is good where there is no rule against perpetuities transgressed. A gift to trustees of the contents of a house "upon trust to select and set aside a collection of the best paintings, &c., for the Earl of E. and his successors *to be held and settled* as heir-looms and to go with the title," is clearly executory, and confers life interests only on persons *in esse* at the death of the testator (*a*).]

Whether joint tenancy in executory trusts in wills to be construed as tenancy in common.

23. Again, in *wills*, if the words taken in their usual sense would create a *joint tenancy*, the Court has no authority, as it has in articles, to execute the trust by giving a tenancy in common; but where the testator has shown a desire of providing for his children (*b*), or putting himself *in loco parentis* to his grandchildren (*c*), the Court has adopted the same construction as in articles: however, in the cases which have occurred, there has always been some accompanying circumstance to denote a tenancy in common as the estate really intended.

[Direction that personalty shall devolve as realty.]

[24. A mere direction by will that personalty shall devolve or pass to persons successively as realty is not operative, and a bequest of personalty on trust for sale, and to hold the net proceeds "upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of freehold" hereditaments by the same will devised in settlement, is not an imperative trust, and a person who becomes tenant in tail of the freehold is entitled to the personalty without executing a disentailing assurance (*d*).]

Settlement on a feme "*strictly*."

So if personalty be directed by a will to be settled on a female "*strictly*," it will be settled upon her (if married) for her sole and separate use without power of anticipation, with a limitation to her absolutely, if she survive her husband, and should she predecease him, then for such intents and purposes as she may by will appoint, and in default of appointment for her next of kin (*e*).

If a testator bequeath a fund in trust for a *feme*, and direct that, in case of her marriage, it shall be so settled that she may enjoy

[(*a*) *Re Johnston*, 26 Ch. D. 538.]
(*b*) *Marryat* v. *Townly*, 1 Ves. 102.
(*c*) *Synge* v. *Hales*, 2 B. & B. 499.
[(*d*) *Re Walker*, (1908) 2 Ch. 705.]
(*e*) *Loch* v. *Bagley*, 4 L. R. Eq. 122.

the same for her life, the Court will settle it with a *clause against anticipation* (*a*).

[If personal estate be bequeathed for the benefit of a *feme sole*, "to be paid upon her marriage and to be settled upon her by her settlement," the Court will upon her marriage settle it on the usual trusts for her and *her children* (*b*). And when a legacy is directed to be settled upon a married woman for her life, and at her death to be divided equally among her children, a clause in restraint of anticipation of her life interest will be introduced, and the trust for the children will be for such as being sons attain 21, or being daughters attain that age or marry, but without any power of appointment among the children being reserved to the mother (*c*).]

Post-nuptial settlements.

25. Executory trusts in *post-nuptial* settlements, whether voluntary or founded on a valuable consideration, will be construed in the same manner as executory trusts in wills (*d*).

Of powers in executory trusts.

26. We shall conclude this branch of our subject with a few observations upon the powers to be introduced in the execution of settlements, where the trust is executory.

Powers not inserted without a direction.

If the testator or contracting parties give no directions as to the insertion of powers, the Court cannot, upon the ground of implied intention, order a power to be introduced (*e*), except possibly a power of *leasing*, which differs from all other powers in being an almost necessary adjunct for the preservation of the estate itself (*f*). If the authority be expressed in general terms, as "to insert all *usual* powers," the trustees may then introduce

(*a*) *In re Dunnill's Trust*, 6 Ir. R. Eq. 322; and see *Turner* v. *Sargent*, 17 Beav. 515; *Stanley* v. *Jackman*, 23 Beav. 450.

[(*b*) *Duckett* v. *Thompson*, 11 L. R. Ir. 424.]

[(*c*) *Re Parrot*, 33 Ch. D. (C.A.) 274; see this case as to the form of the settlement generally.]

(*d*) *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 158.

(*e*) *Wheate* v. *Hall*, 17 Ves. 80, see 85; and see *Brewster* v. *Angell*, 1 J. & W. 628. In a modern case, however, where a will had simply directed a settlement without authorising any powers expressly, the M.R. held a tacit intention to be implied that powers of leasing, sale and exchange, and appointment of new trustees, and of signing receipts, with provisions for maintenance, education, and advancement, should be inserted; *Turner* v. *Sargent*, 17 Beav. 515. [And in a subsequent case, Fry, J., approved of and followed the decision in *Turner* v. *Sargent*, and said that the case of *Wheate* v. *Hall* did not appear to him to conflict with that view; that there the direction was that the trustees should secure the property in a particular manner, which was so fully detailed in the will that the Court thought it could not, although the trusts were in terms executory, insert a power of sale; *Wise* v. *Piper*, 13 Ch. D. 848, 853.] And see *Scott* v. *Steward*, 27 Beav. 367; *Charlton* v. *Rendall*, 11 Hare, 296.

(*f*) See Fearne's P. W. 310; *Woolmore* v. *Burrows*, 1 Sim. 518.

powers of leasing for 21 years (*a*), of sale and exchange (*b*), of maintenance and advancement (*c*), of varying securities (*d*), and of appointment of new trustees (*e*); and, it seems, where the property is joint, or contains mines, or is fit for building, they may also insert powers of partition, of leasing mines, and of granting building leases (*f*). "But there is a palpable distinction," said Sir Launcelot Shadwell, "between powers for the *management* and better enjoyment of the settled estate, as powers of leasing, of sale and exchange, &c., which are beneficial to all parties, and powers which confer *personal privileges* on particular parties, such as powers to jointure, to charge portions, to raise money for any particular purpose, &c." (*g*). The latter, therefore, may not be introduced under a direction to insert *usual* powers, for they have the effect of diminishing the *corpus* of the settled estate, and the Court has no rule by which to determine the *quantum* of the charge (*h*). But where an estate was directed to be settled so as to go along with a peerage, and the trustees were to insert all such powers as they should "consider proper or their counsel should advise," it was ruled that powers of jointuring and charging portions were for the honour of the whole settlement, and not a favour to the first tenant for life only, in contradistinction to his successors, and therefore ought to be inserted (*i*). If the will or articles direct the insertion of some particular powers by name, then, as *expressio unius exclusio alterius*, the meaning of the words "usual powers" will be materially qualified. Thus, where it was stipulated that the settlement should contain a power of leasing for 21 years in possession, a power of sale and exchange, of appointment of new trustees, and *other usual powers*, it was held that a power of granting building leases could not be inserted (*j*). So, if the trustees be authorised to insert a power of sale and exchange of estates in the county of Hereford, and *all other usual powers*, they would not be justified in extending the power of sale and exchange to estates lying in a different

"Usual powers."

(*a*) See *Hill* v. *Hill*, 6 Sim. 144; *The Duke of Bedford* v. *The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*b*) *Hill* v. *Hill*, 6 Sim. 136; *Peake* v. *Penlington*, 2 V. & B. 311; and see *Williams* v. *Carter*, Append. to Sugd. Treat. on Powers, p. 945, 8th ed.

(*c*) *Mayn* v. *Mayn*, 5 L. R. Eq. 150.

(*d*) *Sampayo* v. *Gould*, 12 Sim. 426.

(*e*) *Lindow* v. *Fleetwood*, 6 Sim. 152; *Brewster* v. *Angell*, 1 J. & W. 628, *per* Lord Eldon; *Sampayo* v. *Gould*, 12 Sim. 426.

(*f*) See *Hill* v. *Hill*, 6 Sim. 145; *The Duke of Bedford* v. *The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*g*) *Hill* v. *Hill*, 6 Sim. 144.

(*h*) *Higginson* v. *Barneby*, 2 S. & S. 516, see 518; *In re Grier's Estate*, 6 Ir. R. Eq. 1.

(*i*) *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

(*j*) *Pearse* v. *Baron*, Jac. 158.

county (*a*). And where a testator directed that the settlement should contain all proper powers for making leases, and *otherwise according to circumstances*, and that provision should also be made for the appointment of new trustees, and the Court was asked to insert a power of sale and exchange, Lord Eldon said: "It was held by Sir W. Grant, that unless the insertion of a power were authorised by the direction to make a settlement, it could not be introduced; and if where nothing is expressed, nothing can be implied, it is impossible where something is expressed, I can imply more than is expressed; and particularly where the will notices what powers are to be given" (*b*). But where a testator directed the insertion of powers of leasing and sale or exchange or partition, and then added: "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are *usually* inserted in settlements of the like nature," and the question was raised whether, under these words, a power of appointment of new trustees might be introduced, Lord Cottenham, then M.R., said: "He had referred to the will, and as he found that those general words were in a separate and distinct sentence, he was of opinion that they would authorise the insertion of the power" (*c*).

"Proper powers."

A testator had directed the insertion of *proper* powers for making leases or otherwise to be reserved to the *tenants for life*, while qualified to exercise them, and, whenever disqualified, to the *trustees*. In the execution of the settlement, a power of sale and exchange was introduced, and was *limited to the trustees with the consent of the tenant for life*; but it was held by Lord Eldon, that the insertion of the power in that mode was not in conformity with the instructions (*d*). It was afterwards debated, before Sir T. Plumer, whether a power of sale and exchange could, in any form, be admitted, when his Honour said that "The first point to be considered was, in whom the powers were to be vested; and it was clear that they were to be given to the tenants for life, if qualified, but if they should not be able to act, to the trustees. Now, if the power of sale and exchange was to be given to the tenant for life without check or control, he could not say that it was a proper power; on the contrary, it might be very dangerous, as the tenant for life might for many

(*a*) *Hill* v. *Hill*, 6 Sim. 141, *per* Sir L. Shadwell.

(*b*) *Brewster* v. *Angell*, 1 J. & W. 625; and see *Horne* v. *Barton*, Jac. 439.

(*c*) *Lindow* v. *Fleetwood*, 6 Sim. 152.

(*d*) *Brewster* v. *Angell*, 1 J. & W. 625.

reasons be induced to sell, when it might not be for the benefit of the remaindermen; nor was it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: If the tenant for life was disqualified, as by infancy, could the Court say it was a proper power to be given exclusively to the trustees?" And, therefore, his Honour thought the power of sale and exchange could not be introduced (*a*).

[27. Now by the Settled Land Act, 1882 (*b*), the tenant for life (*c*) under the settlement is empowered to sell, exchange, enfranchise, and concur in partitioning the settled land (*d*), and to grant building, mining and other leases; and by the Conveyancing and Law of Property Act, 1881 (*e*), the trustees of settlements made after the 31st Dec. 1881, are empowered (subject to any contrary intention expressed in the settlement), during the minority of any person beneficially entitled to the possession of the settled land, to manage the property and apply any income for the maintenance, education or benefit of the infant; and consequently powers for these purposes are not now usually inserted in settlements, and it is conceived that the Court would not insert any of them in a settlement under a direction to insert "usual" or "proper" powers; but would, in the absence of special directions, allow the statutory powers to take effect without variation. [Settled Land Act.]

28. It may further be observed that by the Conveyancing and Law of Property Act, 1881 (*f*), it is declared "that the powers given by the Act to any person, and the covenants, provisions, stipulations and words which under the Act are to be deemed, included or implied in any instrument, shall be deemed *proper* powers, covenants, provisions, stipulations, and words to be given by, or to be contained in, any such instrument," and all persons in a fiduciary position and their solicitor are exempted from any obligation to exclude the operation of the Act where such exclusion is possible.] [Conveyancing Act.]

29. If a settlement of stock with a power of varying securities contain a covenant to settle real estate upon the like trusts, and Powers of sale.

(*a*) *Horne* v. *Barton*, Jac. 437.

[(*b*) 45 & 46 Vict. c. 38, ss. 3, 4, 6, *et seq.*]

[(*c*) The tenant for life under the Act is the person *beneficially* entitled to possession, which includes receipt of the rents and profits; and by s. 58 the powers of a tenant for life are exercisable by various other limited owners therein enumerated.]

[(*d*) By the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5, on an exchange or partition any easement may be reserved, granted, or exchanged. This section authorises an exchange of easements apart from any exchange or partition of the land: *Re Bracken's Settlement*, (1903) 1 Ch. 265.]

[(*e*) 44 & 45 Vict. c. 41, s. 42.]

[(*f*) 44 & 45 Vict. c. 41, s. 66.]

with the like powers, a power of sale and exchange is implied, as corresponding to the power of *varying securities* (*a*).

Multiplication of charges.

30. Trusts are often created by words of reference to other trusts, and where this is the case, there should be a proviso, where such is the intention, that charges on the estate shall not be increased or multiplied. Should the clause, however, be omitted, the Court will exercise its judgment on the question whether the duplication of charges was or not intended by the parties;. and as a general rule a referential trust ought not to be so read as to create a duplication (*b*).

SECTION II

OF IMPLIED TRUSTS

General rule.

1. Wherever a person, having a power of disposition over property, manifests any intention with respect to it in favour of another, the Court, *where there is sufficient consideration, or in a will where consideration is implied,* will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed.

Words precatory.

2. A case of implied trust [more frequent under the earlier than under the later decisions] arises where a testator employs words *precatory,* or *recommendatory* or *expressing a belief* (*c*). Thus if he "desire" (*d*), "will" (*e*), "request" (*f*), "will and desire" (*g*),

(*a*) *Williams* v. *Carter*, App. to Sug. Treat. on Powers, p. 945, 8th ed.; *Elton* v. *Elton* (No. 2), 27 Beav. 634; [*Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595;] and see *Horne* v. *Barton*, Jac. 440.

(*b*) *Hindle* v. *Taylor*, 5 De G. M. & G. 577; *Boyd* v. *Boyd*, 9 L. T. N.S. 166; [*Trew* v. *Perpetual Trustee Company*, (1895) A. C. 264; *Re Marquis of Bristol's Settlement*, (1897) 1 Ch. 946; *Re North*, 76 L. T. N.S. 186].

(*c*) *Cary* v. *Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Paul* v. *Compton*, 8 Ves. 380, *per* Lord Eldon.

(*d*) *Harding* v. *Glyn*, 1 Atk. 469; *Mason* v. *Limbury*, cited *Vernon* v. *Vernon*, Amb. 4; [distinguished in *Re Diggles*, 39 Ch. D. (C.A.) 953]; *Trot* v. *Vernon*, 8 Vin. 72; *Pushman* v. *Filliter*, 3 Ves. 7; *Brest* v. *Offley*, 1 Ch. Rep. 246; *Bonser* v. *Kinnear*, 2 Giff. 195; *Cary* v. *Cary*, 2 Sch. & Lef. 189; *Cruwys* v. *Colman*, 9 Ves. 319; and see *Shaw* v. *Lawless*, Ll. & G. *temp.* Sugden, 154; *S. C.* 5 Cl. & Fin. 129; *S. C.* Ll. & G. *temp.* Plunket, 559.

(*e*) *Eales* v. *England*, Pr. Ch. 200; *Clowdsley* v. *Pelham*, 1 Vern. 411.

(*f*) *Pierson* v. *Garnet*, 2 B. C. C. 38; *S. C.* affirmed, id. 226; *Eade* v. *Eade*, 5 Mad. 118; *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26; *Bernard* v. *Minshull*, Johns. 276; and see *House* v. *House*, 31 L. T. N.S. 427; 23 W. R. 22; [contra, *Hill* v. *Hill*, (1897) 1 Q. B. (C.A.) 483; see *post*, p. 155.]

(*g*) *Birch* v. *Wade*, 3 V. & B. 198; *Forbes* v. *Ball*, 3 Mer. 437.

"will and declare" (*a*), "wish and request" (*b*), "wish and desire" (*c*), "entreat" (*d*), "most heartily beseech" (*e*), "order and direct" (*f*), "authorise and impower" (*g*), "recommend" (*h*), "beg" (*i*), "hope" (*j*), "do not doubt" (*k*), "be well assured" (*l*), "confide" (*m*), "have the fullest confidence" (*n*), "trust" (*o*), "trust and confide" (*p*), "have full assurance and confident hope" (*q*), be "under the firm conviction" (*r*), "in the full belief" (*s*), "well know" (*t*), or use such expressions as "of course the legatee will give" (*u*), "in consideration the legatee has promised to give" (*v*), ["to be applied as I have requested him to do" (*w*),] &c.;

(*a*) *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218. The devise was "to A. and B. in the most *absolute* manner, and willing and declaring an intention." But the decision turned also on other grounds.

(*b*) *Foley* v. *Parry*, 5 Sim. 138; affirmed 2 M. & K. 138.

(*c*) *Liddard* v. *Liddard*, 28 Beav. 266; and see *Re Burley*, (1909) W. N. 253; [contra, *Re Hamilton*, (1895) 2 Ch. (C.A.) 370; see *post*, p. 155].

(*d*) *Prevost* v. *Clarke*, 2 Mad. 458; *Meredith* v. *Heneage*, 1 Sim. 553, 555, *per* Chief Baron Wood; and see *Taylor* v. *George*, 2 V. & B. 378.

(*e*) *Meredith* v. *Heneage*, 1 Sim. 553, *per* Chief Baron Wood.

(*f*) *Cary* v. *Cary*, 2 Sch. & Lef. 189; *White* v. *Briggs*, 2 Phil. 583.

(*g*) *Brown* v. *Higgs*, 4 Ves. 708; 5 id. 495; affirmed 8 Ves. 561; and in D. P. 18 Ves. 192.

(*h*) *Tibbits* v. *Tibbits*, Jac. 317; *S. C.* affirmed 19 Ves. 656; *Horwood* v. *West*, 1 S. & S. 387; *Paul* v. *Compton*, 8 Ves. 380, *per* Lord Eldon; *Malim* v. *Keighley*, 2 Ves. jun. 333; *S. C.* Ib. 529: *Malim* v. *Barker*, 3 Ves. 150; *Meredith* v. *Heneage*, 1 Sim. 553, *per* Chief Baron Wood; *Kingston* v. *Lorton*, 2 Hog. 166; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590; *Hart* v. *Tribe*, 18 Beav. 215; and see *Meggison* v. *Moore*, 2 Ves. jun. 630; *Sale* v. *Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & C. 636; *Randal* v. *Hearle*, 1 Anst. 124; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1. As to *Cunliffe* v. *Cunliffe*, Amb. 686, see *Pierson* v. *Garnet*, 2 B. C. C. 46; *Malim* v. *Keighley*, 2 Ves. jun. 532; *Pushman* v. *Filliter*, 3 Ves. 9.

(*i*) *Corbet* v. *Corbet*, 7 Ir. R. Eq. 456.

(*j*) *Harland* v. *Trigg*, 1 B. C. C. 142; and see *Paul* v. *Compton*, 8 Ves. 380.

(*k*) *Parsons* v. *Baker*, 18 Ves. 476; *Taylor* v. *George*, 2 V. & B. 378; *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunket, 465; and see *Sale* v. *Moore*, 1 Sim. 534.

(*l*) *Macey* v. *Shurmer*, 1 Atk. 389; *S. C.* Amb. 520. See *Ray* v. *Adams*, 3 M. & K. 237.

(*m*) *Griffiths* v. *Evan*, 5 Beav. 241; and see *Shepherd* v. *Nottidge*, 2 J. & H. 766.

(*n*) See *Shovelton* v. *Shovelton*, 32 Beav. 143; *Wright* v. *Atkyns*, 17 Ves. 255, 19 Ves. 299, G. Coop. 111, T. & R. 143; *Webb* v. *Wools*, 2 Sim. N.S. 267; *Palmer* v. *Simmonds*, 2 Drew. 225; *Curnick* v. *Tucker*, 17 L. R. Eq. 320; *Le Marchant* v. *Le Marchant*, 18 L. R. Eq. 414; [contra, *Re Williams*, (1897) 2 Ch. (C.A.) 12; see *post*, p. 154].

(*o*) *Irvine* v. *Sullivan*, 8 L. R. Eq. 673.

(*p*) *Wood* v. *Cox*, 1 Keen, 317; *S. C.* 2 M. & C. 684; *Pilkington* v. *Boughey*, 12 Sim. 114.

(*q*) *Macnab* v. *Whitbread*, 17 Beav. 299.

(*r*) *Barnes* v. *Grant*, 2 Jur. N.S. 1127.

(*s*) *Fordham* v. *Speight*, 23 W. R. 782.

(*t*) *Bardswell* v. *Bardswell*, 9 Sim. 323; *Nowlan* v. *Nelligan*, 1 B. C. C. 489; *Briggs* v. *Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525; [but see the observations on *Briggs* v. *Penny* in *Stead* v. *Mellor*, 5 Ch. D. 225; and see *Clancarty* v. *Clancarty*, 31 L. R. Ir. 530].

(*u*) *Robinson* v. *Smith*, 6 Mad. 194; but see *Lechmere* v. *Lavie*, 2 M. & K. 198.

(*v*) *Clifton* v. *Lombe*, Amb. 519.

[(*w*) *Re Fleetwood*, 15 Ch. D. 594.]

in these and similar cases, the intention of the testator has been considered imperative, and the devisee or legatee held bound and compellable to give effect to the injunction (*a*). And though instances of this kind generally occur upon the construction of wills, the doctrine does not apply to wills exclusively, but has been extended also to settlements *inter vivos* (*b*).

No trust raised where there is uncertainty.

3. But precatory words will be held to express a wish only, and not a command, if it be impracticable for the Court to deal with it as a trust; as if a testator devise a house to his wife, and express a wish that his sister should live with her, for here no interest in the house is given to the sister, and how can the Court compel the widow and sister to live together? (*c*). And the like construction will prevail where either the objects intended to be benefited are imperfectly described (*d*), or the amount of the property to which the trust should attach is not sufficiently defined (*e*); for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was really intended (*f*). The rule as laid down by Lord Alvanley, and since recognised as the correct principle, is, that a trust is created in those cases only "where a testator points out *the objects, the property, and the way in which it shall go*" (*g*).

[(*a*) A trust in favour of a class of "children" at the death of the legatee may be executed by limiting the interests of females to their separate use, for such a limitation effectually carries out the intention; *Willis* v. *Kymer*, 7 Ch. D. 181.]

(*b*) *Liddard* v. *Liddard*, 28 Beav. 266; [and see *Hill* v. *Hill*, (1897) 1 Q. B. (C.A.) 483].

(*c*) *Graves* v. *Graves*, 13 Ir. Ch. Rep. 182; and see *Hood* v. *Oglander*, 34 Beav. 513.

(*d*) *Harland* v. *Trigg*, 1 B. C. C. 142; *Tibbits* v. *Tibbits*, 19 Ves. 664, *per* Lord Eldon; *Richardson* v. *Chapman*, 1 Burn's Eccles. Law, 245; *Pierson* v. *Garnet*, 2 B. C. C. 45, *per* Lord Kenyon; *S. C.* Ib. 230, *per* Lord Thurlow; *Knight* v. *Knight*, 3 Beav. 173, *per* Lord Langdale; *Sale* v. *Moore*, 1 Sim. 534; *Cary* v. *Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Meredith* v. *Heneage*, 1 Sim. 542, see 558, 559, 565; *Ex parte Payne*, 2 Y. & C. 636; *Reid* v. *Atkinson*, 5 Ir. R. Eq. 162, 373.

(*e*) *Lechmere* v. *Lavie*, 2 M. & K. 197; *Knight* v. *Knight*, 3 Beav. 148; *Meredith* v. *Heneage*, 1 Sim. 556; *Buggins* v. *Yates*, 9 Mod. 122; *Sale* v. *Moore*, 1 Sim. 534; *Anon. Case*, 8 Vin. 72; *Tibbits* v. *Tibbits*, 19 Ves. 664, *per* Lord Eldon; *Wynne* v. *Hawkins*, 1 B. C. C. 179; *Pierson* v. *Garnet*, 2 B. C. C. 45, *per* Lord Kenyon; *S. C.* Ib. 230, *per* Lord Thurlow; *Bland* v. *Bland*, 2 Cox, 349; *Le Maitre* v. *Bannister*, cited in note to *Eales* v. *England*, Pr. Ch. 200; *Sprange* v. *Barnard*, 2 B. C. C. 585; *Pushman* v. *Filliter*, 3 Ves. 7; *Attorney-General* v. *Hall*, Fitzg. 314; *Wilson* v. *Major*, 11 Ves. 205; *Eade* v. *Eade*, 5 Mad. 118; *Curtis* v. *Rippon*, 5 Mad. 434; *Russell* v. *Jackson*, 10 Hare, 213.

(*f*) *Morice* v. *Bishop of Durham*, 10 Ves. 536, *per* Lord Eldon.

(*g*) *Malim* v. *Keighley*, 2 Ves. jun. 335; [and see *Harland* v. *Trigg*, 1 B. C. C. 142. In *Re Hamilton*, (1895) 2 Ch. (C.A.) 370, 372, the language of Lord Alvanley is adversely commented on by Lindley, L. J., but it is apprehended that those comments do not in any way affect the negative principle stated in the text, which was in fact adopted by Rigby, L. J., in

Secus, where the uncertainty arises from want of evidence.

4. But although uncertainty in the object will unquestionably furnish a reason for holding no trust to have been intended by precatory words, it will be otherwise where the uncertainty arises from the circumstance that the Court has not before it for its guidance the *whole intention* of the testator in reference to the object: and in such a case the Court will make a declaration that the devisee or legatee is a trustee for objects unascertainable, and (unless the trust was by way of charge upon the estate of the devisee or legatee) will decree a resulting trust for the benefit of the heir-at-law or next of kin, according to the nature of the property (*a*).

Uncertainty of the objects.

"Family."

5. The *objects* have been held to be uncertain where *personal estate* was given to A., with a hope "that he would continue it in the *family*" (*b*); but, as regards personal estate, the word family has been sometimes construed as equivalent to relations, that is next of kin (*c*), and where *freeholds* were so devised, it was held that by "family" was to be understood the worthiest member of it, viz. the heir-at-law (*d*). But the designation was held to be too uncertain as to freeholds, where the request was to distribute "*amongst* such members of the person's family" as he should think most deserving (*e*).

"Heirs."

In another case *both real and personal estate* were blended

Re Williams, (1897) 2 Ch. (C.A.) 12, 28, 35; and see *Hill* v. *Hill*, (1897) 1 Q. B. (C.A.) 483. See also] *Knight* v. *Boughton*, 11 Cl. & Fin. 548, 551; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Greene* v. *Greene*, 3 Ir. R. Eq. 631; [*Stead* v. *Mellor*, 5 Ch. D. 225; *Re Douglas*, 35 Ch. D. (C.A.) 472; and *Wilkinson* v. *Wilkinson*, 62 L. T. N.S. 735, where a gift to testator's father "for his own use and benefit, and at his discretion for the further use and benefit" of the testator's infant daughter, was held an express and not an implied trust, the father and daughter taking as joint tenants, with discretion in him as to application of her share during minority].

(*a*) *Corporation of Gloucester* v. *Wood*, 3 Hare, 131; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Bernard* v. *Minshull*, Johns. 276; see and consider the observations of V. C. Wood, Ib. 286.

(*b*) *Harland* v. *Trigg*, 1 B. C. C. 142. See *Wright* v. *Atkyns*, G. Coop. 121; *Woods* v. *Woods*, 1 Myl. & Cr. 401; *Re Parkinson's Trust*, 1 Sim. N.S. 242; *Williams* v. *Williams*, 1 Sim. N.S. 358; *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597; [*Re Hamilton*, (1895) 2 Ch. 370, 373;] but see *White* v. *Briggs*, 2 Phil. 583; and *Liley* v. *Hey*, 1 Hare, 580.

(*c*) *Cruwys* v. *Colman*, 9 Ves. 319; *Grant* v. *Lynam*, 4 Russ. 292. [But the primary meaning of the word "family" in a will is "children," and any other meaning must be supplied by the context; *Pigg* v. *Clarke*, 3 Ch. D. 672; and under a testamentary gift by a married man to his family, his widow takes no interest; see *Re Hutchinson and Tenant*, 8 Ch. D. 540. As to the meaning of the word "family," when occurring in a power of selection, see *Sinnott* v. *Walsh*, 3 L. R. Ir. 12; 5 L. R. Ir. 27.]

(*d*) *Atkyns* v. *Wright*, 17 Ves. 255; *S. C.* 19 Ves. 229; *S. C.* G. Coop. 111; and see *S. C.* T. & R. 143; *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunket, 465; *Griffiths* v. *Evan*, 5 Beav. 241; *White* v. *Briggs*, 2 Phil. 583; *Green* v. *Marsden*, 1 Drew. 646; [*Re Williams*, (1897) 2 Ch. (C.A.) 12, 38].

(*e*) *Green* v. *Marsden*, 1 Drew. 646,

together, and given to A., in full confidence that she would devise the whole of the estate to "such of the heirs of the testator's father as she might think best deserved a preference," and the Court could not determine whether heirs were intended, or next of kin, or both (*a*).

"Relations."

Again, a residuary estate was bequeathed to A., with a recommendation that she would "consider the testator's *relations*." Sir A. Hart asked, Who were the objects of the trust? Did the testator mean relations at his own death, or at A.'s death? Did he mean that she should have the liberty of executing the trust the day after his death? And his Honour was of opinion that no trust could attach (*b*). But there can be no uncertainty of the objects where such a trust is to be executed by *will*, for then those who answer the description at the death of the donee of the power must be the parties contemplated (*c*).

Uncertainty of the subject matter.

6. The Court has refused to establish the trust from the uncertainty of the *subject* (that is, of the property claimed to be bound by the trust), where the recommendation was to "consider certain persons" (*d*), "to be kind to them" (*e*), "to remember them" (*f*), "to do justice to them" (*g*), "to make ample provision for them" (*h*), ["to take care of his nephew as might seem best in future" (*i*),] "to use the property for herself and her children, and to remember the Church of God, and the poor" (*j*), "to give what should remain at his death, or what he should die seised or possessed of" (*k*), "to finally appropriate as he pleased," with a recommendation to divide amongst certain persons (*l*), to divide and dispose of the savings (*m*), or the bulk

(*a*) *Meredith* v. *Heneage*, 1 Sim. 542, see 558, 559, 565; but see *Wright* v. *Atkyns*, G. Coop. 119.

(*b*) *Sale* v. *Moore*, 1 Sim. 534, see 540; and see *Macnab* v. *Whitbread*, 17 Beav. 299; but see *Wright* v. *Atkyns*, G. Coop. 119-123.

(*c*) *Pierson* v. *Garnet*, 2 B. C. C. 38; *S. C.* id. 226; *Atkyns* v. *Wright*, 17 Ves. 255; *S. C.* 19 Ves. 299; *S. C.* G. Coop. 111; and see *S. C.* T. & R. 162; *Knight* v. *Knight*, 3 Beav. 173; *Meredith* v. *Heneage*, 1 Sim. 558.

(*d*) *Sale* v. *Moore*, 1 Sim. 534; and see *Hoy* v. *Master*, 6 Sim. 568.

(*e*) *Buggins* v. *Yates*, 9 Mod. 122.

(*f*) *Bardswell* v. *Bardswell*, 9 Sim. 319.

(*g*) *Le Maitre* v. *Bannister*, Pr. Ch. 200, note (1); *Pope* v. *Pope*, 10 Sim. 1; *Ellis* v. *Ellis*, 44 L. J. N.S. Ch. 225; [*Cole* v. *Hawes*, 4 Ch. D. 238.]

(*h*) *Winch* v. *Brutton*, 14 Sim. 379; *Fox* v. *Fox*, 27 Beav. 301.

[(*i*) *Re Moore*, 55 L. J. N.S. Ch. 418; 54 L. T. N.S. 231; 34 W. R. 343.]

(*j*) *Curtis* v. *Rippon*, 5 Mad. 434.

(*k*) *Sprange* v. *Barnard*, 2 B. C. C. 585; *Green* v. *Marsden*, 1 Drew. 646; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Eade* v. *Eade*, 5 Mad. 118; *Wynne* v. *Hawkins*, 1 B. C. C. 179; *Lechmere* v. *Lavie*, 2 M. & K. 197; *Bland* v. *Bland*, 2 Cox, 349; *Attorney-General* v. *Hall*, Fitzg. 314; and see *Meredith* v. *Heneage*, 1 Sim. 556; *Tibbits* v. *Tibbits*, 19 Ves. 664; *Pope* v. *Pope*, 10 Sim. 1.

(*l*) *White* v. *Briggs*, 15 Sim. 33.

(*m*) *Cowman* v. *Harrison*, 10 Hare, 234.

of the property (*a*), or where the donee of the property had power to dispose of any part he pleased, whether expressly given him, or arising from implication, or from the nature of the subject (*b*), [or where the gift was for such "charitable or other purposes" as the trustee should think fit (*c*); or to divide among such charitable or religious institutions and societies as the trustees might select (*d*). So where the bequest was to trustees to expend the income of or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations," or for churches, chapels, or schools, or in paying or contributing to the salaries of rectors, vicars, and others upon certain conditions for promotion of evangelical principles, it was held that as there was no trust, charitable or other, which the Court could execute, and no general trust for charity binding the whole fund, the entire gift failed for uncertainty (*e*); and where the testator gave all his property to his wife, and expressed his "wish that whatever property his wife might possess at her death should be equally divided between his children," the wife was held to be absolutely entitled (*f*).] But where the recommendation was that the legatee, in case she married again, should settle what she possessed under the testator's will to her separate use, and should bequeath what she should die possessed of under the will in favour of certain persons, it was held that the *whole* personal estate was over-reached by the trust (*g*).

Whether trust or power is a question of intention, not of grammatical import.

7. Where both objects and property are certain, yet no trust will arise, if the testator expressly declare that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given (*h*); or if, all circumstances considered, it is more probable that the testator meant to communicate a mere discretion (*i*);

(*a*) *Palmer* v. *Simmonds*, 2 Drew. 221.

(*b*) *Malim* v. *Keighley*, 2 Ves. jun. 531, *per* Lord Loughborough; and see *Knight* v. *Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Huskisson* v. *Bridge*, 4 De G. & Sm. 245.

[(*c*) *Blair* v. *Duncan*, (1902) A. C. (H. L. Sc.) 37.]

[(*d*) *Grimond* (or *Macintyre*) v. *Grimond*, (1905) A. C. (H. L. Sc.) 124; *secus*, where the discretion was for charitable, educational or other institutions of the town of K. and for other general purposes for the benefit of the town; *Re Allen*, (1905) 2 Ch. 400, and see *Re Pardoe*, (1906) 2 Ch. 184.]

[(*e*) *Hunter* v. *Attorney-General*, (1899) A. C. (H. L.) 309; and see *Re Church Patronage Trust*, (1904) 1 Ch. 41; (1904) 2 Ch. (C.A.) 643, where the gift in terms merely required the trustees to perform the ordinary duty of an owner of an advowson, and was held not charitable.]

[(*f*) *Parnall* v. *Parnall*, 9 Ch. D. 96.]

(*g*) *Horwood* v. *West*, 1 S. & S. 387.

(*h*) *Webb* v. *Wools*, 2 Sim. N.S. 267; *Huskisson* v. *Bridge*, 4 De G. & Sm. 245.

(*i*) *Bull* v. *Vardy*, 1 Ves. jun. 270; *Knott* v. *Cottee*, 2 Phill. 192; *Knight*

or if a testator give an estate to a feme covert to be her sole and separate property, "with *power* to appoint to her husband or children" (*a*); or the testator at the same time declare that the estate shall be "unfettered and unlimited" (*b*); or, "in the legatee's entire power" (*c*); or be "left to his entire judgment" (*d*); or if he "recommend but do not absolutely enjoin" (*e*); or if a testator give the property to his wife, "well knowing her *sense of justice and love to her family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children" (*f*); [or "to be used by her in such ways and means as she may *consider best* for her own benefit and that of my three children" (*g*); or "feeling confident that she will act justly to our children in dividing the same when no longer required by her" (*h*); or "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease" (*i*); or to her "absolutely in the fullest confidence" that she will carry out his wishes by leaving policy moneys of her own and of his to their daughter (*j*); or "well knowing she will religiously carry out what she knows to be my wishes in the disposal of it" (*k*);] or "to be at her disposal in any way she may think best for the benefit of herself and family" (*l*); [or "to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having full confidence that she will do so" (*m*); or if he give the residue of his property to legatees, "his desire being that they shall distribute such residue as they *think* will be most agreeable to his wishes" (*n*), or bequeaths sums of money to legatees, and "wishes

v. *Knight*, 3 Beav. 148; *Meggison* v. *Moore*, 2 Ves. jun. 630; *Hill* v. *Bishop of London*, 1 Atk. 618; *House* v. *House*, W. N. 1874, p. 189; and see *Paul* v. *Compton*, 8 Ves. 380; *Knight* v. *Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1; *Shepherd* v. *Nottidge*, 2 J. & H. 766; *Eaton* v. *Watts*, 2 W. R. 108; [*Re Byrne's Estate*, 29 L. R. Ir. 250].

(*a*) *Brook* v. *Brook*, 3 Sm. & Gif. 280; and see *Paul* v. *Compton*, 8 Ves. 380; *Howorth* v. *Dewell*, 29 Beav. 18; [*Ahearne* v. *Ahearne*, 9 L. R. Ir. 144].

(*b*) *Meredith* v. *Heneage*, 1 Sim. 542; *S. C.* 10 Price, 230; *Hoy* v. *Master*, 6 Sim. 568.

(*c*) *Eaton* v. *Watts*, 4 L. R. Eq. 151.

(*d*) *M'Cormick* v. *Grogan*, 1 Ir. R. Eq. 313; [and see *Sullivan* v. *Sullivan*, (1903) 2 I. R. 193].

(*e*) *Young* v. *Martin*, 2 Y. & C. Ch. Ca. 582.

(*f*) *Greene* v. *Greene*, 3 Ir. R. Eq. 90, 629.

[(*g*) *M'Alinden* v. *M'Alinden*, 11 Ir. R. Eq. 219.]

[(*h*) *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321; 9 L. R. Ind. App. 70.]

[(*i*) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. (C.A.) 394.]

[(*j*) *Re Williams*, (1897) 2 Ch. (C.A.) 12, (diss. Rigby, L. J.); and see *Re Oldfield*, (1904) 1 Ch. (C.A.) 549.]

[(*k*) *Clancarty* v. *Clancarty*, 31 L. R. Ir. (C.A.) 530.]

(*l*) *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597.

[(*m*) *Re Hutchinson and Tenant*, 8 Ch. D. 540.]

[(*n*) *Stead* v. *Mellor*, 5 Ch. D. 225.]

them to bequeath the same between the families" of his nephew and niece "in such mode as they shall consider right" (*a*); or if he "desires" that his legatee "will allow an annuity" to A. (*b*), or where the donor of jewels *inter vivos* requests that at the death of the donee they may be left as heir-looms (*c*); but where a testator gave, devised, and bequeathed to his wife the whole of his real and personal estate and property "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," it was held that, upon the true construction of the will, there was an absolute gift of the testator's real and personal estate to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces or any one or more of them (*d*)].

The construction of the words we are considering never turns on their grammatical import: they may be imperative, but are not necessarily so (*e*). In *Shaw* v. *Lawless* (*f*) the trustees were recommended to employ a receiver, and Lord Cottenham, alluding to that case, observed: "It was there laid down as a rule which I have since acted upon, that though 'recommendation' may in some cases amount to a direction and create a trust, yet, that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more. In that case the interest supposed to be given to the party recommended was inconsistent with the other powers which the trustees were to exercise, and those powers being given in unambiguous terms, it was held that, as the two provisions could not stand together, the flexible term was to give way to the inflexible term" (*g*).

8. If a trust be created, it does not follow that it shall be equally restrictive, as in the case of a clear ordinary trust. Thus, Trustees of this kind not always so strictly bound as in a common trust.

[(*a*) *Re Hamilton*, (1895) 1 Ch. 373; 2 Ch. (C.A.) 370; and see *Re Conolly*, (1909) W. N. 259.]

[(*b*) *Re Diggles*, 39 Ch. D. (C.A.) 253.]

[(*c*) *Hill* v. *Hill*, (1897) 1 Q. B. (C.A.) 483.]

[(*d*) *Comiskey* v. *Bowring-Hanbury*, (1905) A. C. (H. L.) 84, reversing *Re Hanbury*, (1904) 1 Ch. (C.A.) 415.]

(*e*) *Meggison* v. *Moore*, 2 Ves. jun. 632, *per* Lord Loughborough; and see *Johnston* v. *Rowlands*, 2 De G. & Sm. 385.

(*f*) Ll. & G. *t.* Sugden, 154; 5 Cl. & Fin. 129; Ll. & G. *t.* Plunket, 559.

(*g*) *Knott* v. *Cottee*, 2 Phill. 192.

an estate was devised to A. and her heirs, "in the fullest confidence" that after her decease she would devise the property to the family of the testator; and Lord Eldon asked, if there were any case in which the doctrine had been carried so far, that the tenant in fee was not at liberty, with respect to *timber and mines*, to treat the estate in the same husbandlike manner as another tenant in fee? and his Lordship said he should hesitate a long time before he held that the person bound by the trust was not entitled to cut timber in the ordinary management of the property (*a*). And so it was afterwards decided by the House of Lords on appeal (*b*).

Case of trustee taking no beneficial interest.

9. On the other hand, the settlement may be so specially worded that the person bound by the trust takes for life only, with remainder to the children (*c*), or is not even tenant for life, and takes no beneficial interest at all. Thus, where a testator devised to his wife in fee, "under the firm conviction that she would dispose of and manage the same for the benefit of her children," the widow claimed to be tenant for life, but the Court held that she was merely a trustee (*d*).

Where the words raise a partial trust, the surplus does not result.

10. Where the words are construed in equity to raise a partial trust, the devisee or legatee is treated as beneficial owner, subject to the charge, and the *surplus* will not result to the heir or next of kin, but will belong to the devisee or legatee (*e*).

Implied trusts now rather discouraged.

11. The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee; [and although "it would be an entire mistake to suppose that the old doctrine of precatory trusts is abolished" (*f*), yet undoubtedly the Court now refuses to extend the doctrine, or to regard the mere use of particular words (*g*), and will not imply a trust, unless it appears from the whole will that an obligation was intended to be imposed by the testator (*h*)].

(*a*) *Wright* v. *Atkyns*, T. & R. 157, 163. [For fuller accounts of the course of decision in this case, see the judgments of *Lindley* and *Rigby*, L.JJ., in *Re Williams*, (1897) 2 Ch. (C.A.) 12.]

(*b*) See *Lawless* v. *Shaw*, Ll. & G. *t.* Sugden, 164.

(*c*) *Wace* v. *Mallard*, 21 L. J. N.S. Ch. 355.

(*d*) *Barnes* v. *Grant*, 26 L. J. N.S. Ch. 92; *S. C.* 2 Jur. N.S. 1127; and see *Greene* v. *Greene*, 3 Ir. R. Eq. 98, 629; *Corbet* v. *Corbet*, 7 Ir. R. Eq. 456.

(*e*) *Wood* v. *Cox*, 1 Keen, 317; 2 Myl. & Cr. 684; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673.

[(*f*) *Re Williams*, (1897) 2 Ch. (C.A.) 12, 18, *per* Lindley, L. J. (but as to the impropriety of the expression "precatory trust," see Ib. p. 27, *per* Rigby, L. J.).]

[(*g*) *Re Adams and the Kensington Vestry*, 27 Ch. D. (C.A.) 394, 410; *Re Diggles*, 39 Ch. D. (C.A.) 253; *Re Downing's Residuary Estate*, 60 L. T. N.S. 140.]

[(*h*) *Re Williams*, (1897) 2 Ch. (C.A.) 12, 21, 22, *per* Lindley, L. J.] *Sale* v. *Moore*, 1 Sim. 540; and see *Meredith* v. *Heneage*, Id. 566; *Lawless* v. *Shaw*, Ll. & G. *t.* Sugden, 164; *Knight* v. *Knight*, 3 Beav. 148; *Williams* v.

Directions as to maintenance.

12. Under the head of trusts which we are now considering, may be classed the cases where property is given to a parent or other person standing or regarded *loco parentis*, with a direction touching the *maintenance* of the children. The first question is: Did the settlor intend to impose a trust, or do the words express only the motive of the gift? Instances where *no trust* is created are, where the bequest is to a person "to enable him to maintain the children" (*a*), or an absolute bequest is made, and afterwards the motive is assigned, as "that he may support himself and his children" (*b*), or "*for* the maintenance of himself and his family" (*c*), [or "towards the support and maintenance of her two children until they shall attain the age of twenty-one years" (*d*),] or "to A. for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for her children" (*e*), or, "being well assured that she will husband the means left to her for the sake of herself and her children" (*f*), or "to be applied by her in the bringing up and maintenance of her children" (*g*), [and such a trust, if incautiously worded, may be void for remoteness (*h*)]. Instances of the creation of a *trust* are, where property is given, "that he may dispose thereof for the benefit of himself *and* his children" (*i*), or "at her sole and entire disposal for the maintenance of herself *and* her children" (*j*), or "for his own use and benefit, *and* the maintenance and education of his children" (*k*), [or "for their own use and support of their children" (*l*)], or "at the disposal of the legatee for herself *and* her children" (*m*), or all "overplus towards her support *and* her family" (*n*), or to A. "for

Williams, 1 Sim. N.S. 358; *Lefroy* v. *Flood*, 4 Ir. Chanc. Rep. 9; *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597; [*Stead* v. *Mellor*, 5 Ch. D. 225; *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. (C.A.) 394; see especially observations of Cotton, L. J., at p. 410, and Lindley, L. J., at p. 411; *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321, 330; *Re Hanbury*, (1904) 1 Ch. (C.A.) 415; and see p. 155, note (*d*)].

(*a*) *Benson* v. *Whittam*, 5 Sim. 22; but see *Leach* v. *Leach*, 13 Sim. 304; and see *Ryan* v. *Keogh*, 4 Ir. R. Eq. 357.

(*b*) *Thorp* v. *Owen*, 2 Hare, 607; see 611.

(*c*) *Re Robertson's Trust*, 6 W. R. 405; *Bond* v. *Dickinson*, 33 L. T. N.S. 221.

[(*d*) *Farr* v. *Hennis*, 44 L. T. N.S. 202.]

(*e*) *Fox* v. *Fox*, 27 Beav. 301.

(*f*) *Scott* v. *Key*, 35 Beav. 291.

(*g*) *Mackett* v. *Mackett*, 14 L. R. Eq. 49.

[(*h*) *Re Blew*, (1906) 1 Ch. 624, p. 110 *ante*, where a discretionary trust for the maintenance of the testator's son W. "and his *wife* and children or any of them" was held to be limited to the life of W., but if not to be void; and *Re Wise*, (1896) 1 Ch. 281, and *Re Watson*, (1892) W. N. 192, were not followed.]

(*i*) *Raikes* v. *Ward*, 1 Hare, 445; [*O'Connor* v. *Butler*, (1907) 1 I. R. 507.]

(*j*) *Scott* v. *Key*, 35 Beav. 291.

(*k*) *Longmore* v. *Elcum*, 2 Y. & C. Ch. Ca. 369; *Carr* v. *Living*, 28 Beav. 644; *Berry* v. *Bryant*, 2 Drew. & Sm. 1; *Bird* v. *Maybury*, 33 Beav. 351.

[(*l*) *Dixon* v. *Dixon*, W. N. 1876, p. 225.]

(*m*) *Crockett* v. *Crockett*, 1 Hare, 451; and see *S. C.* 2 Phil. 461; *Bibby* v. *Thompson* (No. 1), 32 Beav. 646; [*Re Byrne's Estate*, 29 L. R. Ir. 250].

(*n*) *Woods* v. *Woods*, 1 M. & Cr. 401.

the education and advancing in life of her children" (*a*), [or to the testator's wife "for her use and benefit, and for the maintenance and education of" his children (*b*), or to A. "and the said tenement I leave to the disposal of her, with a view that the said tenement may be disposed of as she may think proper for the maintenance and education of my two daughters" (*c*); and under a gift to the testator's widow during widowhood, "she maintaining, educating, and bringing up" his children under twenty-one years of age, the widow as well as the children takes a beneficial interest (*d*)]. In a modern case (*e*) it was held that the circumstance of a trustee being interposed, instead of the property being given directly to the parent, was sufficient to show that no sub-trust was intended, but this view appears not to be supported by earlier decisions (*f*).

Nature of such a trust.

13. Where a trust is created, the person bound by it is the hand to administer it, and can sign a valid receipt for the fund, the subject of the trust (*g*). And the person bound by the trust is regarded in the same light as a committee of a lunatic, or guardian of an infant (*h*), that is, he has a duty imposed upon him; but so long as he discharges that duty, he is entitled to the surplus for his own benefit, and the Court requires from him no account retrospectively of the application of the fund (*i*), and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished (*j*), or will order payment to him on his undertaking to maintain the children properly, with liberty to the children to apply (*k*). Should the person bound by the trust become by misconduct unfit to maintain and educate the children, the Court will not allow him to receive the fund (*l*); and should the fiduciary assign his interest,

(*a*) *Gilbert* v. *Bennet*, 10 Sim. 371.

[(*b*) *Re Booth*, (1894) 2 Ch. 282.]

[(*c*) *Talbot* v. *O'Sullivan*, 6 L. R. Ir. 302; *Re Haly's Trusts*, 23 L. R. Ir. 130; and see *Rorke* v. *Abraham*, (1895) 1 I. R. 334.]

[(*d*) *Re G.*, (1899) 1 Ch. 719.]

(*e*) *Byne* v. *Blackburn*, 26 Beav. 41.

(*f*) *Gilbert* v. *Bennet*, 10 Sim. 371; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; and see *Carr* v. *Living*, 28 Beav. 644.

(*g*) *Woods* v. *Woods*, 1 M. & Cr. 409, *per* Lord Cottenham; *Raikes* v. *Ward*, 1 Hare, 449, *per* V. C. Wigram; *Cooper* v. *Thornton*, 3 B. C. C. 186; *Robinson* v. *Tickell*, 8 Ves. 142; *Crockett* v. *Crockett*, 1 Hare, 451; 2 Phil. 553; *Greene* v. *Greene*, 3 Ir. R. Eq. 102, *per cur.*; but see *Webb* v. *Wools*, 2 Sim. N.S. 272.

(*h*) As to the position of committees and guardians, see *Joddrell* v. *Joddrell*, 14 Beav. pp. 411-413.

(*i*) *Leach* v. *Leach*, 13 Sim. 304; *Brown* v. *Paull*, 1 Sim. N.S. 92; *Carr* v. *Living*, 28 Beav. 644; *Hora* v. *Hora*, 33 Beav. 88.

(*j*) *Raikes* v. *Ward*, 1 Hare, 450.

(*k*) *Crockett* v. *Crockett*, 1 Hare, 451; *Hadow* v. *Hadow*, 9 Sim. 438.

(*l*) *Castle* v. *Castle*, 1 De G. & J. 352. [In *Re G.*, (1899) 1 Ch. 719, *v. sup.* the Court withdrew the children from the custody of the widow (who was living in adultery), apportioned the income, and applied a portion for the proper bringing up of the children away from their mother.]

the Court will enquire what part is needed for the maintenance and education of the children, and will give the surplus only to the assignee (*a*).

Forisfamiliation.

14. It follows from these principles that if there be no children born (*b*), or if they have since died (*c*), the person bound by the trust takes the whole produce for his own benefit. So the children lose their claim if they become forisfamiliated, *i.e.* cease to be members of or to belong to the establishment contemplated by the testator, as if a child marry (*d*), or under other circumstances maintain a separate establishment (*e*), for it can scarcely be supposed that the testator meant an income given with reference to one establishment, to be split into as many different incomes as there are children (*f*). But it has been said that if a daughter marry, and afterwards becomes a widow and has no support, the right to maintenance may revive (*g*).

Attaining 21.

15. Whether a child's right to maintenance will cease *ipso facto* by his or her attaining the age of twenty-one years, must depend, of course, upon the particular words used (*h*), but is open generally to some uncertainty (*i*). It can hardly be maintained, on the one hand, that when a child has attained majority, and is fairly launched into the world, and is making a livelihood, the trust is to continue (*j*); and, on the other hand, if a child be willing to remain at home, and no reasonable objection can be made to it, the person bound by the trust cannot refuse maintenance on the mere ground that the child has attained twenty-one (*k*). [But an annuity given to children for their "maintenance and education" is not confined to their minorities, but endures during their lives (*l*).]

Case of tenant for life bound by such a trust with remainder over.

16. If a person be entitled for life for the maintenance of herself, and the maintenance and education of the testator's children, and after her death the trust is for the children

(*a*) *Carr* v. *Living*, 28 Beav. 644; *Scott* v. *Key*, 35 Beav. 291.

(*b*) *Hammond* v. *Neame*, 1 Swans. 35; *Cape* v. *Cape*, 2 Y. & C. Ex. 543; *Re Main's Settlement*, 15 W. R. 216.

(*c*) *Bushnell* v. *Parsons*, Pr. Ch. 219.

(*d*) *Bowden* v. *Laing*, 14 Sim. 113; *Carr* v. *Living*, 28 Beav. 644; *Staniland* v. *Staniland*, 34 Beav. 536; *Massey* v. *Massey*, W. N. 1873, p. 76.

(*e*) See *Thorp* v. *Owen*, 2 Hare, 612; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 370; *Wilson* v. *Bell*, 4 L. R. Ch. App. 581.

(*f*) See *Thorp* v. *Owen*, 2 Hare, 613.

(*g*) *Scott* v. *Key*, 35 Beav. 291; [*Wilkins* v. *Jodrell*, 13 Ch. D. 564, 573].

(*h*) See the cases reviewed by V. C. Wood in *Gardner* v. *Barber*, 18 Jur. 508.

(*i*) *Longmore* v. *Elcum*, 2 Y. & C. C. C. 370; *Thorp* v. *Owen*, 2 Hare, 610.

(*j*) See *Thorp* v. *Owen*, 2 Hare, 612; *Carr* v. *Living*, 28 Beav. 644.

(*k*) See *Carr* v. *Living* (No. 2), 33 Beav. 474; *Thorp* v. *Owen*, 2 Hare, 613; *Scott* v. *Key*, 35 Beav. 291; [*Re Booth*, (1894) 2 Ch. 282.]

[(*l*) *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Soames* v. *Martin*, 10 Sim. 287;

absolutely, a child on coming of age cannot, even with the concurrence of the tenant for life, call for a transfer of a proportionate share of the property, if this diminution of the fund would endanger the right of the other children to be properly maintained and educated during the tenancy for life. The Court in such a case has adopted the expedient that a *part* of the child's share should be paid out on his undertaking to account for the income of it, and on the footing that the residue of the share should be retained as a security for the due payment of the income (*a*). Where there was a clear trust for the maintenance of the children, the Court reserved the consideration of what would be the rights of the parties after the parent's death, and gave liberty to apply on that event (*b*).

Charge of debts, &c., in a will.

17. To proceed with the instances of implied trusts, if a person by will direct his realty to be sold, or charge it with debts and legacies (*c*), or with any particular legacy (*d*), the legal estate may descend to the heir, or it may pass to a devisee; but the Court will view the direction as an implied declaration of trust, and will enforce the execution of it against the legal proprietor.

Conditions construed as trusts.

18. So, in many cases, if a person devise an estate with words of condition annexed, the conditional words are not construed to impose a legal forfeiture on breach so as to give a right of entry, but are viewed as trusts affecting the conscience of the owner, and so enforceable in a Court of Equity; as if a house be devised to A. for life, "he keeping the same in repair," or if an estate be given to A. in fee, "he paying the testator's debts within twelve months from the testator's death" (*e*).

Agreement for valuable consideration.

19. Again, if a person agree for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the

Re Booth, (1894) 2 Ch. 282; *Williams* v. *Papworth*, (1900) A. C. 563.]

(*a*) *Berry* v. *Briant*, 2 Dr. & Sm. 1.

(*b*) *Scott* v. *Key*, 35 Beav. 291.

(*c*) *Pitt* v. *Pelham*, 2 Freem. 134; *S. C.* 1 Ch. Rep. 283; *Locton* v. *Locton*, 2 Freem. 136; *Auby* v. *Doyl*, 1 Ch. Cas. 180; *Tenant* v. *Brown*, Ib.; *Garfoot* v. *Garfoot*, 1 Ch. Ca. 35; *S. C.* 2 Freem. 176; *Gwilliams* v. *Rowel*, Hard. 204; *Blatch* v. *Wilder*, 1 Atk. 420; *Carvill* v. *Carvill*, 2 Ch. Rep. 301; *Cook* v. *Fountain*, 3 Swans. 592; *Bennet* v. *Davis*, 2 P. W. 318; *Briggs* v. *Sharp*, 20 L. R. Eq. 317.

(*d*) *Wigg* v. *Wigg*, 1 Atk. 382; [*Re Kirk*, 21 Ch. D. (C.A.) 431].

(*e*) *Wright* v. *Wilkin*, 2 Best & Sm. 232; *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; [*Re Williames*, 54 L. T. N.S. 105; *Foot* v. *Cunningham*, 11 Ir. R. Eq. 306; reversed, *Cunningham* v. *Foot*, 3 App. Cas. 974;] but see *Kingham* v. *Lee*, 15 Sim. 396; *Kinnersley* v. *Williamson*, 39 L. J. N.S. Ch. 788; 18 W. R. 1016.

intended objects, and all the consequences of a trust will follow (*a*); and so, if he covenant to charge all lands that he may possess at a particular time (*b*), or at any time (*c*), he will be a trustee of such lands to the extent of the charge. And even if a person engages on his marriage to settle *all the personal* estate that he may acquire during the coverture, the trusts upon which it is so agreed that the personalty shall be settled will fasten upon the property as it falls into possession; and if the money has been laid out in a purchase, it may be followed into the land (*d*). But if a person covenant to settle such property as he shall *die siesed* of, he may dispose of his property as he pleases in his lifetime, and the covenant will affect only such property as he may leave after payment of his just debts (*e*): and if a person covenant to secure an annuity, *either* by a charge on freeholds, *or* by investment in the funds, *or* by the best means in his power, it will not create a charge on the covenantor's property generally (*f*). [Where a covenant for settlement comprises the covenantor's *whole* future property, it may be doubtful whether such covenant can be enforced in equity (*g*), but if it contains specific words the Court will, if necessary, construe it divisibly, and enforce it as to classes of property falling within the specific words (*h*).]

20. Again, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits (*i*). [The purchaser is, generally speaking, entitled to have the property

Contract for sale.

(*a*) *Finch* v. *Winchelsea*, 1 P. W. 277; *Bremoult* v. *Dedire*, Ib. 429; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355; *Legard* v. *Hodges*, 1 Ves. jun. 477; *S. C.* 3 B. C. C. 531; 4 B. C. C. 421; *Ravenshaw* v. *Hollier*, 7 Sim. 3.

(*b*) *Wellesley* v. *Wellesley*, 4 M. & Cr. 561. As to the proper construction of the particular covenant in that case, see *Countess of Mornington* v. *Keane*, 2 De G. & J. 293.

(*c*) *Lyster* v. *Burrows*, 1 Drury & Walsh, 149; *Stack* v. *Royse*, 12 Ir. Ch. Rep. 246; [*Cleary* v. *Fitzgerald*, 7 L. R. Ir. 229].

(*d*) *Lewis* v. *Madocks*, 8 Ves. 150; *S. C.* 17 Ves. 48; [*Galavan* v. *Dunne*, 7 L. R. Ir. 144; *Lord Churston* v. *Buller*, 77 L. T. N.S. 45; and a covenant by a husband with the trustees of his marriage settlement to settle all his after acquired property (except business assets) is good; *Re Reis*, (1904) 2 K. B. (C.A.) 769, overruling *Ex parte Bolland*, 17 L. R. Eq. 115].

(*e*) *Rowan* v. *Chute*, 13 Ir. Ch. Rep. 168; *Re M'Kenna*, Ib. 239; *Nayler* v. *Wetherall*, 12 Jan. 1831; affirmed 23 Jan. 1833 (MS.); where the covenant was to settle all the real and personal estate which he should be seised or possessed of at the time of his death, and it was declared that the covenant bound all the real and personal estate which he had power to dispose of by will.

(*f*) *Countess of Mornington* v. *Keane*, 2 De G. & J. 292; and see *Stack* v. *Royse*, 12 Ir. Ch. Rep. 246.

[(*g*) See *Re Turcan*, 40 Ch. D. (C.A.) 5.]

[(*h*) *Re Turcan* (*ubi sup.*); *Re Clarke*, 35 Ch. D. 109; 36 Ch. D. (C.A.) 348; *Official Receiver* v. *Tailby*, 13 App. Cas. 523; *Re Kelcey*, (1899) 2 Ch. 530.]

(*i*) See *Acland* v. *Gaisford*, 2 Mad. 32; *Wilson* v. *Clapham*, 1 J. & W. 38; *Shaw* v. *Foster*, L. R. 5 H. L. 338.

preserved pending completion in its existing state (*a*)], and if the tenants have been allowed improperly to run in arrear (*b*), or there has been unhusbandlike farming (*c*), or any other injury done, either by the wilful waste or neglect of the vendor (*d*), he is answerable to the purchaser as for a breach of trust. On the other hand, if any damage arise to the estate, not by default of the vendor, as by fire (*e*), or dilapidations (*f*), the loss will fall on the purchaser; and if the accident by which the damage arises brings with it legal obligations which must be immediately answered, and which the vendor satisfies, the expense thus incurred must be borne by the purchaser (*g*). But where pending the completion of a purchase of copyholds the trustee for sale died, and a new admittance became necessary, it was held that the expense of the fine must be borne by the trust estate (*h*). Should the estate become by any accident more valuable, the purchaser then will take the improvement (*i*). It should be observed, however, that the *vendor* is, after all, a trustee *sub modo* only, for he [has a paramount right to protect his interest as vendor (*j*), and] cannot be compelled to deliver up the possession until the purchase-money has been paid (*k*). And so the *purchaser* is only *a cestui que trust sub modo*, and he cannot enforce any equitable rights attached to the estate until the contract has been completed (*l*).

21. It would be endless to pursue implied trusts through all their ramifications; a subject so extensive that years might be passed in the study of equitable jurisprudence, without exhausting so ample a field; but the leading general principles by which the Courts are guided may be gathered sufficiently for our purpose from the few examples given.

[(*a*) *Raffety* v. *Schofield*, (1897) 1 Ch. 937.]

(*b*) *Acland* v. *Gaisford*, 2 Mad. 28.

(*c*) *Ferguson* v. *Tadman*, 1 Sim. 530; *Foster* v. *Deacon*, 3 Mad. 394.

(*d*) *Wilson* v. *Clapham*, 1 J. & W. 39; *Clarke* v. *Ramuz*, (1891) 2 Q. B. (C.A.) 456.

(*e*) *Paine* v. *Meller*, 6 Ves. 349; *Harford* v. *Purrier*, 1 Mad. 539, *per* Sir T. Plumer; *Acland* v. *Gaisford*, 2 Mad. 32, *per eundem*. As to *Stent* v. *Bailis*, 2 P. W. 220, see *Paine* v. *Meller*, 6 Ves. 352. [And he will not, in the absence of express contract, be entitled to the benefit of a subsisting policy of fire insurance; *Rayner* v. *Preston*, 18 Ch. D. (C.A.) 1.]

(*f*) *Minchin* v. *Nance*, 4 Beav. 332.

(*g*) *Robertson* v. *Skelton*, 12 Beav. 260.

(*h*) *Paramore* v. *Greenslade*, 1 Sm. & Giff. 541.

(*i*) See *Harford* v. *Purrier*, 1 Mad. 539; *Revell* v. *Hussey*, 2 B. & B. 287; *Paine* v. *Meller*, 6 Ves. 352; *Spurrier* v. *Hancock*, 4 Ves. 667; *White* v. *Nutts*, 1 P. W. 61; [*Raffety* v. *Schofield*, (1897) 1 Ch. 937].

[(*j*) *Shaw* v. *Foster*, L. R. 5 H. L. 338, *per* Lord Cairns.]

(*k*) See *Acland* v. *Gaisford*, 2 Mad. 32; *Wall* v. *Bright*, 1 J. & W. 494; *M'Creight* v. *Foster*, 5 L. R. Ch. App. 604; [*Ridout* v. *Fowler*, (1904) 1 Ch. 568; *S. C.* (1904) 2 Ch. (C.A.) 93; *Lysaght* v. *Edwards*, 2 Ch. D. 499; and as to the liability of a vendor remaining in possession and receiving rents after the time fixed for completion, see *Plews* v. *Samuel*, (1904) 1 Ch. 464].

(*l*) See *Tasker* v. *Small*, 3 M. & Cr. 70.

CHAPTER IX

OF RESULTING TRUSTS

HAVING discussed the various questions involved in the creation of trusts by the act of a party, we shall next direct our attention to the creation of trusts by operation of law. Trusts of this kind may be regarded as twofold—viz. 1. Resulting. 2. Constructive. Classification of trusts by operation of law.

Resulting Trusts, the subject of the present chapter, may be subdivided into the two following classes: *First*, where an *owner* or person legally and equitably entitled makes a conveyance, devise, or bequest of the legal estate, and there is no ground for the inference that he meant to dispose of the equitable; and, *Secondly*, Where a *purchaser* of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest. Subdivision of resulting trusts.

SECTION I

OF RESULTING TRUSTS WHERE THERE IS A DISPOSITION OF THE LEGAL AND NOT OF THE EQUITABLE INTEREST

1. The general rule is, that wherever, upon a conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heir, and, if out of personal estate, to himself or his executor. General rule.

2. Should the interest resulting, as a remnant of the real estate, to the heir be of a chattel nature, as a term of years, or a sum of money, it will, on the death of the *heir*, devolve on *his* personal representative (*a*). Chattel interest in real estate results to heir's personal representatives.

(*a*) *Levet* v. *Needham*, 2 Vern. 138; *Wych* v. *Packington*, 3 B. P. C. 44; *Sewell* v. *Denny*, 10 Beav. 315; *Barrett* v. *Buck*, 12 Jur. 771. See *Halford* v. *Stains*, 16 Sim. 448.

Of trusts resulting by presumption.

3. The settlor's intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be *presumed* by the Court, or be actually *expressed* upon the instrument.

Whether trust will result where no trust declared of any part.

4. If an estate be granted either without consideration or for merely a nominal one (*a*), and no trust is declared of *any part*, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* (as in the analogous case of uses before the statute of Henry VIII.) will result to the settlor (*b*). And if two joint tenants make such a conveyance without consideration, the equitable interest will result to them in joint tenancy (*c*).

Case of wife or child.

5. If the conveyance be to a *wife* (*d*) or *child* (*e*), it will be presumed an advancement, and the wife or child will be entitled beneficially.

Enforcement of trust where land absolutely conveyed.

6. In *Leman* v. *Whitley* (*f*), a son conveyed an estate to his father, as purchaser on the face of the deed, for the sum of 400*l.*, and then filed a bill against the devisees of the father for a re-conveyance, on the ground that the son never intended to part with the beneficial interest, but meant only to facilitate the raising of a sum upon mortgage by means of this machinery; Sir J. Leach held, that since the Statute of Frauds, parol evidence was inadmissible to prove a trust for the son, and that as there

(*a*) See *Hayes* v. *Kingdome*, 1 Vern. 33; *Sculthorp* v. *Burgess*, 1 Ves. jun. 92.

(*b*) *Duke of Norfolk* v. *Browne*, Pr. Ch. 80; *Warman* v. *Seaman*, 2 Freem. 308, *per Cur.*; *Hayes* v. *Kingdome*, 1 Vern. 33; *Grey* v. *Grey*, 2 Sw. 598, *per* Lord Nottingham; *Elliot* v. *Elliot*, 2 Ch. Ca. 232, *per eundem*; *Attorney-General* v. *Wilson*, 1 Cr. & Phil. 1; and see *Sculthorp* v. *Burgess*, 1 Ves. jun. 92; *Lady Tyrrell's* case, 2 Freem. 304; *Ward* v. *Lant*, Pr. Ch. 182; *Davies* v. *Otty* (No. 2), 35 Beav. 208. But in *Lloyd* v. *Spillet*, 2 Atk. 150, and *Young* v. *Peachey*, Ib. 257, Lord Hardwicke was apparently of opinion that, since the Statute of Frauds, there are only two cases of resulting trust, viz.: 1st, Where an estate is purchased in the name of a stranger; and 2ndly, Where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use; and see *Hutchins* v. *Lee*, 1 Atk. 447.

(*c*) *Rex* v. *Williams*, Bunbury, 342.

(*d*) See *Christ's Hospital* v. *Budgin*, 2 Vern. 683; [and the presumption does not depend upon the continuance of the marriage, but subsists notwithstanding that the wife obtains a decree of nullity; *Dunbar* v. *Dunbar*, (1909) 2 Ch. 639].

(*e*) *Jennings* v. *Sellick*, 1 Vern. 467; *Grey* v. *Grey*, 2 Swans. 598, *per* Lord Nottingham; *Elliot* v. *Elliot*, 2 Ch. Ca. 232, *per eundem*; and see *Hayes* v. *Kingdome*, 1 Vern. 33; *Baylis* v. *Newton*, 2 Vern. 28; *Cook* v. *Hutchinson*, 1 Keen, 42; [*Doyle* v. *Crean*, (1905) 1 I. R. 252; *Sweetman* v. *Butler*, (1908) 1 I. R. 517].

(*f*) 4 Russ. 423.

was no fraud or misapprehension, but the meaning was that the father should exercise towards the world at large the beneficial ownership, there was no resulting or constructive trust, and that the devisees must keep the estate. But the Court decreed the son as the ostensible vendor to have a lien upon the property for the 400*l.*, as for unpaid purchase-money. However, in a similar case of absolute sale upon the face of the deed, but where the grantee afterwards admitted himself in writing to be a trustee, Lord Kenyon held that, as the written evidence established facts inconsistent with the deed, further evidence by parol was admissible to prove the truth of the transaction (*a*); [and in *Haigh* v. *Kaye* (*b*), under circumstances very similar to those in *Leman* v. *Whitley*, it was held that the principle that the Statute of Frauds cannot be used to cover a fraud (*c*) applied, and parol evidence being admitted accordingly, a re-conveyance was decreed; and in a more recent case (*d*) it has been held by Stirling, J., that *Leman* v. *Whitley* has, in effect, been overruled by *Haigh* v. *Kaye*].

Mistake or fraud.

7. Of course the court will not permit the grantee to retain the beneficial interest if there was any mistake on the part of the *grantor* (*e*), or any *mala fides* on the part of the *grantee* (*f*). But if the *grantor* himself intended a *fraud* upon the law, the assurance, if the defendant set up the defence, will remain absolute against the grantor (*g*); but if the defendant admit the trust, it seems the Court will relieve (*h*).

Addition to a trust fund.

8. If a person invest a sum in the names of the trustees of his marriage settlement, no trust will result, the presumption being that he meant it to be held upon the trusts of the settlement (*i*); and Sir J. Bacon once observed generally, that in marriage settlements the resulting trust was not in favour of the settlor (*j*), meaning it is conceived that the presumption of

(*a*) *Cripps* v. *Jee*, 4 B. C. C. 472.

[(*b*) L. R. 7 Ch. 469.]

[(*c*) See *ante*, p. 56.]

[(*d*) *Re Duke of Marlborough*, (1894) 2 Ch. 133; and see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.]

(*e*) *Birch* v. *Blagrave*, Amb. 264; *Anon.*, cited *Woodman* v. *Morrell*, 2 Freem. 33; *Childers* v. *Childers*, 1 De G. & J. 482; *Manning* v. *Gill*, 13 L. R. Eq. 485; *Davies* v. *Otty* (No. 2), 35 Beav. 208; and see *Attorney-General* v. *Poulden*, 8 Sim. 472.

(*f*) *Lloyd* v. *Spillet*, 2 Atk. 150; *S. C.* Barn. 388, *per* Lord Hardwicke; *Hutchins* v. *Lee*, 1 Atk. 448, *per eundem*; *Young* v. *Peachy*, 2 Atk. 254; *Wilkinson* v. *Brayfield*, cited Ib. 257; *S. C.* reported 2 Vern. 307; *Davies* v. *Otty* (No. 2), 35 Beav. 208.

(*g*) *Cottington* v. *Fletcher*, 2 Atk. 156, *per* Lord Hardwicke; and see *Chaplin* v. *Chaplin*, 3 P. W. 233; *Muckleston* v. *Brown*, 6 Ves. 68.

(*h*) See *Cottington* v. *Fletcher*, *Muckleston* v. *Brown*, *ubi sup.*

(*i*) *Re Curteis's Trusts*, 14 L. R. Eq. 217.

(*j*) *Rainy* v. *Ellis*, W. N. 1872, p. 104; [and see *S.C.* 26 L. T. N.S. 602, and on appeal 27 L. T. N.S. 463].

making provision for the persons marrying and their issue, was strong enough in certain cases to prevail against the general rule. [But where by a marriage settlement the intended wife's father settled property upon trust for the intended husband for life, and then for the intended wife for life, and then for the children of the marriage, but the trusts for the children were void for remoteness, Kay, J., held that there was a resulting trust for the settlor (*a*).]

Transfer of chattels.

9. It was said in one case that if a man transfer *stock* or deliver *money* to another, it must proceed from an intention to benefit that other person, and therefore, although he be a stranger, it shall be *primâ facie* a gift (*b*); but if such an intention cannot be inferred consistently with the attendant circumstances, a trust will result (*c*). And even where there is a gift of stock by transfer into the joint names of the settlor and a stranger, still in this as in other similar cases, the settlor retains the beneficial interest for his life (*d*).

Where a trust is declared of part of the estate, the trust of the residue results.

10. If upon a conveyance (*e*), devise (*f*), or bequest (*g*), a trust be declared of *part* of the estate, and nothing is said as to the residue, then, clearly, the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of by the settlor will result to him or his representative.

Partial declaration of trust distinguished from a charge.

11. But upon this subject a distinction must be observed between a devise to a person for a particular purpose with no intention of conferring the beneficial interest, and a devise with the view of conferring the beneficial interest, but subject to a particular injunction. Thus, if lands be devised to A. and his heirs

[(*a*) *Re Nash's Settlement*, 51 L. J. N.S. Ch. 511; 30 W. R. 406; 46 L. T. N.S. 97.]

(*b*) *George* v. *Howard*, 7 Price, 651, 653; and see *Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431.

(*c*) See *Custance* v. *Cunningham*, 13 Beav. 363; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

(*d*) *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343, see 351.

(*e*) *Northen* v. *Carnegie*, 4 Drew. 587; *Cottington* v. *Fletcher*, 2 Atk. 155; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Cook* v. *Gwavas*, cited *Roper* v. *Radcliffe*, 9 Mod. 187; *Lloyd* v. *Spillet*, 2 Atk. 150; *S. C.* Barn. 388, *per* Lord Hardwicke; [*Re Croome*, 59 L. T. N.S. 582; 61 L. T. N.S. 814].

(*f*) *Sherrard* v. *Lord Harborough*, Amb. 165; *Marquis of Townshend* v. *Bishop of Norwich*, cited Sanders on Uses, C. 3, s. 7, div. 3; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Nash* v. *Smith*, 17 Ves. 29; *Wych* v. *Packington*, cited *Roper* v. *Radcliffe*, 9 Mod. 187; *Davidson* v. *Foley*, 2 B. C. C. 203; *Kiricke* v. *Bransbey*, 2 Eq. Ca. Ab. 508; *Levet* v. *Needham*, 2 Vern. 138; *Halliday* v. *Hudson*, 3 Ves. 210; *Kellett* v. *Kellett*, 3 Dow, 248; *Hall* v. *Waterhouse*, W. N. 1867, p. 11; [*Re Croome*, *sup.*].

(*g*) *Robinson* v. *Taylor*, 2 B. C. C. 589; *Mapp* v. *Elcock*, 2 Phill. 793; affirmed on appeal, 3 H. L. Cas. 492; *Read* v. *Stedman*, 26 Beav. 495; *Bird* v. *Harris*, 9 L. R. Eq. 204; and see *Dawson* v. *Clarke*, 18 Ves. 254; *Williams* v. *Arkle*, 7 L. R. H. L. 606.

upon trust to pay debts, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A. and his heirs *charged with debts*, the intention of the testator is to devise beneficially subject to the charge, and then whatever remains after the charge has been satisfied will belong to the devisee (*a*).

No positive rule to be laid down.

12. No positive rule can be laid down in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the Court, refusing to be governed by mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument (*b*). [Thus where by a creditor's deed the business and property of a firm were assigned to trustees upon trust to carry on the business, or sell and dispose of the assets, and pay and divide the clear residue of the profits and moneys among the creditors in rateable proportion, according to the amounts of the debts, it was held by the House of Lords (*c*), that by the form of the deed there was no resulting trust of any possible surplus in favour of the assignors; and where a society was formed for the purpose of providing by the subscriptions of members annuities for their widows, proportionate to the amount of the subscriptions, and all the members and annuitants having died, there remained a surplus fund unexpended, it was held that there was no resulting trust in favour of the representatives of deceased members, but the fund went to the Crown as *bona vacantia* (*d*). So again, where a fund was subscribed for the education of the infant children of a deceased clergyman, upon a statement that the money was not intended for any one of them exclusively, nor for equal division among them, but to defray the necessary expenses of all, and that solely in the matter of education, and the children having been educated partly out of the fund and partly out of their father's estate, a balance remained unapplied, it was held that there was no resulting trust, and that the balance was divisible among the children equally (*e*). But in the case of a trade union

(*a*) *King* v. *Denison*, 1 V. & B. 272, *per* Lord Eldon; [*Re Croome*, 59 L. T. N.S. 582; 61 L. T. N.S. 814; *Re West*, (1900) 1 Ch. 84].

(*b*) *Hill* v. *Bishop of London*, 1 Atk. 620, *per* Lord Hardwicke; *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant; *Starkey* v. *Brooks*, 1 P. W. 391, *per* Lord Cowper; *King* v. *Denison*, 1 V. & B. 279, *per* Lord Eldon.

[(*c*) *Storey* v. *Cooke*, (1891) A. C. 297, reversing C. A. and restoring Kekewich, J., 45 Ch. D. 38.]

[(*d*) *Cunnack* v. *Edwards*, (1896) 2 Ch. (C.A.) 679, reversing Chitty, J., (1895) 1 Ch. 489; and see *Braithwaite* v. *Attorney-General*, (1909) 1 Ch. 510. So if a corporation having a right of proof in a bankruptcy, is dissolved, the right of proof devolves on the Crown as *bona vacantia*: *Re Higginson*, (1899) 1 Q. B. 325.]

[(*e*) *Re Andrew's Trust*, (1905) 2 Ch. 48.]

which was dissolved, without any provision for the distribution of its accumulated surplus fund among its members, it was held that there was a resulting trust, and that the fund ought to be distributed amongst those who were members at the date of dissolution in the proportion in which they subscribed (*a*); and where a fund was raised by subscriptions for the maintenance of two distressed ladies, and at the death of the survivor a part of the fund remained unapplied, it was held that there was a resulting trust of the surplus in favour of the subscribers (*b*).]

Relationship of the devisee or legatee.

13. The recognition of the *relationship* of the parties has often materially influenced the Court against the construction of a mere trust (*c*); as, where a testator gave 5*l.* to his brother, who was his heir-at-law, and "made and constituted *his dearly beloved wife* his sole heiress and executrix to sell and dispose thereof at her pleasure, and to pay his debts and legacies"; and Lord King decreed the devisee to be beneficially entitled (*d*). But any allusion of this kind is merely one circumstance of evidence, and therefore to be counteracted by the language of the other parts of the instrument (*e*).

Heir of settlor not to be excluded from the resulting trust on mere conjecture.

14. It must also be observed, that the heir will not be excluded from the resulting trust on bare conjecture (*f*); and there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention (*g*). Thus, a legacy to the heir will not prevent a trust from resulting (*h*); but, joined to other circumstances in favour of the devisee, it will not be without its effect (*i*).

Parol evidence.

15. As the species of trust we are now considering results by

[(*a*) *Re Printers' and Transferrers' Society*, (1899) 2 Ch. 184.]

[(*b*) *Re Abbott Fund*, (1900) 2 Ch. 326.]

(*c*) *Lloyd* v. *Spillet*, cited *Cook* v. *Duckenfield*, 2 Atk. 566; *Lloyd* v. *Wentworth*, cited *Robinson* v. *Taylor*, 2 B. C. C. 594; *Smith* v. *King*, 16 East, 283; *Coningham* v. *Mellish*, Pr. Ch. 31; *Cook* v. *Hutchinson*, 1 Keen, 42.

(*d*) *Rogers* v. *Rogers*, 3 P. W. 193.

(*e*) *Buggins* v. *Yates*, 9 Mod. 122; *Wych* v. *Packington*, 2 Eq. Ca. Ab. 507; and see *King* v. *Denison*, 1 V. & B. 274.

(*f*) *Halliday* v. *Hudson*, 3 Ves. 211, *per* Lord Loughborough, and see *Kellett* v. *Kellett*, 3 Dow, 248; *Amphlett* v. *Parke*, 2 R. & M. 227; *Phillips* v. *Phillips*, 1 M. & K. 661; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668.

(*g*) See *Hopkins* v. *Hopkins*, Cas. *t.* Talb. 44; *Tregonwell* v. *Sydenham*, 3 Dow, 211; *Lloyd* v. *Spillet*, 2 Atk. 151; *Habergham* v. *Vincent*, 2 Ves. jun. 225.

(*h*) *Randall* v. *Bookey*, 2 Vern. 425; *S. C.* Pr. Ch. 162; *Hopkins* v. *Hopkins*, Cas. *t.* Talb. 44; *Starkey* v. *Brooks*, 1 P. W. 390, overruling *North* v. *Crompton*, 1 Ch. Ca. 196; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668.

(*i*) *Rogers* v. *Rogers*, 3 P. W. 193; *S. C.* Sel. Ch. Ca. 81; and see *Docksey* v. *Docksey*, 2 Eq. Ca. Ab. 506; *King* v. *Denison*, 1 V. & B. 274; *Amphlett* v. *Parke*, 2 R. & M. 230; *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78.

presumption of law, it may be rebutted as to instruments *inter vivos* by positive evidence by parol, that the settlor's intention was to confer the surplus interest beneficially (*a*). And it seems that in one case parol evidence was read as to the intention of a *testator*, but the decision of the case turned more particularly upon the intention as collected from the will itself (*b*).

Of trusts resulting from intention expressed.

16. Next, a trust results, by operation of law, where the intention not to benefit the grantee, devisee, or legatee, is *expressed* upon the instrument itself, as if the conveyance, devise, or bequest, be to a person "upon trust," and no trust declared (*c*), or the bequest be to a person named as executor "to enable him to carry into effect the trusts of the will," and no trust is declared (*d*), or the grant, devise, or bequest be upon certain trusts that are too vague to be executed (*e*), or upon trusts to be thereafter declared, and no declaration is ever made (*f*), or upon trusts that

(*a*) *Cook* v. *Hutchinson*, 1 Keen, 50, *per* Lord Langdale; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

(*b*) *Docksey* v. *Docksey*, 2 Eq. Ca. Ab. 506; and see *North* v. *Crompton*, 1 Ch. Ca. 196; *S. C.* cited 2 Vern. 253; *Mallabar* v. *Mallabar*, Cas. *t.* Talbot, 78. See also the analogous case of an executor rebutting by parol evidence the presumption arising from the will of a testator's intention to exclude him from the beneficial enjoyment of the residue, *ante*, p. 63.

(*c*) *Dawson* v. *Clarke*, 18 Ves. 254, *per* Lord Eldon; *Southouse* v. *Bate*, 2 V. & B. 396; *Morice* v. *Bishop of Durham*, 10 Ves. 537; *Woollett* v. *Harris*, 5 Mad. 452; *Pratt* v. *Sladden*, 14 Ves. 198; *Dunnage* v. *White*, 1 Jac. & Walk. 583; *Goodere* v. *Lloyd*, 3 Sim. 538; *Anon. Case*, 1 Com. 345; *Penfold* v. *Bouch*, 4 Hare, 271; *Corporation of Gloucester* v. *Wood*, 3 Hare, 131; 1 H. L. Cas. 272; *Attorney-General* v. *Dean and Canons of Windsor*, 24 Beav. 679; *S. C.* in D. P. 8 H. L. Cas. 369; *Welford* v. *Stokoe*, W. N. 1867, p. 208; *Aston* v. *Wood*, 6 L. R. Eq. 419; *Candy* v. *Candy*, W. N. 1872, p. 168; *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R. P. C. 381; [and see *Kirby-Smith* v. *Parnell*, (1903) 1 Ch. 483; *Re Sinclair*, W. N. (1903) 113].

(*d*) *Barrs* v. *Fewke*, 2 H. & M. 60.

(*e*) *Fowler* v. *Garlike*, 1 R. & M. 232; *Morice* v. *Bishop of Durham*, 9 Ves. 399; *S. C.* 10 Ves. 522; *Stubbs* v. *Sargon*, 2 Keen, 255; *S. C.* 3 M. & Cr. 507; *Kendall* v. *Granger*, 5 Beav. 300; *Leslie* v. *Devonshire*, 2 B. C. C. 187; *Vezey* v. *Jamson*, 1 Sim. & Stu. 69; and see *Ellis* v. *Selby*, 7 Sim. 352; *S. C.* 1 M. & Cr. 286; *Williams* v. *Kershaw*, 5 Cl. & Fin. 111; (distinguished in *Re Sutton*, 28 Ch. D. 464); [*Copinger* v. *Crehane*, 11 Ir. R. Eq. 429; *Re Jarman's Estate*, 8 Ch. D. 584; *Fitzgerald* v. *Noad*, W. N. 1886, p. 97, where the testator's wife was to hold "upon trust to carry out my verbal wishes, and further, to execute such trusts as shall be satisfactory to her solicitor"; *Scott* v. *Brownrigg*, 9 L. R. Ir. 246, where a trust for "missionary purposes" was held too vague, and so a trust for "emigration uses," *Re Sidney*, (1907) W. N. 219; and for "charitable religious or other objects in connection with the Roman Catholic faith," *Re Davidson*, (1909) 1 Ch. (C.A.) 567; and see *Re King*, 21 L. R. Ir. 273, 278; *Fenton* v. *Nevin*, 31 L. R. Ir. 478; *Re Harrison*, (1902) 1 I. R. 103; but in *Re Best*, (1904) 2 Ch. 354 a gift of residue upon trust for "such charitable and benevolent institutions" as trustees should determine, was held good and not void for uncertainty; and so in *Dunne* v. *Duignan*, (1908) 1 I. R. 228, where the gift was for charities in Ireland and foreign missions].

(*f*) *Emblyn* v. *Freeman*, Pr. Ch. 541; *City of London* v. *Garway*, 2 Vern. 571; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Fitch* v. *Weber*, 6 Hare, 145; and see *Brown* v. *Jones*, 1 Atk. 188; *Sidney* v. *Shelley*, 19 Ves. 352; *Brookman*

are void for unlawfulness (*a*), or that fail by lapse (*b*), &c.; for in these and the like cases the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

"Trust" and "trustee," do not necessarily exclude a beneficial gift.

17. Although the introduction of the words "upon trust" may be strong evidence of the intention not to confer on the devised a beneficial interest (*c*), yet that construction may be negatived by the context, or the general scope of the instrument (*d*); and in like manner the devisee may be designated as "trustee," but the expression may be explained away; as, for instance, if the term be used with reference to one only of two funds, the devisee may still establish his title to the beneficial interest in the other (*e*). On the other hand there may be a total *absence* of the word "trust" or "trustee" throughout the whole will, and yet the Court may collect an intention that the devisee or legatee should be a trustee, as where there is a direction that the devisee shall be allowed all his costs and expenses, which would be without meaning if he took beneficially (*f*).

Parol evidence.

18. Where a trust results to the settlor or his representative not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol (*g*).

General observations as to resulting trusts.

19. Having distinguished between the two kinds of resulting trusts (a classification necessary to be made for the purpose of

v. *Hales*, 2 V. & B. 45; *Biddulph* v. *Williams*, 1 Ch. D. 203.

(*a*) *Carrick* v. *Errington*, 2 P. W. 361; *Arnold* v. *Chapman*, 1 Ves. 108; *Tregonwell* v. *Sydenham*, 3 Dow, 194; *Jones* v. *Mitchell*, 1 S. & S. 290; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Page* v. *Leapingwell*, 18 Ves. 463; *Pilkington* v. *Boughey*, 12 Sim. 114; *Morris* v. *Owen*, W. N. 1875, p. 134; and see *Cooke* v. *The Stationers' Company*, 3 M. & K. 262. If an estate be devised to A. and his heirs, in trust to sell and pay part of the proceeds to persons capable of taking, and other part to a charity, the Statute of Mortmain does not avoid the whole legal devise, but affects only the interest given to the charity; *Young* v. *Grove*, 4 Com. B. Rep. 668; *Doe* v. *Harris*, 16 Mees. & W. 517.

(*b*) *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Spink* v. *Lewis*, 3 B. C. C. 355; *Williams* v. *Coade*, 10 Ves. 500; *Digby* v. *Legard*, cited *Cruse* v. *Barley*, 3 P. W. 22, note by Cox (1); *Hutcheson* v. *Hammond*, 3 B. C. C. 128; *Davenport* v. *Coltman*, 12 Sim. 610; *Muckleston* v. *Brown*, 6 Ves. 63.

(*c*) See *Hill* v. *Bishop of London*, 1 Atk. 620; *Woollett* v. *Harris*, 5 Mad. 452.

(*d*) *Dawson* v. *Clarke*, 15 Ves. 409; *S. C.* 18 Ves. 247, see 257; *Coningham* v. *Mellish*, Pr. Ch. 31; *Cook* v. *Hutchinson*, 1 Keen, 42; *Hughes* v. *Evans*, 13 Sim. 196.

(*e*) *Batteley* v. *Windle*, 2 B. C. C. 31; *Pratt* v. *Sladden*, 14 Ves. 193; and see *Gibbs* v. *Rumsey*, 2 V. & B. 294.

(*f*) *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*g*) See *Langham* v. *Sanford*, 17 Ves. 442; *S. C.* 19 Ves. 643; *Rachfield* v. *Careless*, 2 P. W. 158; *Gladding* v. *Yapp*, 5 Mad. 59; *White* v. *Evans*, 4 Ves. 21; *Walton* v. *Walton*, 14 Ves. 322; *Irrine* v. *Sullivan*, 8 L. R. Eq. 673.

ascertaining the admissibility of parol evidence), we proceed to introduce a few remarks applicable to resulting trusts generally, whether arising by presumption of law, or from the language of the instrument.

In trusts for sale, the undisposed of proceeds result to the heir, not the executor.

First. If *real estate* be devised upon trust to *sell* for a particular purpose, and that purpose either wholly fails or does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's *heir*, and not to his *next of kin* (*a*), and if the testator was seised of the estate *ex parte maternâ*, the undisposed of interest will result to the maternal heir (*b*). And the whole or surplus will result in this manner, though the proceeds of the realty be blended with personal estate in the formation of one common fund (*c*). And even an express declaration that the proceeds of the sale shall be considered as part of the testator's *personal estate* will not prevent the operation of the rule (*d*); for a direction of this kind is construed to extend to the purposes of the *will* only, and not to give a right to those who claim, as the next of kin, by *operation of law*. The case of *Phillips* v. *Phillips* (*e*) before Sir J. Leach, to the contrary, has repeatedly received the disapprobation of the Court (*f*,) and has now been overruled (*g*).

The conversion is only for the purposes of the will.

(*a*) *Starkey* v. *Brooks*, 1 P. W. 390; *Randall* v. *Bookey*, Pr. Ch. 162; 2 Vern. 425; *Stonehouse* v. *Evelyn*, 3 P. W. 252; *Robinson* v. *Taylor*, 2 B. C. C. 589; *City of London* v. *Garway*, 2 Vern. 571; *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, 11 Ves. 205; *Watson* v. *Hayes*, 5 M. & Cr. 125; and see *Cruse* v. *Barley*, 3 P. W. 20; *Buggins* v. *Yates*, 2 Eq. Ca. Ab. 508; *Hill* v. *Cock*, 1 V. & B. 173; *Nicholls* v. *Crisp*, cited *Croft* v. *Slee*, 4 Ves. 65; *Whitehead* v. *Bennett*, 1 Eq. Rep. 560; *Digby* v. *Legard*, 2 Dick. 500; *Spink* v. *Lewis*, 3 B. C. C. 355; *Chitty* v. *Parker*, 4 B. C. C. 411; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Howse* v. *Chapman*, 4 Ves. 542; *Williams* v. *Coade*, 10 Ves. 500; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Maugham* v. *Mason*, 1 V. & B. 410; *Wright* v. *Wright*, 16 Ves. 188; *Hooper* v. *Goodwin*, 18 Ves. 156; *Jones* v. *Mitchell*, 1 S. & S. 290; *Page* v. *Leapingwell*, 18 Ves. 463; *Gibbs* v. *Ougier*, 12 Ves. 416; *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 545; *Mogg* v. *Hodges*, 2 Ves. 52; *Eyre* v. *Marsden*, 2 Keen, 564; *Ex parte Pring*, 4 Y. & C. 507; *Davenport* v. *Coltman*, 12 Sim. 610; *Bunnett* v. *Foster*, 7 Beav. 540; *Marriott* v. *Turner*, 20 Beav. 557; *Smith* v. *Harding*, W. N. 1874, p. 101; *Watson* v. *Arundel*, 10 Ir. R. Eq. 299, &c. Note, *Countess of Bristol* v. *Hungerford*, 2 Vern. 645, is misreported—see *Rogers* v. *Rogers*, 3 P. W. 194, note (C).

(*b*) *Hutcheson* v. *Hammond*, 3 B. C. C. 128.

(*c*) *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Jessopp* v. *Watson*, 1 M. & K. 665; *Salt* v. *Chattaway*, 3 Beav. 576.

(*d*) *Collins* v. *Wakeman*, 2 Ves. jun. 683; and see *Amphlett* v. *Parke*, 2 R. & M. 226; *Field* v. *Peckett*, (No. 1), 29 Beav. 568; [*M'Guire* v. *M'Guire*, (1900) 1 I. R. 200]. *Ogle* v. *Cook*, cited in *Fletcher* v. *Ashburner*, 1 B. C. C. 502, and in *Ackroyd* v. *Smithson*, id. 513, was for a long time considered *contra;* but in *Collins* v. *Wakeman*, 2 Ves. jun. 686, Lord Loughborough had the Reg. Lib. searched, and it was found the point had been left undecided.

(*e*) 1 M. & K. 649.

(*f*) *Fitch* v. *Weber*, 6 Hare, 145; *Shallcross* v. *Wright*, 12 Beav. 505; *Flint* v. *Warren*, 16 Sim. 124.

(*g*) *Taylor* v. *Taylor*, 3 De G. M. & G. 190; *S. C.* 1 Eq. Rep. 239; *Robinson* v. *London Hospital*, 10 Hare, 19.

Direction for sale, and that the proceeds shall be personal estate.

If a testator direct the proceeds of the sale to be taken as personal estate, and *nothing more is said*, then, as every part of the will ought, if possible, to have an operation, the meaning of the testator might be thought to be, that the realty should be converted into personalty for the benefit of the next of kin by implication; and in *The Countess of Bristol* v. *Hungerford* (*a*) where the testator directed the proceeds of the sale to be taken as personal estate, and go to his executors, to whom he gave 20*l.* a-piece, it is said the next of kin were declared entitled. The two *next of kin*, however, were also the *co-heirs*, and therefore as *utraque viâ datâ* the same persons would claim, it was obviously unnecessary to determine the question. And in a case where the testator even said, "nothing shall result to the heir-at-law," it was held that, nevertheless, a bequest to the next of kin was not implied, but that the heir-at-law must take in spite of the intention to the contrary (*b*).

Fitch *v.* Weber.

Whether the interest results as real or personal estate.

If the execution of the trust require the estate to be sold, but the purposes of the trust do not exhaust the proceeds, the part that is undisposed of will result to the heir in the character of personalty, and, though the sale was not actually effected in his lifetime, will devolve on his executor (*c*); and in the case of a trust created by a settlor in his lifetime, the undisposed of interest in the proceeds of sale will result to the settlor as personal estate, and go to his personal representative, even though the trust for sale was not to arise until after the settlor's decease (*d*). If, however, the trusts declared by the testator so entirely fail as not to call for a conversion, then the whole estate will result to the heir as realty, and descend upon his heir (*e*), though the estate may, by the mistake of the trustees, have been actually sold (*f*), and if the testator was seised *ex parte maternâ*, the equitable interest will descend to the testator's heir in the maternal line (*g*).

Where trusts wholly fail.

(*a*) Pr. Ch. 81; *S. C.* 2 Vern. 645; corrected from Reg. Lib. in *Rogers* v. *Rogers*, 3 P. W. 194, note (C); and see *Sir W. Basset's case*, cited *Bayley* v. *Powell*, 2 Vern. 361.

(*b*) *Fitch* v. *Weber*, 6 Hare, 145; and compare *Johnson* v. *Johnson*, 4 Beav. 318.

(*c*) *Hewitt* v. *Wright*, 1 B. C. C. 86; *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Mad. 484; *Dixon* v. *Dawson*, 2 S. & S. 327; *Jessopp* v. *Watson*, 1 M. & K. 665; *Hatfield* v. *Pryme*, 2 Coll. 204; *Bagster* v. *Fackerel*, 26 Beav. 469; *Wilson* v. *Coles*, 28 Beav. 215; *Hamilton* v. *Foot*, 6 Ir. R. Eq. 572; *The Attorney-General* v. *Lomas*, 9 L. R. Ex. 29; [*Re Richerson*, (1892) 1 Ch. 379 (where the partial failure of the trusts took place after the death of the heir)].

(*d*) *Clarke* v. *Franklin*, 4 K. & J. 257.

(*e*) *Smith* v. *Claxton*, 4 Mad. 484 (where the doctrines of the Court are clearly stated); *Bagster* v. *Fackerel*, 26 Beav. 469; *Chitty* v. *Parker*, 2 Ves. jun. 213; *Buchanan* v. *Harrison*, 1 J. & H. 662.

(*f*) *Davenport* v. *Coltman*, 12 Sim. 610.

(*g*) *Wood* v. *Skelton*, 6 Sim. 176; see *Buchanan* v. *Harrison*, 1 J. & H. 673.

[Since the decision in *Steed* v. *Preece* (*a*), it is established that an order of the Court rightfully (*b*) made for the sale of an estate operates as a conversion from the date of the order, so that the proceeds of sale are personalty. And similarly, where timber growing on settled land has been rightfully felled and sold under an order of the Court, it becomes personal estate, and all the consequences of conversion must follow (*c*). Some earlier cases proceeded upon a different principle, and it was held where] real estate was devised subject to a charge of debts, and sold by the *Court*, that the surplus money could not be considered personal estate, so as to devolve on the devisee's *personal representative*, but would descend to his *heir* (*d*); [but in *Steed* v. *Preece* these cases were disapproved (*e*). [Sale by Court.]

The rule is otherwise, if what has been termed an equity for reconversion (*f*) exists, and thus in the] sale of the property of an infant (*g*), [or lunatic (*h*)], under the Partition Act, 1868, which incorporates some of the provisions of the Leases and Sales of Settled Estates Act for reinvestment of money in land, the interest of the infant [or lunatic] retains its character of real estate [and on his death intestate descends to the heir-at-law, but the heir will take it as realty or personalty according to its actual state of investment at the time of the death (*i*). There may be a question, however, whether this will be so where the sale is made on the request of the infant; and it appears that the practice in such a case is to ear-mark the interest of the infant "as real estate" (*j*). [Under Partition Act.]

[(*a*) 18 L. R. Eq. 192, where it was held that a sale of an infant's estate under an order of the Court, finding that the sale would be for his benefit, effected a conversion; and see *Hyett* v. *Mekin*, 25 Ch. D. 735; *Arnold* v. *Dixon*, 19 L. R. Eq. 113; *Re Beamish*, 27 L. R. Ir. 326; *Re Henry*, 31 L. R. Ir. 158; *Hartley* v. *Pendarves*, (1901) 2 Ch. 498; *Burgess* v. *Booth*, (1908) 2 Ch. (C.A.) 648; *Re Dodson*, (1908) 2 Ch. 638, where it was said that "it is the order itself which effects a conversion."]

[(*b*) *Secus* where the sale is unauthorised, see Jarman on Wills, 5th ed. p. 130, citing *Taylor* v. *Taylor*, 10 Ha. 478, 479; *Re Tugwell*, 27 Ch. D. 309, and see *Re Hall*, 31 L. R. Ir. 416.]

[(*c*) *Hartley* v. *Pendarves*, (1901) 2 Ch. 498.]

(*d*) *Cooke* v. *Dealy*, 22 Beav. 196; *Jermy* v. *Preston*, 13 Sim. 356; see *Flanagan* v. *Flanagan*, cited *Fletcher* v. *Ashburner*, 1 B. C. C. 500; and *Re Cross's Estate*, 1 Sim. N.S. 260; and see *Crowther* v. *Bradney*, 28 L. T. N.S. 464.

[(*e*) The decision in *Scott* v. *Scott*, 9 L. R. Ir. 367 (in which the earlier cases above referred to were apparently followed) has now been overruled, see *Burgess* v. *Booth*, (1908) 2 Ch. (C.A.) 648.]

[(*f*) See *Steed* v. *Preece*, 18 L. R. Eq. 197; *Foster* v. *Foster*, 1 Ch. D. 590.]

(*g*) *Foster* v. *Foster*, 1 Ch. D. 588; but see *Arnold* v. *Dixon*, 19 L. R. Eq. 113.

[(*h*) *Re Barker*, 17 Ch. D. (C.A.) 241; *Grimwood* v. *Bartels*, 46 L. J. N.S. Ch. 788.]

[(*i*) *Mordaunt* v. *Benwell*, 19 Ch. D. 302.]

[(*j*) *Re Norton*, (1900) 1 Ch. 101, referring to *Haward* v. *Jalland*, W. N. (1891), p. 210.]

So, where in a partition suit a sale was directed of certain real estate, one-eighth of which belonged to a married woman in fee, and an order was subsequently made directing that the husband and wife accepting a certain sum as the purchase-money of the one-eighth, that sum should be paid into Court, which was accordingly done, but before any conveyance was executed the married woman died, it was held that the purchase-money must be treated as realty (*a*). But since the Partition Act, 1876, if an order be made for the sale of a married woman's share in real estate, with her consent or at her request, it will operate as a conversion (*b*). Where a sale was ordered in a partition action, and the share of a person who was *sui juris* was ordered to be paid to her, but before payment she became lunatic, and afterwards died intestate, it was held that conversion of the share had taken place at the date of the sale (*c*); and where after sale in a partition action there was an order for payment out to trustees with power of sale, it was held that the fund would devolve as personalty (*d*).

[Where discretion in trustees.]

If trustees have a discretionary power of sale, and an order is made in an administration action directing a sale, the property is converted into personalty as from the date of the order (*e*).

[Under Lands Clauses Consolidation Act.]

If land of which an infant is seised in fee simple be taken under the provisions of the Lands Clauses Consolidation Act, 1845, and the purchase-money be paid into Court, the money retains the quality of real estate, and on the death of the infant descends to his heir-at-law (*f*).]

Money to be laid out on land results to the executor.

Secondly. If a testator bequeath *money* to be laid out in a purchase of *land*, to be settled to uses which either wholly or partially fail to take effect, the undisposed of interest in the money, or estate if purchased, will result to the [testator's *next of kin* (*g*); and will belong to them as realty or personalty, according to its nature in the view of a Court of Equity at the time it results (*h*)].

Appointed fund results to the donee of the power.

Thirdly. "Where" (to use the words of Lord St Leonards)

[(*a*) *Mildmay* v. *Quicke*, 6 Ch. D. 553.]

[(*b*) *Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Re Norton*, (1900) 1 Ch. 101.]

[(*c*) *Re Pickard*, 53 L. T. N.S. 293.]

[(*d*) *Re Morgan*, (1900) 2 Ch. 474.]

[(*e*) *Hyett* v. *Mekin*, 25 Ch. D. 735; *Crowther* v. *Bradney*, 28 L. T. N.S. 464; *Re Beamish*, 27 L. R. Ir. 326.]

[(*f*) *Kelland* v. *Fulford*, 6 Ch. D. 491.]

(*g*) *Cogan* v. *Stephens*, App. No. III. to 3rd edition of this work; *S. C.* 5 L. J. N.S. Ch. 17; *Hereford* v. *Ravenhill*, 1 Beav. 481; [*Curteis* v. *Wormald*, 10 Ch. D. (C.A.) 172; but see] *Reynolds* v *Godlee*, Johns. 536, 583. As to the principle, see the author's argument in favour of the next of kin in the early editions of this work.

[(*h*) *Curteis* v. *Wormald*, 10 Ch. D. (C.A.) 172.]

"there is a power to appoint a settled fund, the execution of the power takes the part appointed entirely out of the settlement. Although, therefore, the beneficial interest in the fund is not in term expressly disposed of, yet there can be no resulting trust for the benefit of any person under the *deed creating the power*, for when the fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power" (*a*). If, therefore, a *feme covert* has in certain events which occur a power to appoint a settled fund by will, and she appoints executors and directs them to apply the fund in payment of legacies which do not exhaust it, [or fail,] the executors hold the surplus in trust, not for the persons entitled under the settlement in default of appointment, but as part of the personal estate of the donee of the power (*b*). [It has been said that "in all cases of this class the question is one of intention, namely, whether the donee of the power meant, by the exercise of it, to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*c*).]

And there is no distinction in this respect between the cases of real estate and personal estate; and so realty appointed under a general power to trustees for purposes which fail will result to the appointor and go as part of his realty (*d*).

[The mere appointment of an executor is not sufficient evidence of an intention on the part of the appointor to make the property his own; and thus where the donee of the power, who was a married woman and also one of the trustees of the settlement creating the power, directed that the trust property should be held

(*a*) Treat. of Powers, 8th ed. p. 467.

(*b*) *Brickenden* v. *Williams*, 7 L. R. Eq. 310; [*Wilkinson* v. *Schneider*, 9 L. R. Eq. 423; *Re Pinede's Settlement*, 12 Ch. D. 667; *Re Ickeringill's Estate*, 17 Ch. D. 151; *Re Horton*, 51 L. T. N.S. 420; *Re Lawley*, (1902) 2 Ch. (C.A.) 673]. *Chamberlain* v. *Hutchinson*, 22 Beav. 444; *Mansell* v. *Price*, Sug. Powers, Appendix.

[(*c*) *Per* V. C. L., *Re De Lusi's Trusts*, 3 L. R. Ir. 232, 237, approved by M. R. *Re Pinede's Settlement*, *ubi sup.*; *Re Van Hagan*, 16 Ch. D. (C.A.) 18; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; *Re Marten*, (1902) 1 Ch. (C.A.) 314; and this rule is applicable although the appointment is not in the first instance to a trustee; *Coxen* v. *Rowland*, (1894) 1 Ch. 406, *per* Stirling, J. The cases, therefore, which deal merely with the question of appointment may be usefully referred to on the question of resulting trust.]

[(*d*) *Re Van Hagan*, 16 Ch. D. (C.A.) 18. Where under a testamentary power an appointment is made to an intended beneficiary without the interposition of any trustee, on the death of the appointee in the lifetime of the donee of the power the appointment wholly fails, and the appointed funds will revert to the persons entitled in default of appointment; *Re Davies' Trusts*, 13 L. R. Eq. 163; *Re De Lusi's Trusts*, 3 L. R. Ir. 232; *Re Boyd*, (1897) 2 Ch. 232.]

by her co-trustee on certain trusts which failed, and appointed the co-trustee her sole executor, it was held that the gift over in default of appointment took effect (*a*).]

In a gift of the whole, subject to a charge that may not arise, no trust results.

Fourthly. It often happens, that the settlor makes a primary disposition of the *whole* property to A. subject to a particular charge in favour of B., and the charge in event either wholly or partially fails so as either not to divest, or only *pro tanto* to divest the estate of A. The reader must distinguish the preceding cases of resulting trust from such a gift as this; for here as the entirety is disposed of in the first instance to A., so far as the charge does not exhaust it, there can nothing result to the heir, even should the charge not take effect. The distinction was thus stated by Sir J. Leach:—"If the devise," he said, "to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure" (*b*).

Gift charged with a contingent legacy.

Thus, if lands be devised to A. charged with a legacy to B., provided B. attain the age of twenty-one, should B. die without attaining that age, the devise has become absolute in A., and the will is to be read as if the legacy to B. had never been mentioned (*c*). So if the lands be given to A. charged with a legacy to B., and B. dies in the testator's lifetime (*d*).

Gift charged with a sum to be appointed, and the power not exercised.

The construction is the same, if lands be devised to A. subject to and charged with any sum not exceeding 10,000*l.* to such persons, and in such manner as the testator shall appoint, and the power is either never exercised, or the execution of it is void (*e*); for here, as the testator confers the whole interest on the devisee, reserving the power, if he either abstain from executing the power, or appoint for an illegal purpose, he does not diminish that interest, but the heir is wholly disinherited (*f*).

Noel *v.* Lord Henley.

And where a testator had devised certain estates upon trust to sell, and out of the proceeds to pay 5000*l.* unto his wife, her

[(*a*) *Re Thurston*, 32 Ch. D. 508.]

(*b*) *Cooke* v. *The Stationers' Company*, 3 M. & K. 264.

(*c*) *Tregonwell* v. *Sydenham*, 3 Dow, 210, *per* Lord Eldon. *Sprigg* v. *Sprigg*, 2 Vern. 394, was decided on this principle; *Cruse* v. *Barley*, 3 P. W. 20, should have been decided the same way, but the point was not noticed. See *Attorney-General* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60.

(*d*) *Sutcliffe* v. *Cole*, 3 Drew. 185.

(*e*) *Jackson* v. *Hurlock*, 2 Eden, 263; *Cooke* v. *The Stationer's Company*, 3 M. & K. 262; *Tucker* v. *Kayes*, 4 K. & J. 339.

(*f*) *Tregonwell* v. *Sydenham*, 3 Dow, 213, *per* Lord Eldon.

executors and administrators, *in part satisfaction of the sum of* 10,000*l. secured to her by marriage settlement in case of her surviving him,* and to invest the residue upon certain trusts, and the wife died in the lifetime of the husband, so that the 10,000*l.* never became raisable, it was held that the 5000*l.* instead of resulting to the heir, was included in the residue (*a*). The construction put upon the will was, that the whole fund was in the first instance given to the residuary legatees, subject to a charge of 5000*l.* to arise on a certain event, and that contingency having never occurred, the primary devise of the entirety was never divested (*b*).

Gift of a charge, and "subject thereto" to A.

Again, if an estate be settled to the use of trustees for a term of ninety-nine years, upon trusts that do not exhaust the whole interest, and from and after the expiration, or other sooner determination of the said term, and *subject thereto*, to uses in strict settlement, the surplus of the term will be in trust, not for the heir, but for the devisees in remainder, for here the intention is express, that subject to trusts which have been exhausted, the remaindermen shall take the whole estate (*c*). So, where an estate was devised to trustees upon trust within one year after the testator's decease to raise 2000*l.*, and, "after raising the same," upon trusts in strict settlement, the Court held the 2000*l.* to be a charge upon and not an exception out of the estate (*d.*)

"Subject thereto" implied.

And if the limitation be to trustees for ninety-nine years upon the trusts thereinafter expressed, and the instrument makes no mention of the trusts, and from and after the expiration, or other sooner determination of the said term to uses in strict settlement, the Court will consider the intention to be clearly *implied*, that the remaindermen should have the beneficial enjoyment subject to the term, and will read the will as if the words *subject thereto and to the trusts thereof* had been actually expressed (*e*).

[Charge if actually raised reverts as personal estate.]

[If the amount charged be actually raised, and subsequently the trusts affecting it fail, so that it reverts to the devisee of the estate charged, the devisee will take it as *personal estate*, for there is no

(*a*) *Noel* v. *Lord Henley*, 7 Price, 241 ; *S. C.* Dan. 211 and 322.

(*b*) That the case was probably decided on this ground, see observations of Richards, C. B., Dan. 235, and of Lord Eldon, Ib. 338.

(*c*) *Davidson* v. *Foley*, 2 B. C. C. 203 ; *Marshall* v. *Holloway*, 2 Swans. 432 ; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54 ; and see *Maundrell* v. *Maundrell*, 10 Ves. 259 ; [*Re Newberry's Trusts*, 5 Ch. D. 746].

(*d*) *Re Cooper's Trusts*, 4 De G. M. & G. 757 ; *S. C.* 2 Eq. Rep. 65.

(*e*) *Sidney* v. *Shelley*, 19 Ves. 352 ; *S. C. nom. Sidney* v. *Miller*, G. Coop. 206, overruling the dictum of Lord Hardwicke, in *Brown* v. *Jones*, 1 Atk. 191.

purpose requiring that it should be turned into land again, and no equity in any person to have it laid out in land (*a*).]

Charity legacies.

There has been much discussion in the Courts how far the rule establishing a distinction between a *charge upon* and *exception from* a devise is applicable to a charity legacy failing not by lapse, but by reason of the unlawfulness of the object. The question, [which has become of less importance since the passing of the Mortmain and Charitable Uses Act, 1891 (*b*),] is one of difficulty (*c*).

Lord Alvanley was of opinion that it mattered not in what way the failure of the legacy arose, whether by lapse, or the unlawfulness of the object. "It is now perfectly settled," said his Lordship, "that if an estate is devised, charged with legacies, and the legacies fail, *no matter how*, the devisee shall have the benefit of it, and take the estate" (*d*).

Results of the cases.

The cases upon the subject are very conflicting, [and for a statement of the best results that can be obtained from them, the reader is referred to the ninth edition of this work (*e*)].

The interest that would have resulted may be disposed of by will.

Fifthly. It has been stated in general terms, that, in the cases we have mentioned, a trust will result to the *settlor or his real or personal representative*, but the doctrine must be received with at least this qualification, that the interest which would have resulted is not otherwise disposed of by the settlor himself.

Any interest that would have resulted may of course be given away from the settlor's representative, by a *particular* and *specific* devise or bequest; it remains only to enquire what is the effect of certain *general* expressions.

Construction of the word "residue" in real estate.

With respect to a testator's realty, the heir "shall sit in the seat of his ancestor," unless the disinherison be expressed or clearly implied. The word "residue," therefore, had, before the Wills Act, received in devises a strict and narrow construction, and was held to mean, not all that the testator had not actually disposed of, but only so much of which he had shown no intention of disposing. Thus, if lands had been devised upon trust to raise 5000*l.* for a charity, the residue to A. (*f*), or upon

[(*a*) *Re Newberry's Trusts*, 5 Ch. D. 746.]

[(*b*) 54 & 55 Vict. c. 73; see *ante*, p. 106.]

[(*c*) For a discussion of the principle to be applied, see the ninth edition of this work, pp. 163, 164.]

(*d*) *Kennell* v. *Abbott*, 4 Ves. 811; [and see *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *Dawson* v. *Small*, 18 L. R. Eq. 114; *Re Rogerson*, (1901) 1 Ch. 715].

[(*e*) 9th ed. pp. 165, 167.]

(*f*) *Hutcheson* v. *Hammond*, 3 B. C. C. 128; *Page* v. *Leapingwell*, 18 Ves. 463; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Cruse* v. *Barley*, 3 P. W. 20; *Jones* v. *Mitchell*, 1 S. & S. 293; *Sprigg*

trust to raise 5000*l.* for a charity, with a general devise "of all the residue of the testator's real estate, whatsoever and wheresoever" (*a*), in either case the void legacy would have resulted to the heir, and not have been included in the residuary clause. Now, by the Wills Act, a residuary devise, unless a contrary intention appear by the will, is made to sweep in every interest undisposed of in real estate, as a residuary bequest already did in respect of personal estate (*b*).

Construction of "personal estate" as applicable to proceeds from sale of real estate.

If a testator direct his lands to be sold, and afterwards add a general bequest of all his *personal estate* (*c*), or appoint a person *residuary executor* (*d*), any part of the proceeds of the sale that is undisposed of will not form part of the residuary fund in the first case, or pass to the residuary executor in the second; for nothing, properly speaking, is a testator's "*personal estate*" but what possesses that character at the moment of his decease (*e*).

"Personal estate" in certain cases may pass such proceeds.

But the intention of converting the property absolutely by the sale, so as to make the proceeds undisposed of by the will pass by the description of the testator's "*personal estate*," may be collected from a will specially worded (*f*); and the blending of the real and personal estate into one fund will be regarded as a circumstance in some degree indicative of such an intention (*g*), and this, of course, will be the case, where the testator expressly directs the proceeds to be considered as part of his personalty (*h*).

Whether a gift of residuary personal estate will pass lapsed legacies from proceeds of sale of real estate.

The question was much discussed before the Wills Act, and

v. *Sprigg*, 2 Vern. 394, *per Cur.*; *Cooke* v. *Stationers' Company*, 3 M. & K. 264, *per Cur.*; *Anon. case*, 1 Com. 345.

(*a*) *Goodright* v. *Opie*, 8 Mod. 123; *Wright* v. *Hall*, Fort. 182; *S. C.* 8 Mod. 222; *Roe* v. *Fludd*, Fort. 184; *Watson* v. *Earl of Lincoln*, Amb. 325; *Oke* v. *Heath*, 1 Ves. 141, *per* Lord Hardwicke; *Cambridge* v. *Rous*, 8 Ves. 25, *per* Sir W. Grant; *Doe* v. *Underdown*, Willes, 293. But see *Page* v. *Leapingwell*, 18 Ves. 463; but it does not appear that the heir was a party, and the question was not discussed.

(*b*) 1 Vict. c. 26, s. 25. [As to the meaning of "residuary devise," see *Mason* v. *Ogden*, (1903) A. C. (H. L.) 1.]

(*c*) *Maugham* v. *Mason*, 1 V. & B. 410; *Smith* v. *Harding*, W. N. 1874, p. 101; and see *Gibbs* v. *Rumsey*, 2 V. & B. 294.

(*d*) *Berry* v. *Usher*, 11 Ves. 87.

(*e*) See *Maugham* v. *Mason*, 1 V. & B. 416.

(*f*) *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78; *Brown* v. *Bigg*, 7 Ves. 279; *Court* v. *Buckland*, 1 Ch. D. 605; *Durour* v. *Motteux*, 1 Ves. 321. (See Motteux's will correctly stated, *Jones* v. *Mitchell*, 1 S. & S. 292, note (d). See observations on *Mallabar* v. *Mallabar*, and *Durour* v. *Motteux*, in *Maugham* v. *Mason*, 1 V. & B. 416.)

(*g*) Compare *Durour* v. *Motteux*, 1 Ves. 321, with *Maugham* v. *Mason*, 1 V. & B. 417; *Hutcheson* v. *Hammond*, 3 B. C. C. 148, *per* Lord Thurlow; but see *Berry* v. *Usher*, 11 Ves. 87.

(*h*) *Kidney* v. *Coussmaker*, 1 Ves. jun. 436; and see *Field* v. *Peckett*, (No. 1), 29 Beav. 568, and *Lowes* v. *Hackward*, 18 Ves. 171. In *Collins* v. *Wakeman*, 2 Ves. jun. 683, the sum undisposed of did not fall into the residue on the principles adopted in *Davers* v. *Dewes*, 3 P. W. 40, and *Attorney-General* v. *Johnstone*, Amb. 377.

may still be material, what expressions of a testator will amount to such an absolute conversion of real estate into personal, that a *void or lapsed legacy* given out of the proceeds of the sale shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the heir. "I agree," said Lord Brougham, "a testator may provide that lapsed and void legacies shall go in this manner, as if the testator say in express words, 'I give all lapsed and void legacies as parcel of my residue to the residuary legatee,' and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument" (*a*). But what will amount to such an implication is a point that can with difficulty be brought under any very definite rule.

Result of the authorities.

Apparently the only principle to be extracted from the authorities is, that a lapsed or void legacy will pass to the residuary legatee, *if the testator expressly declare that the proceeds of the sale shall be considered as "personal estate," or if the intention of an absolute conversion into personal estate for all the purposes of the will can, without the aid of any such express declaration, be gathered from the general structure of the will* (*b*).

Next of kin and residuary legatee distinguished.

It was stated on a former page, that if a testator direct the proceeds of the sale to be taken as "*personal estate*," a part of the proceeds undisposed of by him will, nevertheless, not result to the *next of kin*. The distinction between the *next of kin* and the *residuary legatee* is this: the former claim *dehors* the will, while the latter is a claimant *under* the will, and when the proceeds of the sale are directed to be taken as personalty, the testator must be understood to mean for the purposes of the will only, and not for any object beyond it.

Resulting trust of personal estate.

With respect to resulting trusts of *personal estate*, the general residuary bequest was always held to sweep in every interest, whether undisposed of by the will, or undisposed of in event, and therefore it is only where the will contains no residuary clause that the next of kin can assert a claim to the benefit of the resulting interest (*c*). But if any part of the personal estate be expressly

(*a*) *Amphlett* v. *Parke*, 2 R. & M. 232; and see *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 545.

(*b*) *Durour* v. *Motteux*, 1 Ves. 321, (see the will stated from Reg. Lib. in *Jones* v. *Mitchell*, 1 S. & S. 292, note (d)); *Kennell* v. *Abbott*, 4 Ves. 802; *Amphlett* v. *Parke*, 1 Sim. 275; *S. C.* 2 R. & M. 221; *Green* v. *Jackson*, 5 Russ. 35; *S. C.* 2 R. & M. 238; *Salt* v. *Chattaway*, 3 Beav. 576. [And see *Singleton* v. *Tomlinson*, 3 App. Cas. 404.] As to *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78, see *Phillips* v. *Phillips*, 1 M. & K. 660.

(*c*) See *Dawson* v. *Clarke*, 15 Ves. 417; *Brown* v. *Higgs*, 4 Ves. 708; *S. C.* 8 Ves. 570; *Shanley* v. *Baker*, 4 Ves. 732; *Jackson* v. *Kelly*, 2 Ves. 285; *Oke* v. *Heath*, 1 Ves. 141; *Cam-*

excepted from the residue, as if a testator reserve a sum to be disposed of by a codicil, and give the residue not disposed of or reserved to be disposed of to A., and no codicil is executed, the sum so specially excepted will then result to the next of kin (*a*).

Case of settlor or devisor dying without heir or next of kin.

Sixthly. [In the case of the death of a settlor intestate, without heir or next of kin, the undisposed of beneficial interest in real estate, if the death occurred before the 14th August, 1884, sank into the land for the benefit of the trustee or legal tenant (*b*); and where the death occurs since that date, it escheats to the lord as if the interest were a legal estate in corporeal hereditaments (*c*);] but in the case of personalty the resulting interest, as *bonum vacans*, will fall to the Crown by the prerogative (*d*); [and so in the case of a money fund representing proceeds of sale of land sold under the Settled Land Acts (*e*).]

Of resulting trusts in gifts to charities.

Lastly, it may be noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts: for, upon the construction of instruments of this kind, the Court has adopted the following rules:—

Where no object expressed, the Court will direct the application of the estate to some charity.

(I.) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*f*), or such as do not exhaust the proceeds (*g*),

bridge v. *Rous*, 8 Ves. 25; *Cooke* v. *Stationers' Company*, 3 M. & K. 264; [*Re Marten*, (1902) 1 Ch. (C.A.) 314].

(*a*) *Davers* v. *Dewes*, 3 P. W. 40; *Attorney-General* v. *Johnstone*, Amb. 577.

(*b*) *Burgess* v. *Wheate*, 1 Eden, 177; *Henchman* v. *Attorney-General*, 3 M. & K. 485; *Taylor* v. *Haygarth*, 14 Sim. 8; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168.

[(*c*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4.]

(*d*) *Middleton* v. *Spicer*, 1 B. C. C. 201; *Barclay* v. *Russell*, 3 Ves. 424; *Taylor* v. *Haygarth*, 14 Sim. 8; *Powell* v. *Merrett*, 1 Sm. & G. 381; *Cradock* v. *Owen*, 2 Sm. & G. 241; see *ante*, p. 63.

[(*e*) *Re Bond*, (1901) 1 Ch. 15.]

(*f*) *Attorney-General* v. *Herrick*, Amb. 712.

(*g*) *Attorney-General* v. *Haberdashers' Company*, 4 B. C. C. 102; *S. C.* 2 Ves. jun. 1; *Attorney-General* v. *Minshull*, 4 Ves. 11; *Attorney-General* v. *Arnold*, Shower's P. C. 22; and see *Attorney-General* v. *Sparks*, Amb. 201; and Lord Eldon's observations in *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 319; [and *Biscoe* v. *Jackson*, 35 Ch. D. (C.A.) 460]. Where a gift is to a *particular* charity which exists at the date of the will, but is dissolved in the testator's lifetime, it is as much a lapse as a gift to a man who has ceased to exist; *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; [*Re Rymer*, (1895) 1 Ch. (C.A.) 19, following and explaining *Clark* v. *Taylor* (1 Drew. 642); and see *Attorney-General* v. *Shadwell*, (1909) W. N. 229; but there is no lapse where the purposes of the charity still substantially continue in part, as where a general school still existed in the form of a Sunday school: *Re Waring*, (1907) 1 Ch. 166. Where the charity fails after the death of the testator, but before the legacy is paid, there is no lapse, and the legacy must be applied *cy-pres*, *Re Slevin*, (1891) 2 Ch. (C.A.) 236, reversing *S. C.* (1891) 1 Ch. 373; but it is otherwise where the gift is on a condition which wholly fails, so that the charitable scheme has to be abandoned, *Re University of London Medical Sciences Institute Fund*, (1909) W. N. (C.A.) 57]. And where a fund was given to trustees for education in

the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

Where the rents increase, the surplus will be applied to like charitable purposes.

(II.) Where a person settles lands, or the rents and profits of lands to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*a*).

Exceptions from the foregoing rules.

(III.) But even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*b*), *or* belong to the donee of the

the United States, and the United States repudiated the gift, the fund was not applied to other charitable objects, but fell into the residue, *New* v. *Bonaker*, 4 L. R. Eq. 655. [A gift "towards the new building and equipment" of a hospital partially rebuilt could not be construed as a gift to the charity so as to pass what could not be properly expended on rebuilding or equipment: *Re Unite*, (1906) W. N. 26 distinguishing *Re Sanderson's Trusts* (3 K. & J. 497).]

(*a*) *Inhabitants of Eltham* v. *Warreyn*, Duke, 67; *Sutton Colefield case*, second resolution, Id. 68; *Hynshaw* v. *Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Rep. 130 *b*; *Attorney-General* v. *Johnson*, Amb. 190; *Kennington Hastings case*, Duke, 71; *Attorney-General* v. *Mayor of Coventry*, 2 Vern. 397, reversed in D. P. 7 B. P. C. 236; (see the foregoing cases commented upon by Lord Eldon in *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 316); *Attorney-General* v. *Coopers' Company*, 19 Ves. 189, *per* Lord Eldon; *Attorney-General* v. *Master of Catherine Hall, Cambridge*, Jac. 381; *Attorney-General* v. *Christ's Hospital*, Ib. 73; *Attorney-General* v. *Corporation of Southmolton*, 14 Beav. 357; *S. C.* 5 H. L. C. 1; and see also *Attorney-General* v. *Wilson*, 3 M. & K. 362; *Lad* v. *London City*, Mos. 99; *Attorney-General* v. *Coopers' Company*, 3 Beav. 29; *Attorney-General* v. *Beverley*, 6 H. L. Cas. 310; *Attorney-General* v. *Drapers' Company*, 2 Beav. 508; 4 Beav. 67; *Attorney-General* v. *Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Wax Chandlers' Company*, 6 L. R. H. L. 1; *Attorney-General* v. *Smythies*, 2 R. & M. 717; *Attorney-General* v. *Drapers' Company*, 6 Beav. 382; *Attorney-General* v. *Jesus College*, 29 Beav. 163; [and see Wh. & Tudor's Leading Cases, 3rd ed., p. 52; Tyssen on Charitable Bequests, p. 244]. The additional benefit is not always distributed amongst the different objects of the charity rateably, but the Court exercises a discretion as to the proportions, *Attorney-General* v. *Marchant*, 3 L. R. Eq. 424. [Where there is a mixed endowment, including both educational and non-educational charities, a scheme devoting to educational purposes a part of the income which becomes inapplicable thereto will not in any way prevent the application of it by a future scheme to non-educational charities, should such a course, by reason of school expenses being thrown on the rates, become desirable; *Re Belton's Charity*, (1908) 1 Ch. 205.]

(*b*) See *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 308.

property subject to the charge, if the donee be (as in the case of a charitable corporation) itself an object of charity (*a*).

The exceptions we have noticed were established at an early period, when the doctrine of resulting trusts was imperfectly understood (*b*). The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and trustee (*c*). Were the subject still unprejudiced by authority, there is little doubt that the Court would, at the present day, follow the general principle, and hold a trust to result (*d*).

The doctrine in favour of charities established before trusts were settled.

SECTION II

OF RESULTING TRUSTS UPON PURCHASES IN THE NAMES OF THIRD PERSONS

Purchases of this kind are governed by different rules, according to the relation which subsists at the time between the person who pays the money, and the person in whose name the conveyance is taken. We must, therefore, distribute the subject under two heads: First, Purchases in the name of a stranger; and Secondly, Purchases in the name of a child, or wife, or near relative.

I. *Where the purchase is in the name of a stranger.*

1. "The clear result," said Lord Chief Baron Eyre, "of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly (*e*), or *successivè* (*f*), results to the

General rule.

(*a*) *Attorney-General* v. *Beverley*, 6 H. L. Cas. 310; *Attorney-General* v. *Southmolton*, 5 H. L. Cas. 1; *Attorney-General* v. *Trinity College*, 24 Beav. 383; *Attorney-General* v. *Dean of Windsor*, 24 Beav. 679; affirmed in D. P. 8 H. L. Cas. 369; *Attorney-General* v. *Sidney Sussex College*, 4 L. R. Ch. App. 722; *Attorney-General* v. *Wax Chandlers' Company*, 8 L. R. Eq. 452; 5 L. R. Ch. App. 503; 6 L. R. H. L. 1; and see *Attorney-General* v. *Mercers' Company*, 22 L. T. N.S. 222; 18 W. R. 448; *Merchant Taylors' Company* v. *Attorney-General*, 11 L. R. Eq. 35; affirmed, 6 L. R. Ch. App. 512.

(*b*) *Attorney-General* v. *Johnson*, Amb. 190, *per* Lord Hardwicke; *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 307, *per* Lord Eldon.

(*c*) See *Thetford School case*, 8 Rep. 130.

(*d*) See *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 307.

(*e*) See *Ex parte Houghton*, 17 Ves. 251; *Rider* v. *Kidder*, 10 Ves. 367.

(*f*) *Withers* v. *Withers*, Amb. 151; *Howe* v. *Howe*, 1 Vern. 415; *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *S. C.* Lofft, 230; *Smith* v. *Baker*, 1 Atk. 385; *Clark* v. *Danvers*, 1 Ch. Ca. 310; *Prankerd* v. *Prankerd*, 1 S. & S. 1.

man who advances the purchase-money (*a*); and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor" (*b*).

Who in particular cases is the real purchaser.

2. But no trust will result unless the person advance the money in the character of a *purchaser;* for if A. discharge the purchase money by way of *loan* to B., in whose name the conveyance is taken, no trust will result in favour of A., who is merely a creditor of B. (*c*). And, on the other hand, should B. advance the purchase-money, but only on account of A., then A. is the owner in equity and B., who takes the conveyance, stands in the light of a creditor (*d*).

Principle applicable to personalty.

3. Not only *real estate* but *personalty* also, is governed by these principles, as if a man take a bond (*e*), or purchase an annuity (*f*), stock (*g*), or other chattel interest (*h*), [or effect a policy of assurance (*i*)] in the name of a stranger, the equitable ownership results to the person from whom the consideration moved.

Joint advance and purchase in name of third person.

4. In *Crop* v. *Norton* (*j*) Lord Hardwicke doubted whether the rule was not confined to an individual purchaser. But in *Wray* v. *Steele* (*k*) the point was expressly decided in conformity with the general principle; for what was there applicable to an advance by a *single* individual which was not equally applicable to a *joint* advance under similar circumstances?

Joint advance and purchase as joint tenants.

5. If two persons, joining in a purchase, take the conveyance not in the name of a *stranger,* or of *one* of themselves, but in the

(*a*) *Redington* v. *Redington*, 3 Ridg. 177, *per* Lord Loughborough; *Hungate* v. *Hungate*, Tothill, 120; *Ex parte Vernon*, 2 P. W. 549; *Ambrose* v. *Ambrose*, 1 P. W. 321; *Willis* v. *Willis*, 2 Atk. 71; *Woodman* v. *Morrel*, 2 Freem. 33 *per Cur.*; *Finch* v. *Finch*, 15 Ves. 50, *per* Lord Eldon; *Grey* v. *Grey*, 2 Sw. 597; *S. C.* Finch, 340, *per* Lord Nottingham; *Wray* v. *Steele*, 2 V. & B. 390, *per* Sir T. Plumer; *Smith* v. *Camelford*, 2 Ves. jun. 712, *per* Lord Loughborough; *Anon.* 2 Vent. 361; *Pelly* v. *Maddin*, 21 Vin. Ab. 498; *Lever* v. *Andrews*, 7 B. P. C. 288; *Lade* v. *Lade*, 1 Wils. 21; *Groves* v. *Groves*, 3 Y. & J. 170, *per* Ch. Bar. Alexander; *Murless* v. *Franklin*, 1 Sw. 17, 18, *per* Lord Eldon; *Crop* v. *Norton*, 9 Mod. 235; *S. C.* Barn. 184; *S. C.* 2 Atk. 75, *per* Lord Hardwicke; *Trench* v. *Harrison*, 17 Sim. 111; *James* v. *Holmes*, 4 De G. F. & J. 470.

(*b*) *Dyer* v. *Dyer*, 2 Cox, 93; *S. C.* 1 Watk. Cop. 218; [*Lynch* v. *Clarkin*, (1900) 1 I. R. (C.A.) 178].

(*c*) See *Bartlett* v. *Pickersgill*, 1 Eden, 516; *Crop* v. *Norton*, 9 Mod. 235.

(*d*) See *Aveling* v. *Knipe*, 19 Ves. 441.

(*e*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(*f*) *Mortimer* v. *Davies*, cited *Rider* v. *Kidder*, 10 Ves. 363, 366.

(*g*) *Rider* v. *Kidder*, 10 Ves. 360; *Lloyd* v. *Read*, 1 P. W. 607; and see *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Garrick* v. *Taylor*, 29 Beav. 79; *Beecher* v. *Major*, 2 Dr. & Sm. 431.

(*h*) See *Ex parte Houghton*, 17 Ves. 253; *Garrick* v. *Taylor*, 29 Beav. 79.

[(*i*) *Re Scottish Equitable Life Assurance Society*, (1902) 1 Ch. 282.]

(*j*) Barn. 179; *S. C.* 9 Mod. 233; *S. C.* 2 Atk. 74.

(*k*) 2 V. & B. 388.

names of *both* of themselves as joint tenants, then a distinction must be observed between an *equal* and an *unequal* contribution.

Equal contribution.

In the former case there is nothing on which to ground the presumption of a resulting trust, for persons making equal advances might very consistently take an estate in joint tenancy, as each has it in his power to compel a partition, or by executing a conveyance to pass a moiety of the estate, and in the meantime each runs his own life against that of the other (*a*). And so, if two persons *contract* for a purchase in favour of them and their heirs, and one of them dies, the Court, if they paid equal proportions, will specifically perform the agreement, by ordering a conveyance, not to the heir of the deceased person and the survivor as tenants in common, but to the survivor alone (*b*). But even where equal contributors take a conveyance in joint tenancy, collateral circumstances may induce a Court of Equity to construe it a tenancy in common (*c*). Thus, where two tenants in common of a mortgage term, purchased the equity of redemption to them and their heirs, it was held that the nature of the inheritance should follow that of the term (*d*); for if two persons join in lending money upon mortgage, equity says it could not have been the intention that the interest in that should survive, but though they took a joint security, each meant to lend his own, and take back his own (*e*), [and the insertion of a joint account clause is not conclusive to the contrary (*f*)]. And in all cases of a joint undertaking or partnership, by way of trade, or upon the hazard of profit and loss, the *jus accrescendi* is excluded, and the survivors are trustees, in due proportions, for the representatives of those who are dead (*g*). And where the purchasers pay equally, and

Mortgage.

Trading.

Subsequent improvement by one.

(*a*) *Robinson* v. *Preston*, 4 K. & J. 505; *Rea* v. *Williams*, App. to Sugd. Vend. and Purch. 11th ed.; *Moyse* v. *Gyles*, 2 Vern. 385; *York* v. *Eaton*, 2 Freem. 23; *Rigden* v. *Vallier*, 3 Atk. 735, *per* Lord Hardwicke; *Hayes* v. *Kingdome*, 1 Vern. 33; *Aveling* v. *Knipe*, 19 Ves. 444, *per* Sir W. Grant; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir Jos. Jekyll; *Anon. case*, Carth. 15; *Bone* v. *Pollard*, 24 Beav. 288; and see *Thicknesse* v. *Vernon*, 2 Freem. 84.

(*b*) *Aveling* v. *Knipe*, 19 Ves. 441.

(*c*) *Robinson* v. *Preston*, 4 K. & J. 505.

(*d*) *Edwards* v. *Fashion*, Pr. Ch. 332; and see *Aveling* v. *Knipe*, 19 Ves. 444.

(*e*) *Morley* v. *Bird*, 3 Ves. 631, *per* Lord Alvanley; *Rigden* v. *Vallier*, 3 Atk. 734, *per* Lord Hardwicke; *Anon. case*, Carth. 16; *Partridge* v. *Pawlet*, 1 Atk. 467; *Petty* v. *Styward*, 1 Ch. Rep. 57; *Vickers* v. *Cowell*, 1 Beav. 529; and see *Robinson* v. *Preston*, 4 K. & J. 511, [and *Steeds* v. *Steeds*, 22 Q. B. D. 537, where the principle was extended to a common money bond; and see *Powell* v. *Brodhurst*, (1901) 2 Ch. 160].

[(*f*) *Re Jackson*, 34 Ch. D. 732.]

(*g*) *Lake* v. *Gibson*, Eq. Ca. Ab. 290; *S. C.* (by name of *Lake* v. *Craddock*) affirmed 3 P. W. 158; *Jefferey*s v. *Small*, 1 Vern. 217; *Elliot* v. *Brown*, cited *Jackson* v. *Jackson*, 9 Ves. 597; *Lyster* v. *Dolland*, 1 Ves. jun. 434, 435, *per* Lord Thurlow; and see *York* v. *Eaton*, 2 Freem. 23; *Bone* v. *Pollard*, 24 Beav. 288.

take a joint estate, and one afterward *improves* the property at his own cost, he has a lien upon the land *pro tanto* for the money he has expended (*a*).

Unequal contribution.

Should the contribution of the parties be *unequal*, then in all cases a trust results to each of them in proportion to the amount originally subscribed (*b*).

Copyhold grant to B. for life, and fine paid by A., who on A.'s death shall have it?

6. If A. discharge the fine on a grant of *copyholds* to B., C., and D. successively for their lives, the equitable interest will result to A.; but should A. die intestate, on whom will the remaining equity devolve? Estates *pur autre vie* in copyholds were not within the Statute of Frauds (*c*), nor the 14 G. 2. c. 20, sect. 9 (*d*), nor is there a general occupancy of a trust (*e*), and before the Wills Act the questions were asked: Can the *heir* take an estate which has no descendible property? or can the *executor* claim as assets what is not of the nature of personalty? or shall the tenants of the legal estate become the beneficial proprietors in the absence of any one to advance a better title? (*f*) In *Clark* v. *Danver* (*g*) the plaintiff was both *heir* and *executor* of the equitable owner, and was decreed the benefit of the trust. In *Howe* v. *Howe* (*h*) the administratrix was held entitled, and so it was allowed in *Rundle* v. *Rundle* (*i*), and *Withers* v. *Withers* (*j*), and was subsequently sanctioned by the high authority of Lord Mansfield (*k*). Now by the Wills Act, 1837 (7 W. 4. and 1 Vict. c. 26), sect. 6, it is declared that, where there is no special occupant, an estate *pur autre vie*, whether in freehold or in copyhold, shall, if not disposed of by the will of the grantee, go to his personal representative (*l*).

(*a*) *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir J. Jekyll.

(*b*) *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir J. Jekyll; *Rigden* v. *Vallier*, 3 Atk. 735, *per* Lord Hardwicke; *Hill* v. *Hill*, 8 Ir. R. Eq. 140; affirmed Ib. 622.

(*c*) 29 Car. 2, c. 3, s. 12.

(*d*) *Rundle* v. *Rundle*, Amb. 152.

(*e*) *Penny* v. *Allen*, 7 De G. M. & G. 422; and see *Castle* v. *Dod*, Cro. Jac. 200.

(*f*) See *Jones* v. *Goodchild*, 3 P. W. 33, note B.

(*g*) 1 Ch. Ca. 310.

(*h*) 1 Vern. 415.

(*i*) 2 Vern. 252, 264; *S. C.* Amb. 152.

(*j*) Amb. 151.

(*k*) *Goodright* v. *Hodges*, 1 Watk. Cop. 228; and see *Rumboll* v. *Rumboll*, 2 Eden, 15.

(*l*) *Reynolds* v. *Wright*, 25 Beav. 100; 2 De G. F. & J. 590; *Re Inman*, (1903) 1 Ch. 241. [As to testators dying on or after Jan. 1st, 1898, see the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 1. Where leaseholds for lives were conveyed to trustees, their executors, administrators, and assigns in trust (in the events which happened) for certain persons absolutely but without words of limitation, it was held in a case in Ireland, that the personal representatives of the *cestuis que trust* became entitled on their deaths to the property, either as special occupants, as indicated in the grant, or under the Wills Act in default of a special occupant; *Croker* v. *Brady*, 4 L. R. Ir. 653; overruling *S. C.* 4 L. R. Ir. 61.]

Purchase of a ship in stranger's name.

7. The Court cannot imply a resulting trust in evasion of an Act of Parliament, and therefore [under the old Registry Acts,] if A., on purchasing a ship, took the transfer in the name of B., the complete ownership, both legal and equitable, was in B. (*a*). In order to enforce the navigation laws, and secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts required an exact history to be kept of every ship, how far throughout her existence she had been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might have been indirectly defeated (*b*).

Exceptions to the rule.

However, in certain cases [even under the old law, a person might have been] the registered owner and still have been a trustee. When, for instance, one of the members of a firm had a ship registered in his name, it was held by him in trust for the firm including the other partners (*c*). And when a ship was registered by mistake in the name of a person who was not the owner of it, and where the person who transferred it to him had no interest in it, the transferee did not acquire such a title to the ship as to deprive the rightful owner of it (*d*). [And in delivering judgment in the case of *Holderness* v. *Lamport*, Sir J. Romilly, M.R., observed,] "If letters of administration were obtained to the estate of a shipowner, and the administrator transferred the ship into his own name, and afterwards a will was discovered and probate granted to the executor, could it be contended that the executor was precluded from obtaining the ship, because another person had, *bonâ fide* but by mistake, been registered as the owner?" (*e*).

[Merchant Shipping Act, 1894.]

[The law has, however, now been modified so as to allow of a beneficial interest in a ship in persons not appearing on the register, and under the Act now in force, although no notice of a trust is allowed on the register, equitable interests may be enforced by or against the registered owners and mortgagees of ships, or in respect of their interest therein, in the same manner as they may be enforced in respect of any other personal property (*f*), and it follows that if a ship be purchased by A. in the name of a stranger, there will be a resulting trust in favour of A.]

(*a*) *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Camden* v. *Anderson*, 5 T. R. 709.

(*b*) See *Ex parte Yallop*, 15 Ves. 66, 69.

(*c*) *Holderness* v. *Lamport*, 29 Beav. 129, *per* M. R.

(*d*) *Holderness* v *Lamport*, 29 Beav. 129.

(*e*) Ib.

[(*f*) 57 & 58 Vict. c. 60, ss. 56, 57; see 17 & 18 Vict. c. 104, ss. 37, *et seq.*; 25 & 26 Vict. c. 63, s. 3; 43 & 44 Vict. c. 18, s. 2; and see *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127.]

Resulting trusts under papistry Acts.

8. While the papistry laws were in force, if A., a papist, had purchased an estate in the name of B., the Court could not have presumed a resulting trust to A., which as soon as raised, would have become forfeitable to the State (*a*).

In purchases for giving votes.

9. And so if a purchaser took a conveyance in the name of another, with a view of giving him a vote for a member of parliament, he could not afterwards claim the beneficial ownership, for the operation of such a right would render the original purchase fraudulent (*b*).

[Patents, designs, and trade marks.]

[10. Under the Patents, Designs, and Trade Marks Act, 1883, no notice of any trust is allowed on the register, and the registered proprietor of a patent, copyright in a design, or trade mark, as the case may be, is empowered (subject to any rights appearing from the register to be vested in any other person) absolutely to assign, grant licences as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. But any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*c*).]

Parol evidence as regards Statute of Frauds.

11. As the Statute of Frauds (*d*) extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of the purchase-money by *parol*, even though it be otherwise expressed in the deed.

In *Kirk* v. *Webb* (*e*) the Court refused to admit evidence, and the decision was followed in subsequent cases (*f*); however, the doctrine, though supported by numerous precedents, has since been clearly overthrown by the concurrent authority of the most distinguished judges (*g*).

[Purchase by an agent no exception to general rule.]

[In *Bartlett* v. *Pickersgill* (*h*) it was held that the rule would

(*a*) See *Redington* v. *Redington*, 3 Ridg. 184.

(*b*) *Groves* v. *Groves*, 3 Y. & J. 163, see 172, 173.

[(*c*) 46 & 47 Vict. c. 57, ss. 85, 87; 51 & 52 Vict. c. 50, s. 21.]

(*d*) 29 Car. 2, c. 3.

(*e*) Prec. Ch. 84.

(*f*) *Heron* v. *Heron*, Pr. Ch. 163; *S. C.* Freem. 246; *Skett* v. *Whitmore*, Freem. 280; *Kinder* v. *Miller*, Pr. Ch. 172; and see *Halcott* v. *Markant*, Pr. Ch. 168; *Hooper* v. *Eyles*, 2 Vern. 480; *Newton* v. *Preston*, Pr. Ch. 103; *Cox* v. *Bateman*, 2 Ves. 19; *Ambrose* v. *Ambrose*, 1 P. W. 321; *Deg* v. *Deg*, 2 P. W. 414. The earlier case of *Gascoigne* v. *Thwing*, 1 Vern. 366, was in harmony with the modern doctrine.

(*g*) *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.* Amb. 413; *Willis* v. *Willis*, 2 Atk. 71; *Bartlett* v. *Pickersgill*, 1 Eden, 515; *Lane* v. *Dighton*, Amb. 409; *Knight* v. *Pechey*, 1 Dick. 327; *S. C.* cited from MS. 3 Vend. & Purch. 258; *Groves* v. *Groves*, 3 Y. & J. 163; *Lench* v. *Lench*, 10 Ves. 517; *Gray* v. *Lucas*, W. N. 1874, p. 223.

(*h*) 1 Eden. 515; [1 Cox, 15; 4 Ea. 576 n.;] and see *Rastel* v. *Hutchinson*, 1 Dick. 44; *Lamas* v. *Bayly*, 2 Vern. 627; *Atkins* v. *Rowe*, Mos. 39; *S. C.* Cas. Dom. Proc. 1730.

not] warrant the admission of parol evidence, where an estate was purchased by an *agent*, and no part of the consideration paid by the employer; for though an agent was a trustee in equity, yet the trust was one arising *ex contractu*, and not resulting by operation of law, and though the agent was indicted for perjury in denying his character, and convicted, yet the Court had no power to decree the trust. [But this decision seems to be inconsistent with the authorities which proceed on the footing that the Court will not allow the Statute of Frauds to be made an instrument of fraud (*a*); and it has now been distinctly overruled (*b*).]

Parol evidence must be clear.

Parol evidence, where admitted, must prove the fact very *clearly* (*c*); though no objection lies against the reception of *circumstantial* evidence, as that the means of the pretended purchaser were so slender as to make it impossible he should have paid the purchase-money himself (*d*).

Trust may be proved against defendant's denial.

And should the nominal purchaser *deny* the trust by his answer, the solemnity of the defendant's oath will of course require a considerable weight of evidence to overcome its impression (*e*).

Of written evidence after the death of the nominal purchaser.

12. It is laid down by Mr Sanders, that "if a person at his death leave any papers disclosing the real circumstances of the case, the Court will raise the trust even against the express declaration of the purchase-deed" (*f*). We have seen that, according to the latest authorities, parol evidence is in ordinary cases admissible against the language of the purchase-deed; but if Mr Sanders's opinion to the contrary were well founded, it does not appear how mere papers would satisfy the requisitions of the statute; for, to have that effect, the writings ought also to be *signed* by the party. The cases of *Ryall* v. *Ryall* (*g*) and *Lane* v. *Dighton* (*h*), which are cited for the position, do not at all turn upon the distinction suggested.

Of parol evidence after the death of the nominal purchaser.

13. It is observed by the same writer, that "*after the death of the supposed nominal purchaser*, parol proof alone can in no instance be admitted against the express declaration of the deed" (*i*); but the cases relied upon in support of this

[(*a*) *Heard* v. *Pilley*, L. R. 4 Ch. 548, 553, *per* Giffard, L. J.]

[(*b*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196, 206.]

(*c*) *Gascoigne* v. *Thwing*, 1 Vern. 366; *Halcott* v. *Markant*, Pr. Ch. 168; *Willis* v. *Willis*, 2 Atk. 71; *Goodright* v. *Hodges*, 1 Watk. Cop. 229, *per* Lord Mansfield; *Groves* v. *Groves*, 3 Y. & J. 163; and see *Rider* v. *Kidder*, 10 Ves. 364.

(*d*) *Willis* v. *Willis*, 2 Atk. 71, *per* Lord Hardwicke; and see *Lench* v. *Lench*, 10 Ves. 518; *Wilkins* v. *Stevens*, 1 Y. & C. C. C. 431.

(*e*) See *Cooth* v. *Jackson*, 6 Ves. 39.

(*f*) Uses and Trusts, c. 3, s. 7, div. 2.

(*g*) Amb. 413.

(*h*) Amb. 409.

(*i*) Uses and Trusts, c. 3, s. 7, div. 2.

doctrine (*a*) do not distinguish between proofs in a person's lifetime and after his decease; they are certainly authorities for the exclusion of parol evidence universally, but in this respect, as before noticed, they have been subsequently overruled. It would seem upon principle, that the death of the nominal purchaser cannot affect the *admissibility* of parol testimony, whatever effect it may have in detracting from its *weight.*

Of following trust-money into land.

14. In the question, whether a purchase in the name of a third person can be established by parol testimony, is also involved the question, whether trust money can be followed into *land* by parol. A purchase with trust money is virtually a purchase paid for by the *cestuis que trust;* and on the ground that such a purchase is a trust resulting by operation of law, and not within the purview of the Statute of Frauds, it has been settled that parol evidence is clearly admissible (*b*).

The resulting trust may be rebutted by parol.

15. As in the cases we have been considering the trust results to the real purchaser by presumption of law, which is merely an *abitrary implication* in the absence of *reasonable proof* to the contrary, the nominal purchaser is at liberty to rebut the presumption by the production of parol evidence showing the intention of conferring the beneficial interest (*c*); and the evidence to rebut need not be as strong as evidence to create a trust (*d*). And as he may repel the presumption *in toto,* so may he in part; as by proving the purchaser's intention to permit the legal tenant to enjoy beneficially for life (*e*); [or, where stock has been transferred into the joint names of the transferor and another person, by proving the intention of the transferor to have the dividends for his life, and that the transfer should enure for the benefit of such other person if he survived the transferor (*f*)].

Declarations subsequent to the purchase.

16. When it has been once ascertained that the understanding of the parties at the time of the purchase was that the legal

(*a*) *Kirk* v. *Webb*, Pr. Ch. 84; *S. C.* Freem. 229; *Heron* v. *Heron*, Pr. Ch. 163; *Halcott* v. *Markant*, Id. 168; *Kinder* v. *Miller*, Id. 172; *S. C.* 2 Vern. 440; *Deg* v. *Deg*, 2 P. W. 414, *per* Lord King.

(*b*) *Lench* v. *Lench*, 10 Ves. 517, *per* Sir W. Grant; *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.* Amb. 413; *Lane* v. *Dighton*, Amb. 409; *Balgney* v. *Hamilton*, Amb. 414; *Trench* v. *Harrison*, 17 Sim. 111.

(*c*) *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *S. C.* Lofft, 230; *Rider* v. *Kidder*, 10 Ves. 364; *Rundle* v. *Rundle*, 2 Vern. 252, 264; *Taylor* v. *Taylor*, 1 Atk. 386; *Redington* v. *Redington*, 3 Ridg. 106; see 165, 177, 178; [*Standing* v. *Bowring*, 27 Ch. D. 341, 31 Ch. D. (C.A.) 282]; *Garrick* v. *Taylor*, 29 Beav. 79; *Beecher* v. *Major*, 2 Dr. & Sm. 431.

(*d*) *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 332, *per cur.*

(*e*) *Rider* v. *Kidder*, 10 Ves. 360, see 368; *Benbow* v. *Townsend*, 1 M. & K. 506; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

[(*f*) *Standing* v. *Bowring*, 27 Ch. D. 341; 31 Ch. D. (C.A.) 282.]

owner should also be the beneficial owner, it is not competent to the person who paid the money to put a different construction upon the instrument at any subsequent period, and claim the estate against his intentions at the time (*a*); and even if under such circumstances the legal tenant agreed afterwards to execute a conveyance to the person who paid the money, the Court would not enforce the contract, if merely voluntary (*b*).

Effect of time.

17. The real purchaser may be barred of his interest by laches, for the presumption of a resulting trust will not be raised, after a great length of time, more particularly if it be in opposition to the evidence afforded by the actual enjoyment (*c*).

II. *Where the purchase is made by a person in the name of a child, or a wife, or a near relative.*

Advancement.

Where a father purchases in the name of his child, the presumption of law is, that a provision was intended (*d*). The grounds of this doctrine are well stated by Lord Chief Baron Eyre (*e*). "The circumstance," he said, "of one or more of the nominees being a child or children of the purchaser, is held to operate by *rebutting the resulting trust;* and it has been determined in so many cases that the nominee being a child shall have such operation as a *circumstance of evidence,* that it would be disturbing landmarks if we suffered either of these propositions to be called into question;—namely, That such circumstance shall rebut the resulting trust; and, That it shall do so as a circumstance of evidence. I think it would have been a

The relationship of father and child a mere circumstance of evidence.

(*a*) *Groves* v. *Groves*, 3 Y. & J. 172, *per* Alexander, C. B.

(*b*) *Groves* v. *Groves*, 3 Y. & J. 163.

(*c*) *Delane* v. *Delane*, 7 B. P. C. 279; and see *Groves* v. *Groves*, 3 Y. & J. 172; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*d*) *Dyer* v. *Dyer*, 2 Cox, 93; *S. C.* 1 Watk. Cop. 219, *per* Eyre, C. B.; *Grey* v. *Grey*, 2 Swans. 597; *S. C.* Finch, 340, *per* Lord Nottingham; *Sidmouth* v. *Sidmouth*, 2 Beav. 454, *per* Lord Langdale; *Redington* v. *Redington*, 3 Ridg. 176, *per* Lord Loughborough; *Christy* v. *Courtenay*, 13 Beav. 96; *Elliot* v. *Elliot*, 2 Ch. Ca. 231, agreed; *Bedwell* v. *Froome*, cited 2 Cox, 97, and 1 Watk. Cop. 224, *per* Sir T. Sewell; *Goodright* v. *Hodges*, 1 Watk. Cop. 228, *per* Lord Mansfield; *Pole* v. *Pole*, 1 Ves. 76, *per* Lord Hardwicke; *Lamplugh* v. *Lamplugh*, 1 P. W. 111, 2nd point; *Woodman* v. *Morrel*, 2 Freem. 33, *per cur.*; *Murless* v. *Franklin*, 1 Sw. 17, 18, *per* Lord Eldon; *Finch* v. *Finch*, 15 Ves. 50, *per eundem;* Fearne's P. W. 327, &c. ["Where money is paid by one man to another, the legal presumption is that it was paid in discharge of some prior debt or obligation, and not that it was meant as a gift; and if money is paid by a father to a son, and nothing beyond the fact of payment is proved, there is no legal obligation on the son to repay it, and the equitable doctrine that there is a presumption that moneys advanced by a father to a son are intended as a gift has no application. The onus of proof is on the person who claims repayment to show that there was some contract rendering the payee liable to repay the money," *per* Jessel, M.R.; *Ex parte Cooper*, W. N. 1882, p. 96.]

(*e*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. Cop. 218; and see Lord Nottingham's observations in *Grey* v. *Grey*, 2 Sw. 598.

more simple doctrine, if the children had been considered as *purchasers for valuable consideration.* This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides."

The difficulties arising from the light in which the question has been viewed will amply appear from the numerous refined distinctions upon which the Court from time to time has been called upon to adjudicate.

Case of the child being an infant.

1. A distinction was formerly taken where the child was an *infant* (*a*); for a parent, it was said, could scarcely have intended to bestow a separate and independent provision upon one utterly incapable of undertaking the management of it. But still more improbable was the supposition that an infant should have been selected as a trustee (*b*), and accordingly the notion has long since been overruled (*c*); nay, the infancy of the child is now looked upon as a circumstance particularly favourable (*d*).

Purchase of a reversionary estate.

2. It was objected, that a *reversionary estate,* from the uncertainty of the time when it would fall into possession, was not such a kind of interest as a parent would prudently purchase by way of provision for a child; but mere proximity or remoteness of the enjoyment, whether the reversion be expectant on the decease of the parent or a stranger, has since been held clearly insufficient to countervail the general rule (*e*).

Purchase in joint names of father and son.

3. A purchase in the *joint* names of the father and son has met with objections; "for this," observed Lord Hardwicke, "does not answer the purpose of an advancement, as it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son die during his minority, the father would be entitled to the whole by survivorship, and the son could not

(*a*) 4 Freem. 128, c. 151; and see *Binion* v. *Stone,* Id. 169; *S. C.* Nels. 68.

(*b*) See *sup.,* p. 37.

(*c*) *Lamplugh* v. *Lamplugh,* 1 P. W. 111; *Lady Gorge's case,* cited 2 Sw. 600; *Skeats* v. *Skeats,* 2 Y. & C. C. C. 9; *Christy* v. *Courtenay,* 13 Beav. 96; *Collinson* v. *Collinson,* 3 De G. M. & G. 403; *Mumma* v. *Mumma,* 2 Vern. 19; *Finch* v. *Finch,* 15 Ves. 43, &c.

(*d*) Fearne's P. W. 327.

(*e*) *Rumboll* v. *Rumboll,* 2 Eden, 17, *per* Lord Henley; *Finch* v. *Finch,* 15 Ves. 43; *Murless* v. *Franklin,* 1 Sw. 13.

prevent it by severance, he being an infant" (*a*). But surely no improvidence can be justly charged on a parent who so settles his estate, that if the son die a minor it shall revert to himself; that until the marriage of the son or other pressing occasion, the father and son shall possess an equal interest during their joint lives, with the right of survivorship as to the whole; that the son shall have the power, when necessary, of settling one moiety of the estate, but shall leave the other moiety to his parent. Whatever opinion may be entertained as to the principle, the doubts above expressed by Lord Hardwicke can scarcely be maintained in opposition to repeated decisions (*b*). A purchase in the joint names of the son and a *stranger* is less favourable to the supposition of an intended advancement (*c*); but even here the right of the child is now indisputably established (*d*). However, the advancement cannot be *more extensive than the legal estate in the child* (*e*); and therefore the *stranger*, *quatenus* the legal estate vested in *him*, must hold upon trust for the father (*f*).

Purchase of copyholds granted for lives *successivè*.

4. It is the custom, in many manors, to make grants for lives *successivè*. Should a father pay a fine upon a grant to himself and his two sons, shall this be held an advancement or a trust? Upon the difficulty of this case, Lord Chief Baron Eyre remarked, that "when the lessees were to take *successivè*, the father could not take the whole in his own name, but *must* insert other names in the lease, and that there might be many prudential reasons for putting in the life of a child as trustee for him, in preference to any other person" (*g*). And in accordance with this reasoning was decided the case of *Dickinson* v. *Shaw* (*h*); but in *Dyer* v. *Dyer* (*i*) the notion was overruled as savouring too much of refinement; and so at the present day it must be considered as settled (*j*).

Child already provided for.

5. It may happen, that the child in whose name the purchase is taken may have been *already provided for*, a circumstance of

(*a*) *Stileman* v. *Ashdown*, 2 Atk. 480; and see *Pole* v. *Pole*, 1 Ves. 76.

(*b*) *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrews*, 2 Vern. 120; *Grey* v. *Grey*, 2 Sw. 599, and cases there cited; *Dummer* v. *Pitcher*, 2 M. & K. 272.

(*c*) See *Hayes* v. *Kingdome*, 1 Vern. 34.

(*d*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111; *Kingdome* v. *Bridges*, 2 Vern. 67. [And see *Re Eykyn's Trusts*, 6 Ch. D. 115.]

(*e*) See *Rumboll* v. *Rumboll*, 1 Eden, 17.

(*f*) See *Kingdome* v. *Bridges*, 2 Vern. 67; *Lamplugh* v. *Lamplugh*, 1 P. W. 112.

(*g*) *Dyer* v. *Dyer*, 2 Cox, 95; *S. C.* 1 Watk. Cop. 221.

(*h*) Cited 2 Cox, 95; 1 Watk. Cop. 221.

(*i*) 2 Cox, 92; 1 Watk. Cop. 216.

(*j*) *Swift* v. *Davies*, 8 East, 354, note (*a*); Fearne's P. W. 327; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Jeans* v. *Cooke*, 24 Beav. 513.

very considerable weight in rebutting the presumption of further advancement. "The rule of equity," said Lord Chief Baron Eyre, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision, and therefore the distinction of the son being provided for or not is not very solidly taken" (*a*). However, the distinction has been relied upon in several cases (*b*), and has been repeatedly recognised by the highest authorities (*c*). At the same time, it must be noticed that the prior advancement of the child has always been accompanied with some additional circumstance that tended to strengthen the presumption that no further provision was designed (*d*); and Lord Loughborough laid down the general rule to be, that a purchase made by a father in the name of a son, already fully advanced and established by him, not *was* but *might* be, a trust for the father (*e*).

Whether child considered as provided for when adult.

It is said by Lord Chief Baron Gilbert, that "if a father purchase in the name of a son *who is of full age, which by our law is an emancipation out of the power of the father*, there, if the father take the profits, &c., the son is a trustee for the father" (*f*). But for this opinion there appears to be not the slightest ground (*g*). The provision must exist not by a fiction of law, but *bonâ fide* and substantially; "as," said Lord Nottingham, "if the son be married in his father's lifetime, and with his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated" (*h*). A provision in part will not have the effect of rebutting the presumption of advancement (*i*); and the settlement of a reversionary estate upon the son will not be deemed a provision, for he might starve before it fell into possession (*j*).

Previous provision in part.

Reversionary estate not a provision.

Case of father holding the possession, and child an infant.

6. Suppose the father continues, after the purchase, in the perception of the rents and profits, and exerts other acts of ownership, then, if the son be an infant, it is said, as the parent

(*a*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. Cop. 220.

(*b*) *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Pole* v. *Pole*, 1 Ves. 76.

(*c*) See *Grey* v. *Grey*, 2 Sw. 600; *S. C.* Finch, 341; *Lloyd* v. *Read*, 1 P. W. 608; *Redington* v. *Redington*, 3 Ridg. 190; Gilb. Lex. Præt. 271.

(*d*) *Pole* v. *Pole*, *Elliot* v. *Elliot*, *ubi sup.*; and see *Grey* v. *Grey*, 2 Sw. 600; Gilb. Lex. Præt. 271.

(*e*) *Redington* v. *Redington*, 3 Ridg. 190; and see *Sidmouth* v. *Sidmouth*, 2 Beav. 456; [*Re Gooch*, 62 L. T. N.S. 384].

(*f*) Lex. Præt. 271.

(*g*) In *Grey* v. *Grey* (*ubi sup.*), for instance, the son was of age.

(*h*) *Grey* v. *Grey*, 2 Sw. 600.

(*i*) Ib.; *Redington* v. *Redington*, 3 Ridg. 190.

(*j*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111.

is the natural *guardian* of the child, the perception of the profits or other exercise of dominion shall be referred to that ground, and the right of the son shall not be prejudiced, and so in numerous cases the point has been adjudged (*a*); and it will not vary the case if the son sign receipts in the name of the father, for during his minority he could give no other receipts that would discharge the tenants who hold by lease from his father (*b*). Lord Chief Baron Eyre expressed himself dissatisfied with this reasoning in reference to the guardianship (*c*), and Lord Nottingham referred the decisions to a higher ground. "Some," he said, "have taken the difference, that where the father has colour to receive the rents as guardian, their perception of profits is no evidence of a trust: otherwise it would be if the perception of profits were without any such colour. Plainly the reason of the resolutions stands, not upon the *guardianship*, but upon the *presumptive advancement*, for a purchase in the name of an infant *stranger* (that is, notwithstanding the relation of guardian and ward) with the perception of profits, &c., will be evidence of a trust" (*d*).

Son signing receipts for rents in father's name.

Chief Baron Eyre's opinion. Lord Nottingham's opinion.

7. Suppose the father purchases in the name of the son who is *adult*, and then, without contradiction from the son, takes the rents and profits, and exerts other acts of ownership; even here it has been determined that the right of the son will prevail. A stronger instance can hardly be conceived than occurred in the very leading case of *Grey* v. *Grey* (*e*), before Lord Nottingham. We have his lordship's own manuscript of this case, and the circumstances are thus stated:—"The evidence to prove this purchase in the name of the son to be a trust for the father consists of—1st, father possessed the money; 2ndly, received the profits twenty years; 3rdly, made leases; 4thly, took fines; 5thly, enclosed part in a park; 6thly, built much; 7thly, provided materials for more; 8thly, directed Lord Chief Justice North to draw a settlement; 9thly, treated about the sale of it" (*f*): yet, for all this, it was decided, after long and mature deliberation, that the consideration of blood and affection was so predominant, that the father's perception of rents and profits,

Case of a father holding the possession, and son adult.

Grey *v.* Grey.

(*a*) *Gorge's case*, cited Cro. Car. 550, & 2 Sw. 600; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 1 Atk. 386; *Lamplugh* v. *Lamplugh*, 1 P. W. 111; and see *Stileman* v. *Ashdown*, 2 Atk. 480; *Lloyd* v. *Read*, 1 P. W. 608; *Christy* v. *Courtenay*, 13 Beav. 96; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89.

(*b*) *Taylor* v. *Taylor*, 1 Atk. 386.

(*c*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. 220.

(*d*) *Grey* v. *Grey*, 2 Sw. 600.

(*e*) 2 Sw. 594; Finch. 338.

(*f*) 2 Sw. 596.

or making leases, or the like acts, which the son, in good manners, did not contradict, could not countervail it (*a*). The propriety of this decision, upon principle independently of authority, has been called into question (*b*). It might perhaps be successfully contended, that Lord Nottingham's determination was founded upon the more enlarged view of the subject in respect even of *principle;* however, the point must at the present day be considered as settled at least upon *authority*, if any point can be considered as settled after repeated decisions (*c*).

[Policy on father's life.]

[So if a father effects a policy of assurance on his own life in the name of a child, and himself pays the premiums and retains the policy until the time of his death, the child will be entitled to the benefit of the policy (*d*).]

[Contract of purchase by son only.]

[Where a contract to purchase a business was entered into by *the son alone*, the purchase-money being payable by instalments, and the father paid a sum in cash, and the rest was secured by the joint and several promissory notes of the father and son, it was held that the case was not one of advancement, but merely of suretyship (*e*).]

Evidence from facts to rebut the presumption.

8. The advancement of the son is a mere question of intention, and, therefore, facts *antecedent to* or *contemporaneous with* the purchase (*f*), or so *immediately after* it as to constitute part of the same transaction (*g*), may properly be put in evidence for the purpose of rebutting the presumption. Thus it will not be held an advancement, if, on a grant of copyholds to a father and his son for their lives *successive*, the father at the same Court surrenders the copyholds to the use of his will (*h*), or obtains a

(*a*) See 2 Sw. 599.

(*b*) *Dyer* v. *Dyer*, 2 Cox, 95 ; *S. C.* 1 Watk. Cop. 220.

(*c*) *Woodman* v. *Morrel*, 2 Freem. 32, reversed on the re-hearing (see note by Hovenden) ; *Shales* v. *Shales*, Ib. 252 ; *Sidmouth* v. *Sidmouth*, 2 Beav. 447 ; *Williams* v. *Williams*, 32 Beav. 370 ; *Batstone* v. *Salter*, 19 L. R. Eq. 250 ; 10 L. R. Ch. App. 431 ; and see *Elliot* v. *Elliot*, 2 Ch. Ca. 231 ; but see *Lloyd* v. *Read*, 1 P. W. 607 ; *Redington* v. *Redington*, 3 Ridg. 190 ; *Murless* v. *Franklin*, 1 Sw. 17 ; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

[(*d*) *Re Richardson*, 47 L. T. N.S. 514.]

[(*e*) *Re Whitehouse*, 37 Ch. D. 683.]

(*f*) See *Williams* v. *Williams*, 32 Beav. 370 ; *Tucker* v. *Burrow*, 2 H. & M. 524 ; *Collinson* v. *Collinson*, 3 De G. M. & G. 409 ; *Murless* v. *Franklin* 1 Sw. 17, 19 ; *Sidmouth* v. *Sidmouth*, 2 Beav. 447 ; *Lloyd* v. *Read*, 1 P. W. 607 ; *Taylor* v. *Alston*, cited 2 Cox, 96 ; 1 Watk. Cop. 223 ; *Redington* v. *Redington*, 3 Ridg. 177 ; *Grey* v. *Grey*, 2 Sw. 594 ; *Rawleigh's case*, cited Hard. 497 ; *Baylis* v. *Newton*, 2 Vern. 28 ; *Shales* v. *Shales*, 2 Freem. 252 ; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65 ; *Christy* v. *Courtenay*, 13 Beav. 96.

(*g*) *Redington* v. *Redington*, 3 Ridg. 196, *per* Lord Loughborough ; *Jeans* v. *Cooke*, 24 Beav. 521, *per* M. R.

(*h*) *Prankerd* v. *Prankerd*, 1 S. & S. 1.

licence from the lord to lease for years (*a*), or takes possession by some overt act immediately consequent upon the purchase (*b*), or serves a notice with a view of taking possession, and then waives it and receives the rents, &c. (*c*), [or if a father transfers shares in companies into his son's name for the purpose of qualifying him as a director (*d*)].

Evidence from parol declaration.

So the father may prove a parol declaration of trust by himself, either before or at the time of the purchase, not that it operates by way of declaration of trust, for the Statute of Frauds would interfere to prevent it; but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration of intention (*e*). But his evidence is admissible for the purpose of proving what was the intention at the time (*f*).

Evidence on the part of a child.

On the other hand, the son may produce parol evidence to prove the intention of advancement (*g*), and *à fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument (*h*). And it seems the subsequent acts and declarations of the father may be *used against* him by the son, though they cannot be used *in his favour* (*i*), and so the subsequent acts or declarations of the *son* may be used against *him* by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father (*j*);

(*a*) *Swift* v. *Davis*, 8 East, 354, note (a).

(*b*) Lord Eldon could scarcely have meant more than this, when he observed: "Possession taken by the father at the time would amount to such evidence." *Murless* v. *Franklin*, 1 Sw. 17.

(*c*) *Stock* v. *M'Avoy*, 15 L. R. Eq. 55. In this case evidence was given that the father said it should be his son's after his own death, but V. C. Wickens observed: "If the son is a trustee at all, he is wholly a trustee." Ib. 58.

[(*d*) *Re Gooch*, 62 L. T. N.S. 384, following *Childers* v. *Childers*, 1 D. G. & J. 482.]

(*e*) See *Williams* v. *Williams*, 32 Beav. 370; *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Finch* v. *Finch*, 15 Ves. 51; *Woodman* v. *Morrel*, 2 Freem. 33; *Birch* v. *Blagrave*, Amb. 266; Gilb. Lex. Præt. 271; *Sidmouth* v. *Sidmouth*, 2 Beav. 456; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Christy* v. *Courtenay*, 13 Beav. 96; *O'Brien* v. *Shiel*, 7 Ir. R. Eq. 255.

(*f*) *Devoy* v. *Devoy*, 3 Sm. & G. 403; [and see *Re Gooch*, 62 L. T. N.S. 384].

(*g*) *Taylor* v. *Alston*, cited 2 Cox, 96; 1 Watk. Cop. 223; *Beckford* v. *Beckford*, Lofft, 490.

(*h*) See *Taylor* v. *Taylor*, 1 Atk. 386; *Lamplugh* v. *Lamplugh*, 1 P. W. 113; *Redington* v. *Redington*, 3 Ridg. 182, 195.

(*i*) See *Redington* v. *Redington*, 3 Ridg. 195, 197; *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Stock* v. *M'Avoy*, 15 L. R. Eq. 55.

(*j*) See *Murless* v. *Franklin*, 1 Sw. 20; *Pole* v. *Pole*, 1 Ves. 76; *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Jeans* v. *Cooke*, 24 Beav. 521.

but not otherwise, for the question is, not what did the *son*, but what did the *father* mean by the purchase?

[Where the parties to the transaction are alive and give evidence, there is no occasion to resort to any presumption (*a*).]

Rule not to be eluded by nice refinements.

9. From the manner in which the Court has disposed of the several distinctions we have been considering, one general principle is to be extracted applicable to every case. "We think," said Chief Baron Eyre, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property, which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout" (*b*); and Lord Eldon to the same effect observed, "that the Court in *Dyer* v. *Dyer* meant to establish this principle, that the purchase is an advance *primâ facie*, and in this sense, that this principle of law and presumption is not to be frittered away by mere refinements" (*c*).

Rule applies to an illegitimate child.

10. The doctrine of advancement has been applied to the case of even an *illegitimate son* (*d*); for it is said the principle is, that a father is under a moral duty to provide for his child, and as the obligation extends to the case of an illegitimate child, he is equally entitled to the benefit of the presumption (*e*). But the doctrine will not be applied to the illegitimate son of a legitimate child of the real purchaser, the person who paid the purchase-money, though such purchaser may have placed himself in *loco parentis* to the illegitimate grandchild (*f*).

Rule applies to daughters as well sons.

11. It has been said that the presumption of advancement is not so strong in favour of a *daughter* as of a *son*, because daughters are not generally provided for by a settlement of real estate (*g*); but the distinction has been contradicted by more than one decision, and does not now exist (*h*).

Rule applies to a wife, and grandchild or nephew, towards whom the purchaser stands in *loco parentis*.

12. Advancement will be presumed in the case of a *wife* (*i*),

[(*a*) *Per* Lindley, L. J., *Ex parte Cooper*, W. N. 1882, p. 96.]

(*b*) 2 Cox, 98; 1 Watk. Cop. 226.

(*c*) *Finch* v. *Finch*, 15 Ves. 50.

(*d*) *Beckford* v. *Beckford*, Lofft, 490; Fearne's P. W. 327; and see *Soar* v. *Foster*, 4 K. & J. 160; *Kilpin* v. *Kilpin*, 1 My. & K. 520; *Tucker* v. *Burrow*, 2 H. & M. 525.

(*e*) See Fonb. Eq. Tr. 123, note (*i*), 4th ed.

(*f*) *Tucker* v. *Burrow*, 2 H. & M. 515.

(*g*) Gilb. Lex. Præt. 272.

(*h*) *Lady Gorge's case*, cited Cro. Car. 550, 2 Sw. 600; *Jennings* v. *Selleck*, 1 Vern. 467; and see *Woodman* v. *Morrel*, 2 Freem. 33; *Clark* v. *Danvers*, 1 Ch. Ca. 310.

(*i*) *Kingdome* v. *Bridges*, 2 Vern. 67; *Christ's Hospital* v. *Budgin*, Id. 683; *Back* v. *Andrews*, Id. 120; *Glaister* v. *Hewer*, 8 Ves. 199, *per* Sir W. Grant; *Rider* v. *Kidder*, 10 Ves. 367, *per* Lord Eldon; Gilb. Lex. Præt. 272; *Dummer* v. *Pitcher*, 2 M. & K. 262; and see *Lloyd* v. *Pughe*, 14 L. R. Eq. 241; 8 L. K. Ch. App. 88.

and this presumption may, as in that of a child, be rebutted by the special circumstances under which the transfer was made (*a*); but no presumption will arise in favour of a reputed *wife*, being the sister of a former wife, and therefore not legally married (*b*). And the presumption will be made where the purchase is taken in the name of a grandchild, where the father is dead (*c*), or of a nephew who had been adopted as a son (*d*); but it seems that the advancement will not be presumed in favour of a more remote relation, and *à fortiori* not of a stranger, though the real purchaser may have placed himself in *loco parentis* (*e*).

[13. The doctrine of advancement has been applied to the case of an investment by a husband in the joint names of himself, his wife and strangers (*f*).] [Investment in joint names of purchaser, wife, and strangers.]

14. The cases of advancement are generally those of a father, but [the question has arisen on several occasions whether the principle is applicable as between mother and child, and has given rise to some difference of opinion. On the balance of the authorities as well as on principle, it would seem that the true rule is, that, as a Court of Equity recognises no such obligation according to the rules of equity in a mother to provide for her child as exists in the case of a father, so the mere purchase or investment in the name of the child is not sufficient *per se* to raise a presumption of advancement, but to entitle the child to the property there must be some evidence of intention on the part of the mother, either to place herself in *loco parentis* or to advance the child. However, very slight evidence of intention is sufficient, there being very little additional motive required beyond the relationship to induce a mother to make a gift to her child (*g*). The principle] does not apply to a *stepmother* (*h*). Case of a mother.

(*a*) *Marshall* v. *Crutwell*, 20 L. R. Eq. 328; and M.R. further observed: "Now in all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift." Ib. 330, *sed qu.*

(*b*) *Soar* v. *Foster*, 4 K. & J. 152.

(*c*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; and see *Lloyd* v. *Read*, 1 P. W. 607; *Currant* v. *Jago*, 1 Coll. 265, note (*c*); *Tucker* v. *Burrow*, 2 H. & M. 525; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

(*d*) *Currant* v. *Jago*, 1 Coll. 261.

(*e*) See *Tucker* v. *Burrow*, 2 H. & M. 515; [*Re Scottish Equitable Assurance Soc.*, (1902) 1 Ch. 282, v. *sup.* p. 184;] but see the analogous class of cases in reference to double portions, *Powys* v. *Mansfield*, 3 My. & Cr. 359, &c., *inf.* Chap. XVII. s. 1.

[(*f*) *Re Eykyn's Trusts*, 6 Ch. D. 115.]

[(*g*) *Re De Visme*, 2 De G. J. & Sm. 17; *Bennet* v. *Bennet*, 10 Ch. D. 474; *Re Orme*, 50 L. T. N.S. 51; but see *Sayre* v. *Hughes*, 5 L. R. Eq. 376; *Batstone* v. *Salter*, 10 L. R. Ch. App. 431; and the provision of s. 21 of the Married Women's Property Act, 1882, rendering a married woman having separate property liable for the maintenance of her children, may be material.]

(*h*) *Todd* v. *Moorhouse*, 19 L. R. Eq. 69.

Purchase-money not paid, a debt from parent.

15. Where the purchase is held to be an advancement, and the purchase-money has not been paid, it will be a charge on the father's assets as an ordinary debt (*a*); and the conveyance, where the contract in favour of the wife or child remains to be executed, will be made to the wife or child, though the real purchaser's executor pays the purchase-money, for it is not the case of a volunteer (viz. the wife or child) calling for specific performance, but the vendor on his side has a right to enforce the contract and compel payment of the price, and then the Court settles the conveyance in the form in which, according to the contract, it was meant to be taken, viz. in favour of the wife or child (*b*).

Advancement applies to personalty.

16. Of course, the doctrine of advancement applies to personal as well as real estate; as where a father purchases stock in the name of his son (*c*), or daughter (*d*), [or transfers stock into the joint names of a married daughter and her husband (*e*)].

Solicitor.

17. Where money was lent out upon a bond in the name of a person who was both *son* and *solicitor* of the owner of the sum lent, it was held that the particular relation of solicitor prevented the application of the general rule (*f*).

(*a*) *Redington* v. *Redington*, 3 Ridg. 196, see 200; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

(*b*) *Drew* v. *Martin*, 2 H. & M. 130; and see *Nicholson* v. *Mulligan* 3 Ir. R. Eq. 308.

(*c*) *Dummer* v. *Pitcher*, 2 M. & K. 263; *Sidmouth* v. *Sidmouth*. 2 Beav. 447; *Hepworth* v. *Hepworth*, 11 L. R. Eq. 10; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89; and see *Bone* v. *Pollard*, 24 Beav. 283; *Devoy* v. *Devoy*, 3 Sm. & G. 403.

(*d*) *O'Brien* v. *Shiel*, 7 Ir. R. Eq. 255.

[(*e*) *Batstone* v. *Salter*, 10 L. R. Ch. App. 431.]

(*f*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

CHAPTER X

OF CONSTRUCTIVE TRUSTS

General doctrine.

1. A *constructive trust* (*a*) is raised by a Court of Equity *wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee;* for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a *legal* title he may have, will be decreed in *equity* to hold for the benefit of his *cestui que trust.*

Renewal of leases.

2. A common instance of a constructive trust occurs in the renewal of leases; the rule being, that if a trustee (*b*), or executor (*c*), or even an executor *de son tort* (*d*), renew a lease in his own name, he will be deemed in equity to be trustee for those interested in the original term.

Rumford Market Case.

The leading authority upon this subject is *Sandford* v. *Keech* commonly called the Rumford Market Case (*e*). A lessee of the profits of a market had devised the lease to a trustee for an infant, and the trustee applied for a renewal on behalf of the infant, which was refused, on the ground that there could be no distress of the profits of a market, but the remedy must rest singly in covenant, of which an infant was incapable. Upon this

(*a*) As to the meaning of the term "constructive trust," see page 124, *sup.*

(*b*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 354, *per* Lord Redesdale; *Pickering* v. *Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Pierson* v. *Shore*, 1 Atk. 480, *per* Lord Hardwicke; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; *Turner* v. *Hill*, 11 Sim. 13, *per* Sir L. Shadwell.

(*c*) *Walley* v. *Walley*, 1 Vern. 484; *Holt* v. *Holt*, 1 Ch. Ca. 190; *Abney* v. *Miller*, 2 Atk. 597, *per* Lord Hardwicke; *Killick* v. *Flexney*, 4 B. C. C. 161; *Pickering* v. *Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Luckin* v. *Rushworth*, Finch, 392; *Anon.* 2 Ch. Ca. 207; and see *Mulvany* v. *Dillon*, 1 B. & B. 409; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Owen* v. *Williams*, Amb. 734; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; [*Kelly* v. *Kelly*, 8 Ir. R. Eq. 403].

(*d*) *Mulvany* v. *Dillon*, 1 B. & B. 409.

(*e*) Sel. Ch. Ca. 61.

the trustee took a lease for the benefit of himself; but Lord King said: "I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestuis que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relaxed." And so he decreed the lease to be assigned to the infant.

Rule applicable to tenant for life, &c.

3. Upon the same principle, if a person, possessing only a partial interest in a lease, as a tenant for life (*a*), though with an absolute power of appointment, but which he does not exercise (*b*), a mortgagee (*c*), devisee subject to debts and legacies (*d*), or to an annuity (*e*), or partner (*f*), renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal; and no person taking only a limited interest can avail himself of the situation in which the settlement has placed him to obtain a disproportionate advantage in derogation of the rights of others who have similar claims.

[So where a lessee had assigned the original lease by way of settlement, and subsequently, without disclosing the settlement, took a new lease for a longer term in consideration of (in addition

(*a*) *Eyre* v. *Dolphin*, 2 B. & B. 290; *Rawe* v. *Chichester*, Amb. 715; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Pickering* v. *Vowles*, 1 B. C. C. 197; *Taster* v. *Marriott*, Amb. 668; *Owen* v. *Williams*, Id. 734; and see *James* v. *Dean*, 11 Ves. 383; *S. C.* 15 Ves. 236; *Kempton* v. *Packman*, cited 7 Ves. 176; *Giddings* v. *Giddings*, 3 Russ. 241; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; *Crop* v. *Norton*, 9 Mod. 233; *Buckley* v. *Lanauze*, Ll. & G. Rep. *t.* Plunket, 327; *Tanner* v. *Elworthy*, 4 Beav. 487; *Waters* v. *Bailey*, 2 Y. & C. C. C. 218; *Yem* v. *Edwards*, 3 K. & J. 564; 1 De G. & J. 598; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 345; and other cases cited Wh. & Tud. 6th ed. p. 53, in the note to *Keech* v. *Sandford*. See also *Hill* v. *Hill*, 8 Ir. R. Eq. 140, 622; *In the matter of P. Dane*, 5 Ir. R. Eq. 498; [*Re Lord Ranelagh's Will*, 26 Ch. D. 590; and see *Griffith* v. *Owen*, (1907) 1 Ch. 195, where the husband of a tenant for life, having purchased from mortgagees of the settled property, was held to be a trustee of the benefit of the purchase for his children, who were beneficiaries].

(*b*) *Brookman* v. *Hales*, 2 V. & B. 45.

(*c*) *Rushworth's case*, Freem. 13; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners.

(*d*) *Jackson* v. *Welsh*, Ll. & G. Rep. *t.* Plunket, 346.

(*e*) *Winslow* v. *Tighe*, 2 B. & B. 195; *Stubbs* v. *Roth*, Id. 548; and see *Webb* v. *Lugar*, 2 Y. & C. 247; *Jones* v. *Kearney*, 1 Conn. & Laws. 34. [In the text of the tenth edition of this work the words "a joint tenant" were inserted here, the case of *Palmer* v. *Young*, 1 Vern. 276, being referred to as an authority justifying the insertion; but in the recent case of *Re Biss*, (1903) 2 Ch. (C.A.) 40, 63, 65, it is shown that the report in 1 Vernon was incorrect, and a more correct report is given.]

(*f*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & Pul. 376; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

to a money payment) the surrender of the lease which was erroneously stated to be vested in him, the renewed lease was held to be bound by the settlement (*a*).

The mere circumstance, however, that a person is interested in an old lease does not preclude him from obtaining a new lease for his own benefit, and in order that he should be held to be a constructive trustee of the new lease, his position must be such that he owes some duty to the other persons interested (*b*).]

Even to a yearly tenant.

4. Even where a testator was possessed of leaseholds, and devised all his interest therein to A. for life, remainder to B., and the lease having expired in the testator's lifetime, he was at his death a mere yearly tenant, it was held that A., having renewed the lease, must hold it upon the limitations of the will, for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting on the good-will that accompanied the possession, get the exclusive benefit of a more durable term (*c*).

[So if the legal personal representative of a tenant from year to year of lands in Ireland procure, by reason of any tenant right custom, a renewal of the tenancy or a re-grant to himself, he will take the lands impressed with a trust for the benefit of the estate of the deceased tenant (*d*).]

Case of tenant at will, or at sufferance.

5. But if a testator be merely *tenant at will*, or *at sufferance*, then, if the executor renew, he is not a trustee for the devisees, for as there was no interest upon which the will could operate, there was in fact no devise (*e*). And so, where a testator possessed leaseholds for years and was in possession of other lands without title under the mistaken impression that they were contained in the lease, and devised the lands he held upon lease to A., his executrix, for life, with remainder over, and A. obtained a lease of the lands not passed by the will, it was ruled that no trust attached upon the term in favour of the remainderman (*f*). But although the *devisees* cannot claim in these cases, the executor himself will not be allowed to keep the beneficial interest; but it will be an accretion to the general estate (*g*).

[(*a*) *Re Lulham*, 53 L. J. N.S. Ch. 928; 32 W. R. 1013; affirmed 33 W. R. 788; 53 L. T. N.S. 9.]

[(*b*) *Re Biss*, (1903) 2 Ch. (C.A.) 40.]

(*c*) *James* v. *Dean*, 11 Ves. 383; *S. C.* 15 Ves. 236; *Re Tottenham*, 16 Ir. Ch. Rep. 118.

[(*d*) *M'Cracken* v. *M'Clelland*, 11 Ir. R. Eq. 172; *Kelly* v. *Kelly*, 8 Ir. R. Eq. 403.]

(*e*) See *James* v. *Dean*, 11 Ves. 391, 392.

(*f*) *Rawe* v. *Chichester*, Amb. 715.

(*g*) *James* v. *Dean*, 11 Ves. 392, *per* Lord Eldon. In *Rawe* v. *Chichester*, *ubi sup.*, the executrix was also residuary legatee.

Agent of trustee cannot renew for his own benefit.

6. Neither can an agent (*a*), or other person acting under the authority of a trustee, executor, or tenant for life, renew for his own benefit (*b*).

Trustee may not sell the right of renewal.

7. And if, instead of taking a renewal himself, the trustee, executor, or tenant for life, dispose of the right of renewal for a valuable consideration, the purchase-money will be subjected in equity to the trusts of the settlement; for if a person cannot appropriate the renewal to himself, the Court will not suffer him to sell for his own benefit (*c*).

What particular circumstances will not vary the general rule.

8. In the preceding cases the rules of equity will still hold good, though the lease had not customarily been renewed (*d*), or the period of the old lease had actually expired (*e*), or the renewal was for a different term, or at a different rent (*f*), or instead of a chattel lease, was for lives (*g*), or other lands were demised not comprised in the original lease (*h*), or the landlord refused to renew to the *cestui que trust* (*i*), or the co-trustees refused to concur in a renewal for the *cestui que trust's* benefit (*j*), or the lessee having purchased the immediate reversion, being a term of years, took the renewal from the superior landlord (*k*).

Nesbitt *v.* Tredennick.

9. But where a lessee of lands in Ireland charged a lease with a jointure, and then *mortgaged it* to Newcomen and again to Nesbitt, and afterwards the rent falling in arrear, the landlord recovered possession upon ejectment, and the lessee allowed six months (the period of redemption by the lessee fixed by statute) to pass without tendering the rent, fines, and costs, and Nesbitt (who as mortgagee had three months longer to redeem under the statute), sent notice to the lessee that he would not redeem, but that if the lessee himself did *not* proceed, he should make the best bargain he could with the landlord, and then offered to take a new lease, to commence from the expiration of three months, with a proviso, that if any other of the parties interested should make

(*a*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 353; and see *Edwards* v. *Lewis*, 3 Atk. 538; *Mulvany* v. *Dillon*, 1 B. & B. 417; [*Re Lulham*, 53 L. J. N.S. Ch. 928; 32 W. R. 1013; affirmed 33 W. R. 788; 53 L. T. N.S. 9].

(*b*) *Edwards* v. *Lewis*, 3 Atk. 538.

(*c*) *Owen* v. *Williams*, Amb. 734.

(*d*) See *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Mulvany* v. *Dillon*, 1 B. & B. 409; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Killick* v. *Flexney*, 4 B. C. C. 161.

(*e*) *Edwards* v. *Lewis*, 3 Atk. 538, *per* Lord Hardwicke.

(*f*) *Mulvany* v. *Dillon*, 1 B. & B. 409; *James* v. *Dean*, 11 Ves. 383; *S. C.* 15 Ves. 236, &c.

(*g*) *Eyre* v. *Dolphin*, 2 B. & B. 299.

(*h*) *Giddings* v. *Giddings*, 3 Russ. 241; [*Re Morgan*, 18 Ch. D. (C.A.) 93]. But the lease of the additional lands will not be a graft, *Acheson* v. *Fair*, 2 Conn. & Laws. 208.

(*i*) *Keech* v. *Sandford*, Sel. Ch. Ca. 61; *Griffin* v. *Griffin*, 1 Sch. & Lef. 353; [but see *Re Biss*, (1903) 2 Ch. (C.A.) 40, v. *sup.* p. 202].

(*j*) *Blewett* v. *Millett*, 7 B. P. C. 367.

(*k*) *Giddings* v. *Giddings*, 3 Russ. 241.

a lodgment before that time, the agreement should be void, Lord Manners said that in all the previous cases the party had obtained the renewal by being in possession, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be ingrafted; but that here no part of Nesbitt's conduct showed a contrivance, nor was he in possession, and all that Nesbitt treated for was a new lease, giving, however, full opportunity to the lessee to dispose of his interest, or to renew, if he was enabled to do so. And under these circumstances his Lordship held that the lease granted to the mortgagee was not bound by any trust for the mortgagor (*a*).

Lien for expenses of renewal, or permanent improvements.

10. A trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal, with interest (*b*); and where lands are taken under the new lease that were not comprised in the original lease, the Court will apportion the expenses according to the value of the respective lands (*c*). The trustee will also be allowed for money subsequently laid out in lasting improvements (*d*), though made during the suit for recovering the lease (*e*). [So where a tenant for life, having, as such, a statutory right of pre-emption, purchases on his own account and executes permanent improvements, he is entitled to be recouped his expenditure to the extent of the improved value (*f*).]

Expenses incurred by tenant for life.

11. In the case of a renewal by tenant for life, if he put in his own life, he, of course, can have no claim to reimbursement (*g*), but if he put in the life of another, the expenses will be apportioned at the death of the tenant for life, according to the time of his actual enjoyment of the renewed interest (*h*); and his estate will be a creditor on the premises for the apportionment, though the remaindermen be his own children, who resist the claim on the ground of advancement (*i*).

Contribution to fine by annuitants.

12. In the case of a testator devising all his interest in

(*a*) *Nesbitt* v. *Tredennick*, 1 B. & B. 29.

(*b*) *Holt* v. *Holt*, 1 Ch. Ca. 190; *Rawe* v. *Chichester*, Amb. 715, see 720; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Lawrence* v. *Maggs*, 1 Eden, 453; *Pickering* v. *Vowles*, 1 B. C. C. 197; *James* v. *Dean*, 11 Ves. 383; *Kempton* v. *Packman*, cited 7 Ves. 176.

(*c*) *Giddings* v. *Giddings*, 3 Russ. 241.

(*d*) *Holt* v. *Holt*, 1 Ch. Ca. 190; *Lawrence* v. *Maggs*, 1 Eden, 453; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 361; [and see *Rowley* v. *Ginnever*, (1897) 2 Ch. 503].

(*e*) *Walley* v. *Walley*, 1 Vern. 184.

[(*f*) *Rowley* v. *Ginnever*, *ubi sup.*]

(*g*) *Lawrence* v. *Maggs*, 1 Eden, 453.

(*h*) See *post*, Chap. XV.

(*i*) *Lawrence* v. *Maggs*, 1 Eden, 453.

leaseholds subject to an *annuity*, the question of the annuitant's contribution has been differently regarded by different judges. In *Maxwell* v. *Ashe* (*a*), the case of a *will*, Sir John Strange decided that the annuitant was *not* bound to contribute; and in *Moody* v. *Matthews* (*b*), where a feme *sold* an annuity to A. for his life, out of tithes held by her upon lease, and covenanted to pay the annuity, and that the tithes should continue subject to it during the life of A., and the feme married and died, and the husband, who took the term by survivorship, renewed at his own expense, Sir W. Grant determined that the annuitant was not to be called upon to contribute, for that would be to make him pay the consideration twice, and he said the case of *Maxwell* v. *Ashe* was decisive. On the other hand, it was ruled by Lord Manners, in the case of a *will*, that the annuitant must contribute in proportion to his interest in the property; for though the testator had given no direction upon this point, it was incident to this sort of tenure (*c*). At the time of this decision, his Lordship was not aware of the cases before Sir J. Strange and Sir W. Grant; but on a subsequent occasion, when the same point again arose before him, he adhered to the same opinion, notwithstanding those authorities, for "all the legatees," he said, "appear to have been equally the objects of the testator's favour. Could it have been his intention that one of them alone should bear the expense of the renewal, and that the others should receive the full amount of their annuities without any deduction?" (*d*).

Terms of assignment by the trustee.

13. In making the assignment to the *cestui que trust* the trustee will also be indemnified against the personal covenants which he entered into with the lessor (*e*); and on his own part must clear the lease of all encumbrances created by himself, except under leases at rack-rent (*f*).

Accounting for *mesne* rents and profits.

14. The trustee must also account to the *cestui que trust* for the *mesne* rents and profits which he has received from the estate (*g*), and also for any sub-fines that may have been paid to him by underlessees (*h*). And the *cestui que trust*, though the lease which was the ground of his equity has since actually expired, may still

(*a*) Cited 7 Ves. 184.

(*b*) 7 Ves. 174; and see *Jones* v. *Kearney*, 1 Conn. & Laws. 47: *Thomas* v. *Burne*, 1 Dru. & Walsh, 657.

(*c*) *Winslow* v. *Tighe*, 2 B. & B. 195.

(*d*) *Stubbs* v. *Roth*, 2 B. & B. 548.

(*e*) *Giddings* v. *Giddings*, 3 Russ. 241; *Keech* v. *Sandford*, Sel. Ch. Ca. 61.

(*f*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209, see 230.

(*g*) *Giddings* v. *Giddings*, *Keech* v. *Sandford*, *ubi sup.*; *Mulvany* v. *Dillon*, 1 B. & B. 409; *Walley* v. *Walley*, 1 Vern. 484; *Luckin* v. *Rushworth*, Finch, 392; *Blewett* v. *Millett*, 7 B. P. C. 367.

(*h*) *Rawe* v. *Chichester*, Amb. 715, see 720.

call for an account of the rents and profits (*a*). In the case of a renewal by tenant for life, the account will of course be restricted to the period since the tenant for life's decease (*b*).

Remedy against purchasers and others claiming under the lessee.

15. The *cestui que trust* may pursue his remedy not only against the original trustee, executor, or tenant for life, and volunteers claiming through them (*c*), but also against a purchaser, with notice express or implied of the plaintiff's title (*d*); and a purchaser will be deemed to have had notice if the lease assigned to him recited the surrender of a former lease which recited the surrender of a previous lease, in which mention was made of the settlement under which the *cestui que trust* claims (*e*); and the volunteer or purchaser with notice will not be helped by a fine levied (*f*), or even by a release from the *cestui que trust*, if executed by him while in ignorance of the facts of the case (*g*). However, a purchaser will stand in the place of his assignor in respect of any allowances for expenses incurred in the renewal (*h*).

Limitation of time.

16. A *cestui que trust* will be barred of his remedy if he be guilty of long *acquiescence*, as, in one case, for a period of fifteen years (*i*); and in another case concerning a lease of mines (which stand on a peculiar footing), relief was refused after a period of nine years (*j*); and continual claim by the *cestui que trust*, if without any effective step to enforce the right, will be of no avail (*k*).

Case of trustee of a lease purchasing the reversion.

17. If the trustee of a lease become the *purchaser of the reversion* Sir W. Grant said, that, as he thereby intercepts and cuts off the chance of future renewals, and consequently makes use of his situation to prejudice the interests of those who stand behind him, there might be some sort of equity in a claim to have the reversion considered as a substitution for those interests, but his Honour was not aware of any determination to that effect (*l*). [However, it

(*a*) *Eyre* v. *Dolphin*, 2 B & B. 290.
(*b*) *James* v. *Dean*, 11 Ves. 383, see 396; *Giddings* v. *Giddings*, 3 Russ. 241.
(*c*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Blewett* v. *Millett*, 7 B. P. C. 367.
(*d*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Walley* v. *Walley*, 1 Vern. 484; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 345.
(*e*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Hodgkinson* v. *Cooper*, 9 Beav. 304.
(*f*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.
(*g*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.
(*h*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291.
(*i*) *Isald* v. *Fitzgerald*, cited *Owen* v. *Williams*, Amb. 735, 737; and see *Norris* v. *Le Neve*, 3 Atk. 38; *Jackson* v. *Welsh*, Ll. & G. Rep. *t.* Plunket 346.
(*j*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.
(*k*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.
(*l*) *Randall* v. *Russell*, 3 Mer. 197; and see *Hardman* v. *Johnson*, Ib. 347; *Norris* v. *Le Neve*, 3 Atk. 37 & 38; *Lesley's case*, 2 Freem. 52; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Giddings* v. *Giddings*, 3 Russ. 241.

has recently been held in a case in Ireland that a trustee of leaseholds customarily renewable, who purchased the reversion at a sale by auction, was a constructive trustee for the persons beneficially interested in the leaseholds (*a*); and in another recent case where the assignee of the tenant for life of leaseholds which had been customarily renewable, but which the Ecclesiastical Commissioners had refused to renew any more, purchased the reversion, it was held that he had become a trustee of the reversion for the benefit of the persons interested in the lease subject to his right to be recouped the purchase-money paid by him (*b*).]

No tenant-right where a corporation has sold to an individual.

But where a lease had been held by a trustee as tenant of a college, and the college having disposed of the reversion to a stranger, the trustee purchased of the alienee, Sir W. Grant decided that the parties interested in the original lease had no equity against the trustee, for the tenant-right of renewal with a public body was gone, and the lease at a rack-rent was all that could be expected from a private proprietor (*c*).

But if the trustee of a lease with a covenant for perpetual renewal, or if any person standing in a fiduciary position in respect of such a lease acquires the legal possession of and dominion over the fee which is subject to the covenant, and so deals with the property as to make the renewal impossible by his own act and for his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate (*d*).

[Lease not renewable.]

[The above doctrines have no application where the lease is not renewable by custom or contract, and, in the absence of fraud, a trustee of a lease which is *not renewable* may purchase the reversion and hold it for his own benefit (*e*).]

Factor, agent, &c., constructive trustees.

18. The principle upon which a Court of Equity elicits constructive trusts might be pursued into numerous other instances; as if a factor (*f*), agent (*g*), partner (*h*), inspector under a creditor's

[(*a*) *Gabbett* v. *Lawder*, 11 L. R. Ir. 295; but see the observations of L. J. James in *Trumper* v. *Trumper*, 8 L. R. Ch. App. 879.]

[(*b*) *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *Phillips* v. *Phillips*, 29 Ch. D. (C.A.) 673; and see *Leigh* v. *Burnett*, 29 Ch. D. 231; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503.]

(*c*) *Randall* v. *Russell*, 3 Mer. 190.

(*d*) *Trumper* v. *Trumper*, 14 L. R. Eq. 295, see p. 310; affirmed 8 L. R. Ch. App. 870.

[(*e*) *Bevan* v. *Webb*, (1905) 1 Ch. 620, explaining and following *Longton* v. *Wilsby*, 76 L. T. N.S. 770.]

(*f*) *East India Company* v. *Henchman*, 1 Ves. jun. 287; *S. C.* 8 B. P. C. 85.

(*g*) *Fawcett* v. *Whitehouse*, 1 R. & M. 132; *Hichens* v. *Congreve*, Ib. 150; *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7; *Brookman* v. *Rothschild*, 3 Sim. 153; *Gillett* v. *Peppercorn*, 3 Beav. 78.

(*h*) *Bentley* v. *Craven*, 18 Beav. 75; *Burton* v. *Wookey*, 6 Mad. 368.

deed (*a*), [promoter of a company (*b*)], or other confidential person, acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance; [but until some judgment or decree has been obtained the money cannot be said to be the money of the principal (*c*)].

Unauthorised felling of timber.

19. Again, a constructive trust may arise under special instances in respect of waste. If a tenant for life commit *legal* waste by felling timber, the tenant of the first estate of *inheritance* at the time, though there be an intermediate life estate [and though there be a possibility of intermediate estates of inheritance coming into *esse* (*d*)], can recover the trees or damages (*e*), for even an intermediate tenant for life, though he be unimpeachable of waste, cannot claim the timber against the owner of the inheritance (*f*); and if the tenant for life commit *equitable* waste, the rule is the same, and the timber belongs to the owner of the first estate of inheritance, notwithstanding intermediate estates for life (*g*); and the wrongdoer is accountable for the proceeds, with interest at 4 per cent. (*h*), without being allowed for repairs (*i*); but subject to the bar of the Statute of Limitations, which [in the case of legal waste] begins to run from the time of the waste (*j*), [and in the case of equitable waste from the time when the estate of the remainderman falls into possession (*k*)]. It may happen, however, that the *wrongdoer is himself, at the time, the owner of the first estate of inheritance*, while intermediate estates of inheritance may arise

(*a*) *Coppard* v. *Allen*, 4 Giff. 497; 2 De G. J. & S. 173.

[(*b*) *Gluckstein* v. *Barnes*, (1900) A. C. (H.L.) 240.]

[(*c*) *Lister & Co.* v. *Stubbs*, 45 Ch. D. (C.A.) 1, 13.]

[(*d*) *Cavendish* v. *Mundy*, W. N. 1877, p. 198; *Simpson* v. *Simpson*, 3 L. R. Ir. 308.]

[(*e*) Formerly a Court of Law was the proper tribunal in which to sue for a recovery of the trees or for damages, and relief was given in equity only when the plaintiff asked for an account or injunction; *Gent* v. *Harrison*, Johns. 517; *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676; *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Lee* v. *Alston*, 1 B. C. C. 194; 3 B. C. C. 38; and see *Seagram* v. *Knight*, 3 L. R. Eq. 398; 2 L. R. Ch. App. 628. But now by the Judicature Act, 1873, (36 & 37 Vict. c. 66), s. 24, the jurisdictions of Courts of Law and Equity have been assimilated.]

(*f*) See *Gent* v. *Harrison*, Johns. 517.

(*g*) *Rolt* v. *Somerville*, 3 Eq. C. Ab. 759; *Ormonde* v. *Kynersley*, 5 Mad. 369; 2 S. & S. 15; *Butler* v. *Kynnersley*, 2 Bligh, N.S. 385; 7 L. J. O. S. 150; *Lushington* v. *Boldero*, 15 Beav. 1; *Duke of Leeds* v. *Amherst*, 2 Ph. 117; *Honywood* v. *Honywood*, 18 L. R. Eq. 306.

(*h*) *Garth* v. *Cotton*, 3 Atk. 751.

(*i*) *Whitfield* v. *Bewit*, 2 P. Wms. 240.

(*j*) *Seagram* v. *Knight*, 3 L. R. Eq. 398; 2 L. R. Ch. App. 628; [*Simpson* v. *Simpson*, 3 L. R. Ir. 308; *Dashwood* v. *Magniac*, (1891) 3 Ch. (C.A.) 306;] and see *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676.

[(*k*) *Duke of Leeds* v. *Amherst*, 2 Ph. 117; *Dashwood* v. *Magniac*, (1891) 3 Ch. (C.A.) 306, 386, *per* Kay, L. J.]

in future; as in a limitation to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to A. in fee, and no issue of A. or B. are born at the time of commission of the waste. In this case, as no man shall take advantage of his own wrong, and there is no estate of inheritance in *esse* except that of A. himself, he is *constructively a trustee* in equity of the proceeds of the timber for the benefit of all the persons interested under the settlement, except himself, according to their respective estates—that is, he is made to account for the proceeds, which are invested and deemed part of the settlement, and the income of such investment is payable to the tenant in *præsenti*, not being the wrongdoer, whether such tenant be for life or otherwise, and if there be no such tenant it accumulates. But if in the case put there be no issue afterwards born of A. or B., and therefore there is no inheritance but that of A., the fund subject to B.'s life estate will belong to A. (*a*). In the above case, A. *himself* had

(*a*) *Williams* v. *Bolton*, 1 Cox, 72; *Powlett* v. *Bolton*, 3 Ves. 374; see further statement of this case in 2 New Rep. 305. But in *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. sen. 523, 546, interest at 4 per cent. was given only from the filing of the bill; and in *Duke of Leeds* v. *Amherst*, 12 Sim. 476; 2 Ph. 117, interest at 4 per cent. was given only from the death of the wrongdoer; [and see *Phillips* v. *Homfray*, (1892) 1 Ch. (C.A.) 465, 471, 473, 474; *Dashwood* v. *Magniac*, (1891) 3 Ch. (C.A.) 306, 387]. In the later case of *Bagot* v. *Bagot*, 32 Beav. 509, M.R. refused interest further back than from the death of the wrongdoer. The decision was appealed from to L.C. (Lord Westbury), and the case was compromised, but in the course of the argument L.C. intimated his concurrence with the view of M.R. as to the time whence interest was to be computed. The L.C. seemed also to think that, as to such timber felled by the tenant for life as the Court upon application to it would have ordered to be cut, the tenant for life would be protected as having done a proper act, but that the onus would lie upon him to establish such a case. "As regards the question of interest on the money arising from timber properly cut, the plaintiff," he said, "could hardly ask for interest. Of course the obligation of making out the case lies upon the tenant for life."—*MS.* However this may be as to the timber *properly* cut, the remark suggests itself as to the timber *improperly* cut, that if the tenant for life is not to pay interest from the time of felling, he takes advantage of his own wrong, for if the timber had been left standing the increase of growth would have enured to the benefit of the remainderman, but by cutting the timber the tenant for life intercepts this accretion and enjoys the *usufruct* himself. True, he loses the mast and shade, but that is the result of his own wilful act, and he cannot therefore complain. [And if it be said that the tenant for life would get the advantage of the increase of growth, and that this is represented by the interest, the answer is that such advantage is of an uncertain character, while the advantage of receipt of the interest is certain and definite.] As regards mines, the case is different, for here there is no continuing growth for the benefit of the remainderman. But in one respect the offence of waste is greater, for if timber be cut other timber may grow in its place, but when minerals are abstracted the vacuum remains for ever. [And in *Phillips* v. *Homfray* (*ubi sup.*) where coal had been wrongfully gotten, it was intimated that interest might have been allowed, on the principle of *Duke of Leeds* v.

the first vested estate of inheritance; but it may happen that the first vested estate of inheritance is in B., and that A. and B. collude together in cutting the timber, and then a Court of Equity equally interferes and makes A. and B. accountable as constructive trustees of the proceeds for the benefit of the other persons interested in the estate, including tenants for life (*a*). Where there is collusion between the tenant for life and the owner of the first estate of inheritance, or where the tenant for life is also owner of the first estate of inheritance, and the timber is improperly cut, the remedy of the next tenant for life in remainder is said to be barred by the statute after six years from the death of the prior tenant for life (*b*). These principles which have been laid down as to timber apply also *mutatis mutandis* to waste in opening mines (*c*). Mines.

Amherst, if application had been made at the right time, and it was said (by Kay, L. J., at p. 474) that "where a man is made liable in equity on the ground that he has received benefit from a wrong committed by him, interest has always been allowed on the amount for which he has been found liable."]

(*a*) *Garth* v. *Cotton*, 3 Atk. 751.

(*b*) *Birch-Wolfe* v. *Birch*, 9 L. R. Eq. 683. Where the timber is *properly* cut, either by order of the Court or by a wise exercise of the discretion of the trustees, the proceeds are treated as part of the settlement, and are invested for the benefit of all persons interested, whether tenants for life or otherwise, and whether impeachable for waste or not, according to their respective estates; *Waldo* v. *Waldo*, 12 Sim. 107; *Wickham* v. *Wickham*, 19 Ves. 419; *Gent* v. *Harrison*, Johns. 517; *Mildmay* v. *Mildmay*, 4 B. C. C. 76; *Delapole* v. *Delapole*, 17 Ves. 150; *Tooker* v. *Annesley*, 5 Sim. 235; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; *Honywood* v. *Honywood*, 18 L. R. Eq. 306. [As to the effect of a local usage in the case of beechwoods, see *Dashwood* v. *Magniac*, (1891) 3 Ch. (C.A.) 306.] If there be a tenant for life unimpeachable of waste, whose estate comes into possession, as he might have cut the timber, he is held to be entitled absolutely to the fund; *Waldo* v. *Waldo*, 12 Sim. 107; *Phillips* v. *Barlow*, 14 Sim. 262; *Gent* v. *Harrison*, Johns. 517; [*Lowndes* v. *Norton*, 6 Ch. D. 139. And an equitable tenant for life unimpeachable for waste is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the Court will not at the instance of the remainderman grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary to cut, and direct that the cutting be done under its supervision; *Baker* v. *Sebright*, 13 Ch. D. 179]. *Windfalls* belong to the owner of the first estate of inheritance, except such trees as the tenant for life would have been entitled to cut as thinnings, &c., and these belong to the tenant for life; *Bateman* v. *Hotchkin* (No. 2), 31 Beav. 486; [and see *Re Ainslie*, 28 Ch. D. (C.A.) 89; *Re Harrison*, 28 Ch. D. (C.A.) 220, where the Court directed that the proceeds of larch plantations which had been blown down should be invested, and fixed an annual sum to be paid to the equitable tenant for life out of the income, and, if necessary, the capital, subject to the right of the trustee to have recourse to the fund in order to replant the plantations].

(*c*) See *Bagot* v. *Bagot*, 32 Beav. 509; [*Re Barrington*, 33 Ch. D. 523; and see *Re Fullerton's Will*, (1906) 2 Ch. 138, where *Re Robinson's Settlement*, (1891) 3 Ch. 129, 133 was followed, and *Re Barrington* was not followed, and it was held that though coal taken under compulsory powers

Judicature Act, 1873.

By the Act 36 & 37 Vict. c. 66, sect. 25, sub-sect. 3, "an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any *legal* right to commit waste of the description known as *equitable waste*, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

[Settled Land Act, 1882.]

[20. By the Settled Land Act, 1882, a tenant for life, though impeachable for waste, may, on obtaining the consent of the trustees of the settlement or an order of the Court, cut timber ripe and fit for cutting, and is entitled to one-fourth of the net proceeds (*a*), and the same Act gives the tenant for life power to lease unopened mines, setting aside a portion of the profits for the benefit of the remaindermen (*b*).]

Bonus for not opposing a bill in Parliament.

21. As another instance of a constructive trust, where money is paid to a tenant for life in consideration of his not opposing a bill in Parliament for sanctioning a railway, he is constructively a trustee of the money for all the persons interested under the settlement (*c*).

[Renewal of agency agreement.]

[22. So where one of the trustees of a lucrative agency agreement procured the agency to be renewed to a firm, in which he was a partner, upon terms less lucrative but still beneficial, it was held that the trustee's interest in the renewed agreement formed part of the trust estate (*d*).]

[Salmon fishings.]

[23. Again, where a grant had been made by the Crown to the Aberdeen Town Council of salmon-fishings in the sea opposite certain lands which, in the view of the Court, were held by the Town Council in trust for the Aberdeen University and its professors, it was held that the grant of the fishings having been made to the Town Council as the proprietors of the lands, they were constructive trustees of the fishings for the University and its professors (*e*).

[Mortgagee.]

24. A mortgagee is not a constructive trustee for the mortgagor of his power of sale, which is a power given to him for his

would probably have been worked out in the lifetime of the tenant for life, he was not entitled to immediate payment of compensation, but that the amount thereof must be divided into half-yearly instalments in proportion to the coal that would actually have been worked out in each half-year, and paid or allocated accordingly.]

[(*a*) 45 & 46 Vict. c. 38, s. 35.]

[(*b*) Ss. 6, 11. Under sect. 6 a tenant for life has power to grant a lease of a right to let down the surface of the land by mining operations: *Sitwell* v. *Earl of Londesborough*, (1905) 1 Ch. 460.]

(*c*) *Pole* v. *Pole*, 2 Dr. & Sm. 420; [*Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1 L.R. Eq. 608].

[(*d*) *Bennett* v. *Gaslight and Coke Company*, 52 L. J. N.S. Ch. 98; 48 L. T. N.S. 156.]

[(*e*) *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544.]

own benefit, to enable him the better to realise his debt (*a*). But after he has exercised the power and paid himself his debt and costs, he is accountable as a trustee for the surplus proceeds of sale, and may be charged with interest thereon (*b*).]

Mortgagee in possession.

25. A mortgagee in *possession* is constructively a trustee of the rents and profits, and bound to apply them in a due course of administration (*c*), and it has been held (*d*) that a mortgagee in possession is so strictly a trustee, that he is liable, even after a transfer, for the rents and profits subsequently accrued, but [the liability will not continue when the transfer is made by the direction of the Court in a redemption action (*e*).]

[Tenants in common.]

[26. A tenant in common does not stand in a fiduciary relation to his co-tenant so as to be a constructive trustee of any benefit acquired from an outstanding estate or incumbrance (*f*).]

Fraud or negligence in attorney.

27. Where A. contracted for the sale of *part* of his estate, and the purchaser requiring a fine to be levied, B., who was A.'s attorney, and also his heir-apparent, advised a fine to be levied of the *whole* estate, whereby the will of the vendor was revoked, and the part not included in the sale descended to B. as his heir-at-law, it was held that the devisee under the will

[(*a*) *Warner* v. *Jacob*, 20 Ch. D. 220; and see *Farrar* v. *Farrars Limited*, 40 Ch. D. (C.A.) 395, 411; *Tomlin* v. *Luce*, 43 Ch. D. (C.A.) 191; *Colson* v. *Williams*, 58 L. J. Ch. 539; 61 L. T. N.S. 71; *Kennedy* v. *De Trafford*, (1896) 1 Ch. (C.A.) 762; (1897) A. C. 180.]

[(*b*) *Charles* v. *Jones*, 35 Ch. D. 544; and see *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 607, *per* Kay, L. J.; S. C. H. L. (1895) A. C. 495; *Eley* v. *Read*, 76 L. T. N.S. (C.A.) 39; *Heath* v. *Chinn*, (1908) W. N. 120.]

(*c*) *Coppring* v. *Cooke*, 1 Vern. 270; *Bentham* v. *Haincroft*, Pr. Ch. 30; *Parker* v. *Calcroft*, 6 Mad. 11; *Hughes* v. *Williams*, 12 Ves. 493; *Maddocks* v. *Wren*, 2 Ch. Rep. 109.

(*d*) *Venables* v. *Foyle*, 1 Ch. Ca. 3.

[(*e*) *Hall* v. *Heward*, 32 Ch. D. (C.A.) 430. In the 8th edition of this work the existence of the liability in any case was doubted, and it was suggested that *Venables* v. *Foyle* was probably decided upon its own special circumstances, for a mortgagee, it was said, has surely a right to transfer his mortgage without notice to the mortgagor, though in the latter case he may not be allowed the costs of the transfer (see *Re Radcliffe*, 22 Beav. 201), and, if he be entitled to transfer, how can he be held responsible as for a breach of trust? (See *Kingham* v. *Lee*, 15 Sim. 400.) But in *Hall* v. *Heward*, both Cotton and Lopes, L.JJ., treated the liability as existing where the transfer is made voluntarily. It is singular that there is no modern case directly in point, but the liability of the mortgagee may be supported on the ground that by entering into possession he has made himself a trustee for the mortgagor of the rents and profits, and that the transfer without the consent of the mortgagor merely constitutes the transferee the agent of the mortgagee for the receipt of the rents and profits, and leaves the mortgagee liable for the acts of his agent; and see Coote on Mortgages, 5th ed., 720, 809; Fisher on Mortgages, 5th ed., 833; *Hall* v. *Heward*, *sup.*]

[(*f*) *Kennedy* v. *De Trafford*, (1896) 1 Ch. (C.A.) 762; S. C. H. L. (1897) A. C. 180.]

could call upon B. as a constructive trustee (*a*). "You," said Lord Eldon, "who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance" (*b*).

Agent not constructive trustee.

28. An *agent* employed by a trustee is accountable in general to his principal only, and cannot as a *constructive trustee* be made responsible to the *cestuis que trust* (*c*); [and the directors of a company which is bound by a trust will not be personally liable for breaches of trust committed by the company (*d*); nor will a bank, who have notice that money lodged with them to their customer's account is trust money, be necessarily liable in respect of his application of it in breach of trust (*e*)].

But of course the rule does not apply where the agent has taken an actively *fraudulent* part, and so made himself a principal (*f*). [And where trust moneys come into the custody and control of a firm of solicitors with notice of the trusts upon which the moneys are held, it lies with the firm to discharge themselves by showing

(*a*) *Bulkley* v. *Wilford*, 2 Cl. & Fin. 177; *S. C.* 8 Bligh, N.S. 111; and see *Segrave* v. *Kirwan*, Beat. 157; *Nanney* v. *Williams*, 22 Beav. 452; [*Keogh* v. *M'Grath*, 5 L. R. Ir. 478; *Lysaght* v. *M'Grath*, 11 L. R. Ir. 142; *Re Birchall*, 44 L. T. N.S. 243; *Horan* v. *Mac-Mahon*, 17 L. R. Ir. 641; *Stokes* v. *Prance*, (1898) 1 Ch. 212, 224].

(*b*) 2 Cl. & Fin. 177.

(*c*) *Keane* v. *Robarts*, 4 Mad. 332; see 356, 359; *Davis* v. *Spurling*, 1 R. & M. 54; *S. C.* Taml. 199; *Crisp* v. *Spranger*, Nels. 109; *Saville* v. *Tancred*, 3 Sw. 141, note; *Nickolson* v. *Knowles*, 5 Mad. 47; *Myler* v. *Fitzpatrick*, 6 Mad. 360; *Fyler* v. *Fyler*, 3 Beav. 550; *Maw* v. *Pearson*, 28 Beav. 196; *Lockwood* v. *Abdy*, 14 Sim. 437; *Archer* v. *Lavender*, 9 I. R. Eq. 225, *per cur.*; [*Barnes* v. *Addy*, L. R. 9 Ch. 244, *per* Lord Selborne, at p. 251; *Wilson* v. *Lord Bury*, 5 Q. B. D. 518; *Re Spencer*, 51 L. J. N.S. Ch. 271; *Mara* v. *Browne*, (1895) 2 Ch. 69; (1896) 1 Ch. (C.A.) 199; *Coleman* v. *Bucks and Oxon Bk.*, (1897) 2 Ch. 243; *Brinsden* v. *Williams*, (1894) 3 Ch. 185;] and see *Ex parte Burton*, 3 Mont. D. & De G. 364; *Re Bunting*, 2 Ad. & Ell. 467; [*Williams* v. *Williams*, 17 Ch. D. 437, where attention is drawn by Kay, J., to the distinction between notice to raise a constructive trust, and notice to an actual trustee; and see *Lister* v. *Stubbs*, 45 Ch. D. (C.A.) 1].

[(*d*) *Wilson* v. *Lord Bury*, 5 Q. B. D. 518; and a liquidator is not a trustee for creditors or contributories; *Knowles* v. *Scott*, (1891) 1 Ch. 717; but as to his liability for neglect of duty towards the creditors, see *Pulsford* v. *Devenish*, (1903) 2 Ch. 625.]

[(*e*) *Shields* v. *Bank of Ireland*, (1901) 1 I. R. 222.]

(*f*) *Hardy* v. *Caley*, 33 Beav. 365; *Fyler* v. *Fyler*, 3 Beav. 550; *Portlock* v. *Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Pannell* v. *Hurley*, 2 Coll. 241; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199; and see *S. C.* 5 Ir. Ch. Rep. 56; *Bridgman* v. *Gill*, 24 Beav. 382; *Archer* v. *Lavender*, 9 I. R. Eq. 220; [*Re Barney*, (1892) 2 Ch. 265; *M'Ardle* v. *Gaughan*, (1903) 1 I. R. 107].

that the moneys were applied in accordance with the trusts (*a*); and the disciplinary jurisdiction of the Court will be exercised against a solicitor who, by a declaration of trust in favour of a person (even though not his client), has induced that person to alter his position (*b*).]

Title-deeds.

29. Under the head of constructive trusts may be mentioned the case of a settlement left in the hands of a person taking only a partial benefit under it as a tenant for life, in which case the other persons interested and claiming under the same title have a right to the fair use of the document, and the holder is deemed a trustee for them, and is bound to produce it at their request (*c*). And in one case it was ruled that if a person sell part of his estate and retain the title-deeds, though he may not have given a covenant for production, he is compellable to produce them as common property to the purchaser (*d*). But in *Barclay* v. *Raine* (*e*) Sir J. Leach seems to have doubted whether, if part be sold and the title-deeds delivered to the *purchaser*, a future purchaser from him could be ordered, where there was no covenant for that purpose, to produce them to the owners of the other parts. The real property commissioners, however, observe, that previously to this case it had been supposed, either that an original independent equity existed entitling any party interested in a deed to call for its production by any other person having the custody of it, or *at least* that such an equity existed wherever the parties requiring the production claimed under a person who had *taken the precaution to procure a covenant for that purpose*, and the person having the actual custody of it derived that custody from or through a person who had entered into such covenant (*f*); upon which Lord St Leonards observes, that the rule in equity was never so universal as it is quoted in the first part of the above statement, but that the second branch, stating what *at least* the doctrine was, appears to be correct (*g*). It is submitted that even where a vendor has taken no such covenant from the purchaser, the vendor, and those claiming under him, would have a right to production of the deeds as common property.

[(*a*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 351; and see *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 405; *Re Dixon*, (1900) 2 Ch. (C.A.) 561.]

[(*b*) *Ex parte Hales*, (1907) 2 K. B. 539.]

(*c*) *Banbury* v. *Briscoe*, 2 Ch. Ca. 42; *Harrison* v. *Coppard*, 2 Cox, 318; *Shore* v. *Collett*, Coop. 234; *Davis* v. *Dysart*, 20 Beav. 405; *Curnick* v. *Tucker*, 17 L. R. Eq. 320.

(*d*) *Fain* v. *Ayers*, 2 S. & S. 533.

(*e*) 1 S. & S. 449; see Byth. by Jarm. Vol. IX. 3rd ed. p. 98; Vol. V. 4th ed. p. 252.

(*f*) 3rd Rep.

(*g*) Vend. & Purch. 14th ed. 454, note (1).

Constructive trust by conversion or notice.

30. Constructive trusts are said also to arise where the trust estate is converted by the trustee from one species of property into another; and again, where the trust estate passes from the trustee into the hands of a volunteer whether with or without notice, or of a purchaser for valuable consideration with notice; but as these are cases rather of an existing trust continued and kept on foot than of a new trust created, the consideration of these topics will be reserved to a subsequent part of the treatise.

In concluding the subject of trusts by *operation of law*, it may be proper to offer a few remarks on the wording of the Statute of Frauds (*a*).

Statute of Frauds as affecting trusts by operation of law.

By the eighth section it is enacted that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may *arise or result by the implication or construction of law*, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if that statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

Lord Hardwicke's opinion.

Lord Hardwicke upon this clause observed: "I am now bound down by the Statute of Frauds to construe nothing a resulting trust but what are there called trusts by operation of law; and what are those? Why, First, when an estate is purchased in the name of one person but the money or consideration is given by another; or, Secondly, where a trust is declared only as to part, and nothing said as to the rest, in which case what remains undisposed of will result to the heir-at-law. I do not know any other instance besides these two, where the Court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *malâ fide*" (*b*).

Mr Fonblanque's opinion.

Upon this opinion of Lord Hardwicke, Mr Fonblanque has made the following just remarks:—"This construction of a clause of the Statute of Frauds restrains it to such trusts as arise by *operation of law*, whereas it clearly extends to such as are raised by *construction of Courts of Equity*; as, in the case of an executor or guardian renewing a lease, though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so

(*a*) 29 Car. 2, c. 3. (*b*) *Lloyd* v. *Spillet*, 2 Atk. 150.

qualified as to let in the exceptions to which the general rule is subject, and the second instance is only applicable to a *will*, whereas the doctrine of resulting trusts is also applicable to *conveyances*" (*a*). As to the latter part of this criticism it may be observed that while Atkyns makes Lord Hardwicke speak of a *will* only, Barnardiston, the other reporter, applies his Lordship's observation to a *conveyance* (*b*). It would thus appear that Lord Hardwicke in fact extended his remark to a will and a conveyance indifferently.

Both Lord Hardwicke and Mr Fonblanque assume that the *seventh* or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from the Act by virtue of the subsequent exception contained in the eighth section; but the language of the latter clause, that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may arise or result," etc., seems to have escaped observation; for, unless *conveyance* be taken with great violence to the meaning of the words to include a *devise*, it is clear that trusts resulting under a will are not reached by the terms of the saving. Nor is it easy to suppose that the legislature could mean to include a devise; for the fifth and sixth sections relate exclusively to devises, and, had it fallen within the scope of the Act to extend the eighth section to wills, it can scarcely be conceived that the proper and technical word should not necessarily have suggested itself. The question then arises, If resulting trusts upon a *will* are not saved by the exception, how are they not affected by force of the previous enactment? As the statute was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischief intended to be remedied. The aim of the legislature was, not to disturb such trusts as were raised by maxims of equity, and so could not open a door to fraud or perjury, but, by requiring the *creation of trusts by parties* to be manifested in writing, to prevent that fraud and perjury to which the admission of parol testimony had hitherto given occasion. And the enactment itself is applicable only to this view of the subject; for the legislature could scarcely direct that "all declarations or creations of trusts should be manifested and proved," etc., unless the trusts were in their nature capable of manifestation and proof; but, as resulting trusts are the effect of a rule of law, to prove them would be to instruct the Court in its own principles, to certify to

(*a*) 2 Tr. Eq. 116, note (*a*).

(*b*) *Lloyd* v. *Spillet*, Barn. 388.

the judge how equity itself operates. The exception could only have been inserted *ex majore cautelâ* that the extent of the enactment might not be left to implication. But why, it will be asked, are resulting trusts upon *conveyances* excepted, and not resulting trusts upon *wills?* The only explanation that suggests itself is this:—The statute had spoken only of *declarations* or *creations* of trusts, and by a will no resulting trust is or can be *declared* or *created.* If lands be devised to A. and his heirs upon trust to pay the testator's debts, the resulting trust of the surplus is no new declaration or creation; the right construction is, that the testator has disposed of the legal estate to the devisee, and of part of the equitable in favour of creditors; but the residue of the equitable, though said to result, has in fact never been parted with, but descends upon the heir-at-law as part of the original inheritance. In *conveyances,* however, this is not equally the case; for if a purchase be taken in the name of a third person, a trust which had no previous existence arises upon the property in favour of the real purchaser; and so if a lease be renewed by a trustee, the equity which was annexed to the old term immediately fastens upon the new. Here, then, it is evident there is an actual *creation* of trust; and, to obviate all doubts as to the operation of the enactment, resulting trusts arising out of *conveyances* are expressly excepted.

PART II

THE TRUSTEE

CHAPTER XI

OF DISCLAIMER AND ACCEPTANCE OF THE TRUST

HAVING treated of the creation of trusts, whether by the act of a party or by operation of law, we shall next direct our attention to the *estate* and *office* of the *trustee*, and, as a preliminary enquiry, we propose in the present chapter to offer a few remarks upon the subject of the trustee's disclaimer or acceptance of the trust.

I. *Of Disclaimer.*

1. It may be laid down as a clear and undisputed rule, that no one is *compellable* to undertake a trust (*a*). "Though a person," said Lord Redesdale, "may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement" (*b*). No person compellable to be a trustee.

2. But there does not appear to be any instance in which, after acceptance by the trustee, his *heir* has been allowed to disclaim the *estate;* and if the law permitted it, many instances would no doubt have occurred (*c*). The inconveniences of such a right of disclaimer would [before the Conveyancing Act of 1881 (*d*) have Heir of a trustees.

(*a*) *Robinson* v. *Pett*, 3 P. W. 251, *per* Lord Talbot; *Moyle* v. *Moyle*, 2 R. & M. 715, *per* Lord Brougham; *Lowry* v. *Fulton*, 9 Sim. 123, *per* Sir L. Shadwell.

(*b*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239.

(*c*) See *Humphrey* v. *Morse*, 2 Atk. 408.

[(*d*) 44 & 45 Vict. c. 41, s. 30, under which the legal estate in realty (except copyholds) vested in a trustee was made to devolve on his personal representative as if it were a chattel real, a provision now extended to real estate generally by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.]

been] great, as the legal estate would then [have] become vested in the Crown. However, where the heir took not strictly in that character, but as special occupant, he might have exercised his discretion in refusing or accepting the estate (*a*).

Disclaimer should be without delay.

3. If the party named as trustee intend to decline the administration of the trust, he ought to execute a disclaimer without delay. There is no rule, however, that a trustee must execute a disclaimer within any particular time. Thus it will operate after an interval of sixteen years, if the interval can be so explained as to rebut the presumption of his having accepted the trust (*b*). If a person know of the trust and lie by for a long period, it is for a jury, or the Court sitting as a jury, to say whether such acquiescence was not because he had assented to the office (*c*).

Form of the disclaimer.

4. The disclaimer should be by deed, for a deed is clear evidence and admits of no ambiguity (*d*); and the instrument should be a *disclaimer* and not a *conveyance*, for the latter, as it transmits the estate, has been held to imply a previous acceptance of the office (*e*); for a person cannot be allowed to disclaim the office and accept the estate (*f*). However, Lord Eldon expressed his opinion, which seems the common-sense view, that where the intention is disclaimer, the instrument ought to receive that construction, though it be a conveyance in form (*g*). [And inasmuch as the office of trustee cannot be disclaimed in part, a disclaimer of the trusts as to a portion only of the trust property, even though the portion not disclaimed be situate abroad, is ineffectual (*h*).]

[Partial disclaimer ineffectual.]

Can a person accept a bounty and repudiate a trust under the same will?

5. If a person be nominated a trustee in a will, and also take a benefit under it, he can claim the testator's bounty, and yet disclaim the *onus* of the trust (*i*); for an executor, who is also a

(*a*) *Creagh* v. *Blood*, 3 Jones & Lat. 170.

(*b*) *Doe* v. *Harris*, 16 M. & W. 517; and see *Noble* v. *Meymott*, 14 Beav. 471.

(*c*) See *Doe* v. *Harris*, 16 M. & W. 522; *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *James* v. *Frearson*, 1 Y. & C. C. C. 370.

(*d*) *Stacey* v. *Elph*, 1 M. & K. 199, *per* Sir J. Leach.

(*e*) *Crewe* v. *Dicken*, 4 Ves. 97; and see *Urch* v. *Walker*, 3 M. & C. 702.

(*f*) *Re Martinez' Trusts*, 22 L. T. N.S. 403; [and see *Re Lord and Fullerton*, (1896) 1 Ch. (C.A.) 228].

(*g*) *Nicloson* v. *Wordsworth*, 2 Sw. 372. In *Attorney-General* v. *Doyley*, 2 Eq. Ca. Ab. 194, the trustee who declined to act was directed to *convey*, and the same decree was made in *Hussey* v. *Markham*, Rep. *t.* Finch, 258. In *Sharp* v. *Sharp*, 2 B. & A. 405, it was held the trustees had not *acted*, though they had *conveyed* the estate instead of disclaiming. See *Urch* v. *Walker*, 3 M. & C. 702; *Richardson* v. *Hulbert*, 1 Anst. 65.

[(*h*) *Re Lord and Fullerton*, (1896) 1 Ch. (C.A.) 228.]

(*i*) See *Talbot* v. *Radnor*, 3 M. & K. 254; *Pollexfen* v. *Moore*, 3 Atk. 272; *Andrews* v. *Trinity Hall, Camb.*, 9 Ves. 525; *Warren* v. *Rudall*, 1 J. & H. 1.

legatee, may renounce probate and yet claim the legacy, and it is difficult to point out a distinction between the two cases. But if the benefit be *annexed to the office* of trustee or executor, and he does not act, he cannot claim the benefit (*a*).

Opinion of counsel as to disclaimer.

6. If one be named as trustee without any authority from himself, he is justified (as between himself and the parties interested in the trust who require a disclaimer from him and thereby undertake to pay all proper costs), in taking the opinion of counsel upon the propriety of executing a deed of disclaimer (*b*).

Disclaimer of trust by statement of defence.

7. A trust may be disclaimed at the bar of the Court (*c*), or by [a statement of defence,] and the person named as trustee will, like any other person made a party to the suit unnecessarily, be entitled to his costs (*d*); (but only as between party and party (*e*);) though the action which might have been dismissed against him at an earlier stage be brought to a hearing (*f*); and if his [statement] be needlessly long, he will only be allowed what would have been the reasonable costs of a simple disclaimer (*g*).

May be shown by acts.

8. A trust may also be repudiated on the evidence of conduct without any express declaration of disclaimer (*h*); and conduct by a devisee in trust which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate (*i*); but a person would act very imprudently, who allowed so important a question as whether he is a trustee or not to remain matter of construction.

After disclaimer, the trustee may act as agent to the trust.

9. After renunciation of the trust, whether by express disclaimer, or by conduct which is tantamount to it, a trustee may assist as agent, or act under a letter of attorney, in the management of the estate without incurring responsibility (*j*); but the caution need scarcely be suggested, that all such interference cannot be too scrupulously avoided before the fact of the

(*a*) *Slaney* v. *Witney*, 2 L. R. Eq. 418; and see *Lewis* v. *Mathews*, 8 L. R. Eq. 277.

(*b*) *In re Tryon*, 7 Beav. 496.

(*c*) *Ladbrook* v. *Bleaden*, M. R., 16 Jur. 630; *Foster* v. *Dawber*, 8 W. R. 646; and see *Re Ellison's Trust*, 2 Jur. N.S. 62.

(*d*) *Hickson* v. *Fitzgerald*, 1 Moll. 14.

(*e*) *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655; see *Legg* v. *Mackrell*, 1 Giff. 166; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N.S. 994.

(*f*) *Bray* v. *West*, 9 Sim. 429.

(*g*) *Martin* v. *Persse*, 1 Moll. 146; *Parsons* v. *Potter*, 2 Hog. 281.

(*h*) *Stacey* v. *Elph*, 1 M. & K. 195; *White* v. *M'Dermott*, 7 I. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55].

[(*i*) *Re Birchall*, 40 Ch. D. (C.A.) 436.]

(*j*) *Dove* v. *Everard*, 1 R. & M. 231; *Harrison* v. *Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, 6th ed. note (*y*); *Stacey* v. *Elph*, 1 M. & K. 195; *Lowry* v. *Fulton*, 9 Sim. 104; *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 480.

renunciation of the trust has been most unquestionably established (*a*); and where the person named as trustee is to receive a profit from his agency, this naturally excites a suspicion in the mind of the Court (*b*).

How estate divested from the trustee.

10. On a grant or other conveyance to a trustee, though upon onerous trusts, the estate passes to him without any express assent, but subject to the right of dissenting (*c*), and what will amount to a disclaimer *at law*, so as to *divest the estate*, may be a distinct question from the disclaimer of the *office* in equity.

Freeholds may be disclaimed by deed.

It was formerly held (at least such was the clear opinion of Lord Coke), that a *freehold*, whether vested in a person by feoffment, grant (*d*), or devise (*e*), could not be disclaimed but by *matter of record;* and the reason upon which this maxim was founded, was that the suitor might be more certainly apprised who was the tenant to the *præcipe* (*f*). But the doctrine of modern times is, that disclaimer by matter of record is unnecessary (*g*); for, as Lord Tenterden observed, there can be no disclaimer by a person in a court of record, unless some other person think fit to cite him there to receive his disclaimer, and if the estate be *damnosa hæreditas*, that is not very likely to happen (*h*). It has been held that the estate may be divested by the disclaimer of the trustee in Chancery, though appearing only as a respondent upon a petition (*i*); and Mr Justice Holroyd laid it down generally that a party might disclaim a freehold not only by deed but by parol (*j*); and the doctrine has since been sanctioned by actual decision (*k*).

Disclaimer of uses.

11. It was laid down in *Butler and Baker's case*, that estates limited *under the statute of uses* were to be disclaimed with the

[(*a*) See *Re Stevens*, (1897) 1 Ch. 422; *S. C.* (1898) 1 Ch. (C.A.) 162.]

(*b*) *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 481.

(*c*) *Siggers* v. *Evans*, 5 Ell. & Bl. 380; [and see *Re Birchall*, 40 Ch. D. (C.A.) 436].

(*d*) *Butler and Baker's case*, 3 Rep. 26 a, 27 a; *Anon. case*, 4 Leon. 207; Shepp. Touch. 285.

(*e*) *Bonifant* v. *Greenfield*, Godb. 79, *per* Lord Coke; but at the rehearing (Cr. Eliz. 80) it was adjudged that three could pass the whole estate, the fourth having disclaimed by act *in pais;* and see Shepp. Touch. 452.

(*f*) *Butler and Baker's case*, 3 Rep. 26 b.

(*g*) *Townson* v. *Tickell*, 3 B. & A. 31; *Begbie* v. *Crook*, 2 Bing. N. C. 70; *S. C.* 2 Scott, 128.

(*h*) *Townson* v. *Tickell*, 3 B. & A. 36.

(*i*) *Foster* v. *Dawber*, 8 W. R. 646; the trust estate comprised mortgages: but see *Re Ellison's Trust*, 2 Jur. N.S. 62.

(*j*) *Townson* v. *Tickell*, 3 B. & A. 38, citing *Bonifant* v. *Greenfield*, Cro. Eliz. 80; and see *Doe* v. *Smyth*, 6 B. & C. 112.

(*k*) *Bingham* v. *Clanmorris*, 2 Moll. 253. And see Shepp. Touch. 452; *Doe* v. *Smyth*, 6 B. & C. 112; *Doe* v. *Harris*, 16 M. & W. 517; [*Re Birchall*, 40 Ch. D. (C.A.) 436;] but see *Re Ellison's Trust*, 2 Jur. N.S. 62.

same formalities as estates at common law (*a*); but Lord Eldon doubted whether a party *could* disclaim in the case of a conveyance to *uses*, except by release with intent of disclaimer: however, his Lordship added, he was aware that such a doctrine would shake titles innumerable (*b*).

Disclaimer of chattels

12. It seems to be clearly established, that a disclaimer by parol declaration will suffice to divest the legal estate, where the trust property is a mere *chattel interest* (*c*).

Disclaimer by *feme covert*.

13. Whether a *feme covert* could, under the Fines and Recoveries Act, *disclaim* an interest in real estate, was, by the terms of the statute, left doubtful; the Act enabling her only to "dispose of, release, surrender, or extinguish," any estate or power as if she were a *feme sole* (*d*). In the Irish Act, 4 & 5 W. 4. c. 92, sect. 68, the word "disclaim" was expressly introduced. And now, by the Real Property Act, 1845 (8 & 9 Vict. c. 106) sect. 7, a married woman is enabled, in like manner, to "disclaim" any estate or interest in lands in England. But the disclaimer must be by deed, and the husband must concur, and the *feme covert* must make the statutory acknowledgment. [Whether under the Married Women's Property Act, 1882 (*e*), or the Married Women's Property Act, 1907 (*f*), a married woman can disclaim, may also be doubtful; and it will be prudent, in all cases coming within 8 & 9 Vict. c. 106, sect. 7, to comply with the formalities required by that Act.]

Effect of disclaimer.

14. The effect of disclaimer by a trustee, where there is a co-trustee, is to vest the whole *legal estate* in the co-trustee (*g*): and, as regards the exercise of the *office*, even if the trust be accompanied with a power, the continuing trustee may administer the trust without the concurrence of the trustee who has chosen to disclaim, and without the appointment of a new trustee (*h*). The settlor, it is said, must be presumed to know what the legal

(*a*) 3 Rep. 27, a.

(*b*) *Nicloson* v. *Wordsworth*, 2 Sw. 372.

(*c*) Shepp. Touch. 285; *Butler and Baker's case*, 3 Rep. 26 b, 27 a; *Smith* v. *Wheeler*, 1 Vent. 130; *S. C.* 2 Keb. 774; *Doe* v. *Harris*, 16 M. & W. 520, 521, *per* Parke, B.

(*d*) 3 & 4 W. 4. c. 74, s. 77.

[(*e*) 45 & 46 Vict. c. 75.]

[(*f*) 7 Edw. 7 c. 18; see *ante*, p. 37.]

(*g*) *Bonifant* v. *Greenfield*, Cro. Eliz. 80; *Crewe* v. *Dicken*, 4 Ves. 100, *per* Lord Loughborough; *Small* v. *Marwood*, 9 B. & C. 299; Freem. 13, case 111; *Hawkins* v. *Kemp*, 3 East, 410; *Townson* v. *Tickell*, 3 B. and Ald. 31; *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram; and see *Nicloson* v. *Wordsworth*, 2 Sw. 369.

(*h*) *Adams* v. *Taunton*, 5 Mad. 435; *Cook* v. *Crawford*, 13 Sim. 96; *Bayly* v. *Cumming*, 10 Ir. Eq. Rep. 410; *Hawkins* v. *Kemp*, 3 East, 410; *White* v. *M'Dermott*, 7 Ir. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55; *Crawford* v. *Forshaw*, 43 Ch. D. 643; (1891) 2 Ch. (C A.) 261].

consequence of the death or disclaimer of one of the trustees would be (*a*). And when the disclaimer has been executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio* (*b*).

Disclaimer of personal contracts.

15. But in *personal contracts* the rule is different, for where A. covenants with B., C., and D. as trustees, and B. disclaims, C. and D. do not take the joint covenant, and cannot sue without B. (*c*).

Disclaimer of protectorship.

16. If trustees are appointed *protectors* of the settlement, and they intend to disclaim the protectorship, the deed of disclaimer must, by the Fines and Recoveries Act, be enrolled in Chancery (*d*).

II. *Of Acceptance.*

How trust accepted.

1. A trustee may *accept* the office either by signing the trust deed (*e*), or by an express declaration of his assent (*f*), or by proceeding to act in the execution of the duties of the trust.

Presumption of acceptance.

2. Where a trustee, with *notice of his appointment* as trustee, has done nothing, but has not disclaimed, it will be presumed after a long lapse of time, as twenty years (*g*), and *à fortiori*, after thirty-four years (*h*), that he accepted the trust (*i*). And even where the deed was only four years old, Lord St Leonards observed, "that where an estate was vested in trustees who *knew of their appointment* and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the Court to hold that in such a case the estate was divested. He spoke with respect to the effect upon third parties; every Court and every jury would presume an assent" (*j*).

Recitals.

3. If the trustee execute the deed, he should see that the recitals are correct; or the Court may hold him liable for the consequences. However, in a case (*k*) where it was recited in a marriage settlement that the lady was possessed of a sum of stock,

(*a*) *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram.

(*b*) *Peppercorn* v. *Wayman*, 5 De G. & Sm. 230.

(*c*) *Wetherell* v. *Langston*, 1 Exch. 634.

(*d*) 3 & 4 W. 4. c. 74, s. 32.

(*e*) See *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 131, 134.

(*f*) See *Doe* v. *Harris*, 16 M. & W. 517.

(*g*) *In re Uniacke*, 1 Jones & Lat. 1.

(*h*) *In re Needham*, 1 Jones & Lat. 34.

(*i*) But see *infra*, p. 225, as to renunciation of probate.

(*j*) *Wise* v. *Wise*, 2 Jones and Lat. 403; see 412; and see *White* v. *M'Dermott*, 7 Ir. R. C. L. 1.

(*k*) *Fenwick* v. *Greenwell*, 10 Beav. 418. I have been informed by one of the counsel in the cause that in *Bliss* v. *Bridgwater*, at the Rolls, many years ago, Sir J. Leach held that trustees were bound by a recital that stock had been transferred into their names; and see *Gore* v. *Bowser*, 3 Sm. & G. 6; *Chaigneau* v. *Bryan*, 8 Ir. Ch. Rep. 251; *Story* v. *Gape*, 2 Jur. N.S. 706; *Westmoreland* v. *Holland*, 23 L. T. N.S. 797; 19 W. R. 302; affirmed W. N. 1871, p. 124.

which subsequently was not forthcoming, Lord Langdale said there were so many instances of parties representing that they were entitled to particular property, which representation afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations; and that he did not, therefore, accede to the argument, that the recital alone bound the trustees. And in another case where a release from the *cestuis que trust* to the trustees stated that the legacy duty amounted only to 19*l.* 8s., whereas it was much more, Lord Romilly said it was a mistake of all parties, and that the trustees were not estopped by it in equity (*a*).

Of acceptance by acting in the trust.

4. What *acts* of a person nominated as trustee will amount to a *constructive* acceptance of the office, is a question constantly arising, and not easily to be determined by any general rule.

Effect of probate.

5. If a person named as executor takes out *probate* of the will, he thereby constitutes himself executor, and incurs all the liabilities annexed to the executorship (*b*). The *renunciation of probate* by a person named as executor and trustee is not in itself a *disclaimer* of the *trust*, but it is one circumstance of evidence, and if there be no proof of his ever having acted, the Court after a long lapse of time, as sixty years, will presume a disclaimer (*c*); [and where the trusts of the real and personal estate were combined, being trusts for sale and conversion, and application of the proceeds as a mixed fund in (*inter alia*) paying debts, legacies, and funeral expenses, and the same persons were appointed executors and trustees, and the only executor and trustee who survived the testator renounced probate, Sir G. Jessel, M.R., held that there was conclusive evidence of a disclaimer, as the trustee, after renouncing execution of the will as to the personal estate, could not carry out the trusts as to the payment of the debts and funeral and testamentary expenses, and could not get rid of a part of his trust in that way, but must have intended to disclaim all the trusts (*d*)].

Executor of an executor.

6. If an executor of an executor take upon himself the administration of the goods of the first testator, he thereby accepts the

(*a*) *Brooke* v. *Haynes*, 6 L. R. Eq. 25.

(*b*) *Booth* v. *Booth*, 1 Beav. 125; *Ward* v. *Butler*, 2 Moll. 533, *per* Lord Manners; *Styles* v. *Guy*, 1 Mac. & G. 431, *per* Lord Cottenham; *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165. The case of *Balchen* v. *Scott*, 2 Ves. jun. 678, cannot be considered as law.

(*c*) *M'Kenna* v. *Eager*, 9 Ir. R. C. L. 79; and see *Earl Granville* v. *M'Neile*, 7 Hare, 156, cited *post*, Chap. XXVI., with remarks.

[(*d*) *Re Gordon*, 6 Ch. D. 531. Where two out of three or more co-executors have died without proving the will, the representation under sec. 16 of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95) devolves as if they had not been appointed executors; *Re Boucherett*, (1908) 1 Ch. 180.]

administration of the goods of the latter; for it is only through the medium of the latter testator that he can reach the executorship of the former. It was at one time thought that an executor might renounce probate of the will of the original testator, and at the same time, or subsequently, prove the will of the immediate testator (*a*), but the practice has now been settled to the contrary (*b*). But if the first executor never proved the will, the chain of representation is not continued (*c*).

Voluntary interference with assets is acceptance of the executorship.

7. Any *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor. Thus, where of four executors only one proved, and the other three, describing themselves as *executors*, gave a letter of attorney to the fourth, describing him as *acting executor*, to receive a quantity of stock, Lord Hardwicke ruled that the whole number, by this conduct, had drawn upon themselves the burden of the executorship (*d*); and so generally, if an executor sign a power of attorney, to get in part of the testator's estate (*e*), [or a letter requesting payment by debtors to the estate (*f*)], he brings down the whole burden upon himself, though at the time of acting he disclaim the intention of assuming the office (*g*).

Acts of acceptance.

8. The joining in an assignment of the testator's lease (*h*), or the bringing an action on the footing of the trust (*i*), is an acceptance of the office. And an executor and trustee for sale will be deemed to have acted in the trust, if the property be expressed to be sold by direction of the trustees, and he is present, and takes part, and exercises authority or ownership by giving orders respecting the sale, and afterwards calls on a co-executor to enquire into the state of the testator's accounts (*j*).

(*a*) Shepp. Touch. by Preston, 464; *Wankford* v. *Wankford*, Freem. 520; *Hayton* v. *Wolfe*, Cro. Jac. 614; *S. C.* Palmer, 156; Hutton, 30.

(*b*) *In the Goods of Perry*, 2 Curt. 655; *Brooke* v. *Haynes*, 6 L. R. Eq. 25; *In the Goods of Delacour*, 9 Ir. R. Eq. 86; *In the Goods of Griffin*, 2 Ir. R. Eq. 320; and see *In the Goods of Beer*, 15 Jur. 160.

(*c*) 21 & 22 Vict. c. 95, s. 16.

(*d*) *Harrison* v. *Graham*, 3 Hill's MSS. 239; *S. C.* cited *Churchill* v. *Lady Hobson*, 1 P. W. 241, note (*y*), 6th ed.; *White* v. *Barton*, 18 Beav. 192; *Carberry & Daly* v. *Cody*, 1 Ir. Rep. Eq. 76.

(*e*) *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723.

[(*f*) *Re Stevens*, (1897) 1 Ch. 422; *S. C.* (app. on other grounds), (1898) 1 Ch. (C.A.) 162.]

(*g*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; but see *Malzy* v. *Edge*, 2 Jur. N.S. 80.

(*h*) *Urch* v. *Walker*, 3 M. & Cr. 702.

(*i*) *Montfort* v. *Cadogan*, 17 Ves. 489.

(*j*) *James* v. *Frearson*, 1 Y. & C. C. C. 370; see 375, 377. In *Orr* v. *Newton*, 2 Cox, 274, A., one of six executors, *admitted in his answer* that during the life of B., another of the executors and who had alone taken out probate, he had assisted in writing letters to the co-executors towards collecting the testator's estate, and it was *proved* that A. had written on behalf of himself and his co-executors to a debtor of the testator requiring

Interference not acceptance, where clearly referable to another ground than acceptance.

9. The rule that every voluntary interference with the subject-matter will convert a person into a trustee must be taken with this qualification, that the interference is not such as to be *plainly* referable to some other ground than the part execution of the trust (*a*).

Trustee may not act ambiguously, and then disclaim.

10. If a trustee act *ambiguously* he cannot afterwards take advantage of the doubt, and say he acted not as trustee, but in some other character (*b*).

Case of executorship clothed with a trust.

11. If the office of executor be, by the will, clothed with certain trusts, a person named as executor who *proves* the will, and thereby makes himself executor, is held to draw upon himself the obligations knit to the office of trustee. Thus, if a testator direct that his *executors* shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and refuse the trust (*c*).

Where the executor is also named as devisee upon trust.

12. And if an *executor* be also designated trustee of the *real* estate, and he *acts* as *executor*, he is deemed to have accepted the entire trusteeship (*d*).

Two trusts in same instrument.

13. And if a person, by the same instrument, be nominated trustee of *two distinct trusts*, he cannot divide them: but if he accept the one, he will be taken to have accepted the other (*e*). However, these are the doctrines in a Court of Equity only, for at law an executor may accept that office and yet disclaim the devise to him of a legal estate (*f*); [and, of course, it is competent for a testator or settlor to appoint separate sets of trustees for separate parts of the property, and where a testator has property in different countries it may be expedient to do so (*g*)].

Taking custody of trust-deed not an acceptance of trust.

14. Where a person was *named* as a trustee in a settlement,

payment. Lord Camden, notwithstanding these circumstances, observed in his argument, that "B. undertook to act *solely*, and did act *solely* until he died," implying that A. had, by his conduct, not assumed the character of executor. But the case was one of "*cruel persecution*" against A.; and his Lordship put the fairest possible construction upon all that A. had done; and besides, Lord Camden might only have meant that B. was *substantially* the sole acting executor, without adverting to the question, whether the interference of A. ought or not, in strict legal construction, to be held an acceptance of the executorship.

(*a*) *Stacey* v. *Elph*, 1 M. & K. 195; and see *Dove* v. *Everard*, 1 R. & M. 231; *S. C.* Taml. 376; *Lowry* v. *Fulton*, 9 Sim. 115.

(*b*) *Conyngham* v. *Conyngham*, 1 Ves. 522; *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 476; see *Lowry* v. *Fulton*, 9 Sim. 115; *Doe* v. *Harris*, 16 M. & W. 517.

(*c*) *Mucklow* v. *Fuller*, Jac. 198; and see *Booth* v. *Booth*, 1 Beav. 125; *Williams* v. *Nixon*, 2 Beav. 472.

(*d*) *Ward* v. *Butler*, 2 Moll. 533.

(*e*) *Urch* v. *Walker*, 3 M. & Cr. 702; [*Re Lord and Fullerton*, (1896) 1 Ch. (C.A.) 228].

(*f*) *Lord Wellesley* v. *Withers*, 4 Ell. & Bl. 750; and see *Bence* v. *Gilpin*, 3 L. R. Ex. 82.

[(*g*) See *Re Lord and Fullerton*, *ubi sup.*]

but he did not execute it, and declined to act, he was held not to have accepted the trust by merely taking the settlement into his custody until a trustee could be found (*a*).

Position of administrator where executor and trustee renounces.

15. If A. be named as executor *and trustee*, and he renounces probate and disclaims the trust, and B. takes out the letters of administration with the will annexed, B., though he thus becomes the personal representative, is not also the trustee of the will, nor is he a trustee in any sense, except as holding the surplus assets after the ordinary administration, with notice of a trust. A proper trustee can only be appointed by the Court (*b*).

Executor converting himself into a trustee.

16. Where a fund is given to a person upon certain trusts, and he is appointed executor, as soon as he has severed the legacy from the general assets, and appropriated it to the specific purpose, he dismisses the character of executor, and assumes that of trustee (*c*). But the assent of the executor to a legacy to himself in trust, however proved, converts him into a trustee (*d*).

Parol evidence.

17. Upon the question of acceptance or non-acceptance of the office, *parol* evidence is, of course, admissible, as on any other issue (*e*).

One nominated a trustee may sue as such without written acceptance.

18. If a person be asked and consent to become a trustee of a *marriage settlement*, and thereupon his name is introduced into *articles* as the basis of the settlement, he may sue the parties bound by the articles for specific performance, though he may not have executed any written instrument declaratory of his acceptance of the trust (*f*).

Of acceptance under hand and seal.

19. With respect to the liability of a trustee, it is perfectly immaterial to him whether he *declare* his acceptance of the office by deed or parol, or his consent be *implied* from his acts, for in each case the obligations imposed upon him are precisely the same (*g*). In the event of a *breach of trust*, the consequences to the parties beneficially interested admitted, until recent enactments, of a slight variation. A breach of trust creates *per se* a

(*a*) *Evans* v. *John*, 4 Beav. 35.

(*b*) See *Wyman* v. *Carter*, 12 L. R. Eq. 309.

(*c*) *Phillippo* v. *Munnings*, 2 M. & C. 309; *Byrchall* v. *Bradford*, 6 Mad. 13; *S. C.* Ib. 235; *Ex parte Dover*, 5 Sim. 500; *Ex parte Wilkinson*, 3 Mont. & Ayr. 145; see *Wilmott* v. *Jenkins*, 1 Beav. 401; [*Re Smith*, 42 Ch. D. 302; *Re Timmis*, (1902) 1 Ch. 176; and as to the right of an executor or administrator to appropriate part of the estate to his own share; see *Barclay* v. *Owen*, 60 L. T. N.S. 220; *Re Richardson*, (1896) 1 Ch. 512; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sect. 4, sub-sect. 1; and *post*, Chap. XXIV. s. 1].

(*d*) *Dix* v. *Burford*, 19 Beav. 409.

(*e*) See *James* v. *Frearson*, 1 Y. & C. C. C. 370.

(*f*) *Cook* v. *Fryer*, 1 Hare, 498.

(*g*) See *Lord Montfort* v. *Lord Cadogan*, 19 Ves. 638.

simple contract debt only (*a*); but, if the trustee has covenanted under his hand and seal to execute the trust, even though the heirs be not named, the breach of trust, thus becoming a *specialty debt*, would, as respects legal assets, and as to the estates of testators or intestates who died before January, 1870, take precedence of simple contract debts (*b*). However, the mere fact of a trustee being made a party to and executing a deed appointing him to that office, does not of itself amount to a covenant on his part to execute the trusts, if the deed do not contain any words which could be construed a covenant at law (*c*); and if the deed do contain such words, yet the trustee cannot be sued upon covenant if he did not execute the deed; though, of course, after accepting the trust he would be liable for a breach of contract, as for a simple contract debt (*d*). If he execute the deed, it is not necessary, in order to make it a covenant, that there should be the word *covenant*, but the words *agree* and *declare* (*e*), or the word *declare* alone will suffice (*f*). There is no magic in words, and it is simply a question of intention whether the execution of the deed was for the purpose of creating a specialty debt or *alio intuitu* (*g*). In the case of a trustee covenanting for himself and his *heirs*, a remedy lay at *common law* against the *heir* in respect of estates descended; and by 3 W. & M. c. 14 the like remedy was given against the *devisee* of the debtor: but this was only where the specialty would have supported an *action of debt*, as in the case of a bond, and did not apply to a *covenant*, by which not a debt was created, but *damages* were recoverable (*h*); but the Debts

(*a*) *Vernon* v. *Vawdry*, 2 Atk. 119; *S. C.* Barn. 280; *Cox* v. *Bateman*, 2 Ves. 19; *Kearnan* v. *FitzSimon*, 3 Ridg. P. C. 18; *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123.

(*b*) *Wood* v. *Hardisty*, 2 Coll. 542; (see as to this case 1 Eq. Rep. 125); *Re Dickson*, 12 L. R. Eq. 154; *Gifford* v. *Manley*, For. 109; *Mavor* v. *Davenport*, 2 Sim. 227; *Benson* v. *Benson*, 1 P. W. 131; *Deg* v. *Deg*, 2 P. W. 414; *Turner* v. *Wardle*, 7 Sim. 80; *Primrose* v. *Bromley*, 1 Atk. 89; *Cummins* v. *Cummins*, 3 Jones & Lat. 64; see *Baily* v. *Ekins*, 2 Dick. 632; *Norris* v. *Sadleir*, 8 Ir. R. Eq. 161, 519.

(*c*) *Adey* v. *Arnold*, 2 De G. M. & G. 433; *Isaacson* v. *Harwood*, 3 L. R. Ch. App. 225; *Holland* v. *Holland*, 4 L. R. Ch. App. 449; *Newport* v. *Bryan*, 5 Ir. Ch. Rep. 119; *Marryat* v. *Marryat*, 6 Jur. N.S. 572; *Courtney* v. *Taylor*, 6 M. & Gr. 851; *Wynch* v. *Grant*, 2 Drew. 312. It appears from the latter case, that in *Adey* v. *Arnold*, the trustee had executed the deed, a circumstance not mentioned in the report of *Adey* v. *Arnold*.

(*d*) *Richardson* v. *Jenkins*, 1 Drew. 477; *Vincent* v. *Godson*, 1 Sm. & G. 384.

(*e*) *Westmoreland* v. *Tunnicliffe*, W. N. 1869, p. 182.

(*f*) *Richardson* v. *Jenkins*, 1 Drew. 477; and see *Saltoun* v. *Houston*, 1 Bing. N. C. 433; *Cummins* v. *Cummins*, 3 Jones & Lat. 64; 8 Ir. Eq. Rep. 723; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123.

(*g*) *Isaacson* v. *Harwood*, 3 L. R. Ch. App. 225.

(*h*) *Wilson* v. *Knubley*, 7 East, 127.

Recovery Act, 1830 (11 G. 4. & 1 W. 4. c. 47), perfected the remedy by extending it to the case of a covenant [or other specialty (*a*). By the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed, a covenant and a contract under seal, and a bond or obligation under seal, made, or implied by virtue of the Act, since the 31st December 1881, though not expressed to bind the heirs, operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, as if heirs were expressed (*b*). The effect of this section seems to be to extend the remedy given by 11 G. 4. & 1 W. 4. c. 47, to all specialty creditors, whether the heirs are named or not. By the Administration of Estates Act, 1833 (3 & 4 W. 4. c. 104) it was] declared that the lands of a debtor should be liable to *all his debts*, whether on simple contract or on specialty; but specialties, where the heir was bound, were still made to take precedence of simple contract debts, and specialties where the heir was not bound. A subsequent statute (*c*) has now abolished the distinction between simple contract debts and specialty debts, and directed all debts to be paid *pari passu* in the administration of estates of testators or intestates who may have died on or after the 1st January 1870.

Dutie consequent on acceptance.

20. As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust. The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts (*d*). If he sign a power of attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor and had the sole management of the transaction (*e*).

[(*a*) The effect of ss. 6 and 8 of this Act is that upon alienation by the devisee, the testator's debts become his debts to the extent of the value of the land. See *Re Hedgeley*, 34 Ch. D. 379, and *Re Hyatt*, 38 Ch. D. 609, at p. 619.]

[(*b*) 44 & 45 Vict. c. 41, s. 59.]

(*c*) The Administration of Estates Act, 1869 (32 & 33 Vict. c. 46).

[(*d*) See *Re Turner*, (1897) 1 Ch. 536.]

[(*e*) But a solicitor who, being acting trustee, has by his negligent conduct of the trust business caused an action to be brought against him and his co-trustee, is liable to indemnify his co-trustee against the costs, even where no actual loss has been occasioned to the trust estate; *Re Linsley*, (1904) 2 Ch. 785, applying *Lockhart* v. *Reilly*, 25 L. J. Ch. 697.]

A trustee on acceptance must inform himself of the state of the trust.

21. Again, when a trustee has entered upon the trust, he is bound at once to acquaint himself with the nature and particular circumstances of the property, and to take such steps as may be necessary for the due protection of it (*a*). Thus he is not liable for the defaults of any predecessor in the trust, but if the fund is in danger and not in the state in which it ought to be, the Court will presume him to have made proper enquiries, and will hold him responsible if he does not take such measures as may be called for (*b*). [But a trustee who, acting with reasonable prudence, retains *authorised* investments, will not be liable for subsequent depreciation in value (*c*).]

Covenant to settle future property.

22. Where a person was appointed new trustee of a marriage settlement, which contained a covenant by the husband for the settlement of the wife's future property, it was held that he was entitled to assume that the covenant had been duly performed up to the time of his becoming trustee, if he had no reason to suspect the contrary (*d*).

Inventory.

23. A trustee of chattels personal for the separate use of a wife must take care, on accepting the trust, to have the effects ascertained by a proper inventory, or in a suit for an account of the trust estate he may be deprived of his costs (*e*). [And where a tenant for life of chattels is let into possession he should sign an inventory (*f*).]

Trustee by mistake or otherwise assuming that character.

24. We may add in conclusion, that if a person by mistake or otherwise assume the character of trustee, when it really does not belong to him, and so becomes a *trustee de son tort*, he may be called to account by the *cestuis que trust* for the moneys he received under colour of the trust. Thus, where a testator devised an estate to W. Thompson upon certain trusts, with a power of sale to him, his heirs and assigns, and the trustee

[(*a*) A trustee who brings an action for the protection of the trust property under the advice of counsel, is not *absolutely* indemnified by such advice from liability to the costs of the action as between himself and his *cestuis que trust*, though such advice would go a long way to justify the proceedings, if instituted *bonâ fide: Stott* v. *Milne*, 25 Ch. D. (C.A.) 710; and see *Re Beddoe*, (1893) 1 Ch. (C.A.) 547, 558.]

(*b*) See *Taylor* v. *Millington*, 4 Jur. N.S. 204; *Townley* v. *Bond*, 2 Conn. & Laws. 405; *James* v. *Frearson*, 1 Y. & C. C. C. 370; *Ex parte Geaves*, 25 L. J. Bank. 53; 2 Jur. N.S. 651; *Youde* v. *Cloud*, 18 L. R. Eq. 634; [*Hallows* v. *Lloyd*, 39 Ch. D. 686, 691;] and see *Malzy* v. *Edge*, 2 Jur. N.S. 80; but this decision seems opposed to the current of authorities.

[(*c*) *Re Chapman*, (1896) 2 Ch. (C.A.) 763; and see the Trustee Act, 1894 (57 & 58 Vict. c. 10) s. 4; Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35) s. 3, and *post* Chap. XXXI. s. 3.]

(*d*) *Geaves* v. *Strahan*, 8 De G. M. & G. 291.

(*e*) *England* v. *Downs*, 6 Beav. 269; see 279.

[(*f*) *Temple* v. *Thring*, 56 L. J. Ch. 767, 768; 56 L. T. N.S. 283, 284.]

devised all his real estate to his sister Grace Thompson, charged with 50*l.* to his friend Watson, and died leaving his brother Jonas Thompson his heir-at-law, and, on the death of the trustee, Grace Thompson, assuming herself to be the devisee, sold the estate and received the money and paid it wrongfully to the tenant for life; in a suit against the representative of Grace Thompson, the Court held that, although she was neither heir nor devisee, yet as she had acted as trustee and received the money in that character, she was accountable for it to the *cestuis que trust* (*a*). [And in a recent case in the House of Lords the same principle was applied, and it was held (reversing the judgment of the Court of Appeal) that a person who had assumed to act as agent and receiver for heirs who were unascertained remained, so long as he continued to act, chargeable in a fiduciary character (*b*).]

(*a*) *Rackham* v. *Siddall*, 16 Sim. 297; affirmed by the Lord Chancellor on appeal as to the point under consideration, 1 Mac. & G. 607; *Pearce* v. *Pearce*, 22 Beav. 248; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Hennessey* v. *Bray*, 33 Beav. 96; *Yardley* v. *Holland*, 20 L. R. Eq. 428; *Ex parte Norris*, 4 L. R. Ch. App. 280.

[(*b*) *Lyell* v. *Kennedy*, 14 App. Cas. 437.]

CHAPTER XII

OF THE LEGAL ESTATE IN THE TRUSTEE

UPON this subject we propose to treat, *First:* Of vesting the legal estate in the trustee; *Secondly:* Of the properties and devolution of the legal estate; and *Thirdly:* What persons taking the legal estate will be bound by the trust.

SECTION I

OF VESTING THE LEGAL ESTATE IN THE TRUSTEE

I. With reference to the *Statute of Uses.*

1. In the case of a simple trust, as the statute of 27 Henry the Eighth operates upon the *first use,* whether designated in the instrument as a *use* or *trust,* if a conveyance or devise be to A. and his heirs "*in trust*" for B. and his heirs, the possession will be executed in B. (*a*); and the statute must operate, notwithstanding the intention of the settlor to the contrary, for the will of the subject cannot control the express enactment of the legislature (*b*). In order, therefore, to prevent the legal estate from being executed in the *cestui que trust,* it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as, by conveying or devising (*c*) "to the trustee and his heirs *to the use* of the trustee and his heirs" (*d*), Statute of Uses.

(*a*) As in *Austen* v. *Taylor,* 1 Eden, 361; *Robinson* v. *Grey,* 9 East, 1; *Williams* v. *Waters,* 14 M. & W. 166, &c. See *Broughton* v. *Langley,* 2 Salk. 679; *Chapman* v. *Blissett,* Cas. *t.* Talb. 150.

(*b*) See *Carwardine* v. *Carwardine,* 1 Eden, 36. In *Gregory* v. *Henderson,* 4 Taunt. 772, Judges Chambre and Gibbs laid a stress on the testator's *intent,* but Judge Heath referred the case to the true principle, viz. that the trustees having a duty to perform, it was a trust special, and so out of the statute.

[(*c*) It must, however, be borne in mind that the Statute of Uses does not of its own force apply to wills, see *Re Brooke,* (1894) 1 Ch. 43, 48, but "testators are at liberty to employ the machinery of the statute for the purpose of manifesting their intention."]

(*d*) *Robinson* v. *Comyns,* Cas. *t.* Talb.

or "unto and *to the use* of the trustee and his heirs" (*a*); for although by the latter form of limitation the trustee will be *in* by the common law, yet, as the possession and the use are both vested in the trustee, the trust over, as not being the primary use, will not be effected by the statute.

Special trusts not within the Act.

2. *Special* trusts are not within the purview of the Act of Henry the Eighth (*b*); and therefore, if any agency be imposed on the trustee, as by a limitation to A. and his heirs, upon trust to *pay* the rents (*c*) or to *convey* the estate (*d*), or if any control is to be exercised, or duty is to be performed, as in the case of a trust to *apply* the rents to a person's *maintenance* (*e*), or in making *repairs* (*f*), or to *preserve contingent remainders* (*g*), and *a fortiori* if to *raise a sum of money* (*h*), or to *dispose of by sale* (*i*), in all these cases as the trust is of a special character, the operation of the Statute of Uses is effectually excluded. So if an estate be *devised* to trustees upon trust for a feme covert for her *sole and separate* use, and her *receipts alone to be discharges* (*j*). But if an estate be released by *deed* to A. and his heirs "upon trust" after the marriage of the relessor "for her and her assigns for life, for her *own sole and separate use*," but no *active* duty in respect of the separate use is expressed to be reposed in the trustee personally, a common law court has rejected the sole and separate use as an estate known only in equity, and held the legal estate for life to be executed in the *feme* (*k*).

164; *Attorney-General* v. *Scott*, Id. 138; *Hopkins* v. *Hopkins*, 1 Atk. 589, *per* Lord Hardwicke.

(*a*) *Doe* v. *Passingham*, 6 B. & C. 305; *Doe* v. *Field*, 2 B. & Ad. 564; *Harris* v. *Pugh*, 12 Moore, 577; *S. C.* 4 Bing. 335; *Rackham* v. *Siddall*, 1 Mac. & G. 607; [and see *Re Brooke*, (1894) 1 Ch. 49].

(*b*) See Introduction, p. 5; and see *Wright* v. *Pearson*, 1 Eden, 125; *Mott* v. *Buxton*, 7 Ves. 201.

(*c*) *Robinson* v. *Grey*, 9 East, 1; *Symson* v. *Turner*, 1 Eq. Ca. Ab. 383, note, 3rd resolution; *Garth* v. *Baldwin*, 2 Ves. 646; *Chapman* v. *Blissett*, Cas. *t.* Talbot, 145; *Barker* v. *Greenwood*, 4 M. & W. 429; *Anthony* v. *Rees*, 2 Cr. & Jer. 75; *White* v. *Parker*, 1 Bing. N. C. 573; *Sherwin* v. *Kenny*, 16 Ir. Ch. Rep. 138; and see *Doe* v. *Homfray*, 6 Ad. & Ell. 206; *Kenrick* v. *Lord Beauclerk*, 3 Bos. & Pul. 178; *Nevil* v. *Saunders*, 1 Vern. 415; *Jones* v. *Lord Say & Sele*, 1 Eq. Ca. Ab. 383.

(*d*) *Garth* v. *Baldwin*, 2 Ves. 646; *Doe* v. *Field*, 2 B. & Ad. 504; *Doe* v. *Edlin*, 4 Ad. & Ell. 582; *Doe* v. *Scott*, 4 Bing. 505.

(*e*) *Sylvester* v. *Wilson*, 2 T. R. 444; *Doe* v. *Edlin*, 4 Ad. & Ell. 582.

(*f*) *Shapland* v. *Smith*, 1 B. C. C. 75.

(*g*) *Biscoe* v. *Perkins*, 1 V. & B. 485; and see *Barker* v. *Greenwood*, 4 M. & W. 431.

(*h*) *Wright* v. *Pearson*, 1 Eden, 119; *Stanley* v. *Lennard*, 1 Eden, 87.

(*i*) *Bagshaw* v. *Spencer*, 1 Ves. 142; [*Re Brooke*, (1894) 1 Ch. 43, 47].

(*j*) *Harton* v. *Harton*, 7 T. R. 652; and see *Hawkins* v. *Luscombe*, 2 Sw. 391; *Nevil* v. *Saunders*, 1 Vern. 415; *Jones* v. *Lord Say & Sele*, 1 Eq. Ca. Ab. 383; *Doe* v. *Claridge*, 6 C. B. 641; *Williams* v. *Waters*, 14 M. & W. 172; [*Re Adams & Perry's Contract*, (1899) 1 Ch. 554].

(*k*) *Williams* v. *Waters*, 14 M. & W. 166. See *Nash* v. *Allen*, 1 H. & C. 167; and see *post*, p. 237.

3. And if the trust be simply to "*permit and suffer A. to receive* the rents" (*a*), the legal estate is executed in A. However, if the lands be devised to three persons and their heirs in trust to permit A. to receive the *net* rents for her life for her own use, and after her death to permit B. to receive the *net* rents for her life for her sole and separate use, with remainder over and a power of sale to the trustees, it has been held that the legal estate is in the trustees, for they are to receive the rents, and thereout pay the land tax and other charges on the estate, and hand over the *net* rents only to the tenant for life (*b*). Trust to "permit and suffer A. to receive," &c., executed by the Act.

[4. And where real estate was devised to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one as tenants in common in fee, with remainders over, and the testator "empowered his trustees to apply the income to which, under the disposition thereinbefore contained, any infant devisee should be presumptively or otherwise entitled, towards the maintenance and education or otherwise for the benefit of such devisee during his minority," it was held by V. C. Hall that the legal fee was in the trustees, inasmuch as the provision for maintenance showed that the intention was that the trustees should, under the disposition to them, their heirs and assigns, take an estate by virtue of which they would receive the rents and profits (*c*).] [Maintenance clause.]

5. If the legal estate be limited to the trustees *charged with debts* or *annuities*, and subject thereto in trust for A., but no directions to the trustees personally to *pay* the debts or annuities (*d*), here, as the trustees have no agency assigned to them, but merely stand seised in trust, the statute will operate, and execute the possession in A. [But where the devisees in trust are also executors, and there is a direction for payment of debts Charge of debts.

(*a*) *Boughton* v. *Langley*, 1 Eq. Ca. Ab. 388; *S. C.* 2 Salk. 679, overruling *Burchett* v. *Durdant*, 2 Vent. 311; *Right* v. *Smith*, 12 East, 455; *Wagstaff* v. *Smith*, 9 Ves. 524, *per* Sir W. Grant; *Gregory* v. *Henderson*, 4 Taunt. 773, *per* Heath, J.; *Warter* v. *Hutchinson*, 5 Moore, 143; *S. C.* 1 B. & C. 721; *Barker* v. *Greenwood*, 4 M. & W. 429, *per* Parke, B.; [and see *Re Beddoe*, (1893) 1 Ch. (C.A.) 547].

(*b*) *Barker* v. *Greenwood*, 4 M. & W. 421; *White* v. *Parker*, 1 Bing. N. C. 573.

[(*c*) *Berry* v. *Berry*, 7 Ch. D. 657. As to the effect of a direction for maintenance in making a share of residue vested which would otherwise be contingent, see *Fox* v. *Fox*, 19 L. R. Eq. 286; *Re Palmer*, (1893) 3 Ch. (C.A.) 369, 373; *Re Turney*, (1899) 2 Ch. (C.A.) 739; *Re Gossling*, (1903) 1 Ch. (C.A.) 448; *Re Williams*, (1907) 1 Ch. 180.]

(*d*) *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Jones* v. *Lord Say & Sele*, 8 Vin. Ab. 262; [*Re Adams and Perry's Contract*, (1899) 1 Ch. 554]. But see *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Baker* v. *White*, 20 L. R. Eq. 174; and see *Collier* v. *M'Bean*, 34 Beav. 426.

which is sufficient to charge the devised estate with their payment, the devisees may be held to take the legal estate (*a*).]

Doe *v.* Nicholls.

6. And where copyholds were devised to trustees during the minority of the testator's son, "the same to be *transferred* to him" when he attained twenty-one, and if he died under twenty-one the testator gave the estate over, it was held that the trustees took a chattel interest only, until the son attained twenty-one, and that the copyholds then vested in the son. It was said, that if the devise were to the son on attaining twenty-one without the intervention of trustees, the *admission* of the son as tenant on the rolls would operate as a *transfer* of the estate, and that the words "the same to be transferred" did not imply that the *trustees* were to transfer the legal estate (*b*). This construction, however, appears to be somewhat forced, and is not quite satisfactory.

Trust to pay, *or* permit, &c.

7. Where the trust is "to pay unto *or* permit and suffer a person to receive" the rents, as the former words would create a special trust, and the latter would be construed a use executed by the statute, the Court holds, for want of a better reason, that the former or latter words shall prevail, as the instrument in which they are found happens to be a deed or a will (*c*). But it may be asked, why might not the settlor have meant to vest a *discretion* in the trustees, either to receive the rents themselves or to put the *cestui que trust* in possession, and if so, the intention would require that the legal estate should be in the trustee. However, numerous titles must have been accepted on the faith of the case referred to, and at this distance of time it might be dangerous to reverse it; and this is the view adopted by the Court (*d*). [But as the rule establishes no principle, it will readily yield to indication of a contrary intention; and where the trust was to "pay the rents unto, or permit the same to be received by" one of the trustees, the Court of Appeal were of opinion that, as effect could be given to both sets of words, there was no inconsistency, and held, upon the construction of the will, that the doctrine of *Doe* v. *Biggs* had no application, and that the legal estate remained in the trustees (*e*).]

[(*a*) *Re Brooke*, (1894) 1 Ch. 43; *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Spence* v. *Spence*, 12 C. B. N.S. 199; *Marshall* v. *Gingell*, 21 Ch. D. 790.]

(*b*) *Doe* v. *Nicholls*, 1 B. & C. 336.

(*c*) *Doe* v. *Biggs*, 2 Taunt. 109; [*Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465, 478; *Re Adams and Perry's Contract*, (1899) 1 Ch. 554].

(*d*) *Baker* v. *White*, 20 L. R. Eq. 171; [*Re Lashmar*, (1891) 1 Ch. (C.A.) 258, 267].

[(*e*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465; and see *Re Lashmar*, *sup.*]

II. Of the *quantity* of legal estate taken by the trustee with reference to the object and scope of the trust.

General rules.

As legal limitations are properly cognisable by a common-law court, it might be supposed that the construction put upon the instrument would stand wholly unaffected by the engraftment of a trust. But as the effect of the instrument is to be ruled by the intention, and as every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the Courts as well of common law as of equity, and more particularly in the case of wills, have entered upon a consideration of the trust, in order to regulate within certain limits the extent of the legal interest by the scope and object of the equitable (*a*).

The following rules of construction have been adopted by the Courts in reference to this branch of our subject in the case of wills, and, except so far as they are controlled by the positive enactments of the Wills Act (*b*), must still be resorted to for guidance.

First, *Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied:* Secondly, *The legal estate limited to the trustee shall not be carried farther than the complete execution of the trust necessarily requires.*

First. As to the former rule.

Legal estate supplied *in toto* on account of the trust.

1. The Court has in some instances *supplied the estate in toto;* as where a testator devised to a *feme covert* the issues and profits of certain lands *to be paid by his executors,* and it was held that the land itself was devised to the executors in trust to receive the rents and profits and apply them to the use of the wife (*c*).

Legal estates enlarged.

2. In *other* cases the Court has *extended the estate,* as where, before the Wills Act, the devise was to three trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust to pay certain annuities for lives, and it was ruled that the trustees took an estate for the *several lives of the annuitants* (*d*).

(*a*) As to the cognisance of trusts by a court of law, see *Sims* v. *Marryatt*, 17 Q. B. 292; *May* v. *Taylor*, 6 Man. & Gr. 261; *Walker* v. *Richardson*, 2 M. & W. 891.

(*b*) 1 Vict. c. 26, ss. 30, 31.

(*c*) *Bush* v. *Allen*, 5 Mod. 63; *Doe* v. *Homfray*, 6 Ad. and Ell. 206; and see *Oates* v. *Cooke*, 3 Burr. 1684; Sir W. Black, 543; *Doe* v. *Woodhouse*, 4 T. R. 89; *Murphy* v. *Donelly*, 4 I. R. Eq. 111; *Stevenson* v. *Mayor of Liverpool*, 10 L. R. Q. B. 81; [*Davies to Jones*, 24 Ch. D. 190].

(*d*) *Doe* v. *Simpson*, 5 East, 162; and see *Atcherley* v. *Vernon*, 10 Mod. 523; *Oates* v. *Cooke*, 3 Burr. 1684; *Shaw* v. *Weigh*, 2 Str. 798; *Jenkins* v. *Jenkins*, Willes, 656. In *Doe* v. *Simpson*, a life estate only was implied, as the trustee was merely such; but in

Trust to sell confers a fee.

3. If land, said Lord Hardwicke, be devised to a man without the word *heirs*, and a trust be declared which can be satisfied in no other way but by the trustees taking an inheritance, it has been construed that a fee passes (*a*). Thus a trust to sell (*b*), even on a contingency (*c*), confers a fee simple as indispensable to the execution of the trust; and the construction is the same in a sale implied, as where the devise is upon trust out of the rents and profits of an estate to discharge certain legacies, made payable at a day inconsistent with the application of the annual profits only (*d*).

Charges not implying a power of sale.

4. But a power of selling will not be implied by a limitation to a trustee, or to a trustee his *executors and administrators* for and *until payment* of debts and legacies generally (*e*), or for raising a sum of money out of the *rents and profits* (*f*); and therefore, in such cases, before the Wills Act, where nothing in the context implied a limitation of the fee, a chattel interest only would have passed. But, if a greater estate be limited expressly, as by a devise to A. *and his heirs* upon trust to pay debts, the Court has no jurisdiction to cut down the expression and reduce the estate to a chattel (*g*); though if a chattel interest be carved out of the fee and be so limited, the word "heirs" may be rejected as inconsistent with the estate, as where lands are devised to trustees and their *heirs*, until an infant attains twenty-one, and then to the infant in fee (*h*).

Grant or devise to two and the heirs of the survivor.

5. If an estate be *granted* to two, and the survivor of them, and the heirs of such survivor, they are not joint tenants in fee, but take a freehold for their joint lives, with a contingent remainder to the one that may happen to survive. The same

Jenkins v. *Jenkins*, the trustee being also interested beneficially, the construction was more liberal, and it was thought the fee simple passed.

(*a*) *Villiers* v. *Villiers*, 2 Atk. 72.

(*b*) *Shaw* v. *Weigh*, 2 Str. 798; *Bagshaw* v. *Spencer*, 1 Ves. 144, *per* Lord Hardwicke; and see *Glover* v. *Monckton*, 3 Bing. 113; 10 Moore, 453. As to *Hawker* v. *Hawker*, 3 B. & Ald. 537, and *Warter* v. *Hutchinson*, 5 Moore, 143; *S. C.* 1 B. & C. 721, see remarks, p. 242, note (*j*) *infra*.

(*c*) *Gibson* v. *Lord Montfort*, 1 Ves. 485, 491.

(*d*) *Gibson* v. *Lord Montfort*, 1 Ves. 485.

(*e*) Co. Lit. 42, a; *Cordal's case*, Cr. Eliz. 315; *Carter* v. *Barnardiston*, 1 P. W. 505; *Hitchens* v. *Hitchens*, 2 Vern. 403; *Doe* v. *Simpson*, 5 East, 171, *per* Lord Ellenborough, C.J.; *Roberts* v. *Dixwell*, 1 Atk. 609, *per* Lord Hardwicke.

(*f*) *Doe* v. *Simpson*, 5 East, 162; and see *Bosworth* v. *Forard*, O. Bridg. Rep. 167; *Thomason* v. *Mackworth*, Id. 507; Co. Lit. 42 a, note (7), Butler's ed.; *Collier* v. *Walters*, 17 L. R. Eq. 252.

(*g*) *Wright* v. *Pearson*, 1 Eden, 119, 123.

(*h*) *Goodtitle* v. *Whitby*, 1 Burr. 228; *Doe* v. *Lea*, 3 T. R. 41; *Warter* v. *Hutchinson*, 1 B. & C. 721; and see *Ackland* v. *Lutley*, 9 Ad. & Ell. 879; but see *Lethieullier* v. *Tracy*, 3 Atk. 780, Fearne's C. R. 226, Butler's note.

construction will be put upon a *devise* expressed simply in the same terms without any trust annexed, or even if there be a trust, provided the nature of it do not require the fee simple to be vested in the trustees (*a*). But if such a devise, even to beneficiaries, be coupled with words pointing to a joint tenancy, the construction will be a joint fee, as if the gift be to two and the survivor of them and *their heirs* (*b*), or to them as *joint tenants*, and the survivors and survivor of them, and the heirs and assigns of such survivor (*c*). And if the devise be to two and the survivor of them, and the heirs of such survivor upon trusts that require the fee simple to be vested in the trustees, or upon trust for *sale*, the prevailing opinion is, that notwithstanding the old case of *Vick* v. *Edwards* (*d*) to the contrary, the Courts would compel a purchaser to accept a title on the assumption that the trustees took the fee simple (*e*). "Whatever doubts," observes Butler, "were formerly entertained, it now appears to be the settled opinion of the profession that a devise to two and the survivor of them, and the heirs and assigns of such survivor, enables the trustees to vest the fee in the purchaser, and that titles under such a devise are accepted with a conveyance from the trustees and without the concurrence of the heir" (*f*).

Implied devise in the word "trustee."

6. If a testator simply appoint a person his executor and *trustee*, it seems the latter word is not so exclusively applied to real estate as to carry by implication to the executor a devise of the testator's freeholds, but if the testator direct certain acts to be done by the trustee, [or by the executor,] which belong to the owner of the freeholds, [or which require that the trustee or executor should have dominion over the real estate,] such a devise will be implied (*g*); [but the implication will only arise when it is necessary to make the words used by the testator sensible (*h*)]. And so if a testator appoint a person his "trustee

(*a*) *Re Harrison*, 3 Anst. 836.

(*b*) *Doe* v. *Sotheron*, 2 B. & Ad. 628; *Oakley* v. *Young*, 2 Eq. Ca. Ab. 537.

(*c*) *Goodtitle* v. *Laymen*, Fearne's C. R. 358.

(*d*) 3 P. W. 372.

(*e*) See *Doe* v. *Ewart*, 7 Ad. & Ell. 636; *Doe* v. *Sotheron*, 2 B. & Ad. 628.

(*f*) Co. Lit. 191 a, note 1; and see Fearne's C. R. 358.

(*g*) *Oates* v. *Cooke*, 3 Burr. 1684; *Bush* v. *Allen*, 5 Mod. 63; *Anthony* v. *Rees*, 2 Cr. and Jer. 75; *Doe* v. *Shotter*, 8 Ad. & Ell. 905; [*Davies to Jones*, 24 Ch. D. 190; *Re Fisher and Haslett*, 13 L. R. Ir. 546]. If a testator appoint his solicitor sole trustee of his will, with a direction that the solicitor is to be paid as a solicitor as if he were not a trustee, it constitutes him a *trustee* only and not an *executor* according to the tenor of the will; *Re Goods of Lowry*, 3 L. R. P. & D. 157.

[(*h*) *Re Cameron*, 26 Ch. D. 19, 25; and see *Dean* v. *Dean*, (1891) 3 Ch. 150, where powers of maintenance and advancement out of the income of land were given to the trustees, and it was held that they did not take an implied legal estate.]

of inheritance," which is equivalent to making him the trustee of his inheritable property (*a*); or if a testator appoint "A. and B. trustees, as also their *heirs* or assigns, not making them accountable for any losses except by their own neglect, and the one not to suffer for the other's negligence" (*b*). And if a testator constitute a trustee by will, and devise the legal estate to him, and then by a codicil "nominates and appoints another person to be *trustee*" in his place, the codicil not only confers the office of the trusteeship, but also carries the legal estate with it (*c*).

If a testator by will devises to several persons upon trust, and nominates them his *trustees and executors*, and then by codicil revokes the appointment of one of them as *executor*, and substitutes another person as *executor* in his place, such revocation and new appointment extends only to the *executorship*, and does not by implication affect the *trusteeship* (*d*).

Legal estate curtailed from the nature of the trust.

Secondly, we proceed to illustrate the rule, that the legal estate limited to the trustee shall not be greater than is required by the trust.

1. If a freehold estate be devised to A. and his heirs upon trust to *permit* B. *to receive* the rents during his life, and on his death to *convey* to C. in fee; here, as during the life of B. the trustees are to be merely passive, but after his death are to do an act, the legal estate for the life of B. is vested in B., and the remainder only in the trustee (*e*). On the other hand, if an estate be devised to A. and his heirs in trust to *pay* the rents to B. for his life, and, on his death, the testator devises the estate to C. in fee, here the legal estate for the life of B. is in the trustee, and the legal estate of the remainder is vested in C. (*f*). So where a

(*a*) *Trent* v. *Hanning*, 1 B. & P. New Rep. 116; 10 Ves. 495; 7 East, 95; 1 Dow, 102; *Doe* v. *Pratt*, 6 Ad. & Ell. 180.

(*b*) *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

(*c*) *Re Hough's Will*, 4 De G. & Sm. 371; *Re Turner*, 2 De G. F. & J. 527.

(*d*) *Worley* v. *Worley*, 18 Beav. 58; *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Barrett* v. *Wilkins*, 5 Jur. N.S. 687.

(*e*) *Doe* v. *Bolton*, 11 Ad. & Ell. 188; *Adams* v. *Adams*, 6 Q. B. 860.

(*f*) *Adams* v. *Adams*, 6 Q. B. 860; *Cooke* v. *Blake*, 1 Exch. 220; *Jones* v. *Lord Say & Sele*, 8 Vin. Ab. 262; *Doe* v. *Simpson*, 5 East, 171, *per* Lord Ellenborough; *Robinson* v. *Grey*, 9 East, 1; *Doe* v. *Ironmonger*, 3 East, 533; *Warter* v. *Hutchinson*, 5 Moore, 143; *S. C.* 1 B. & C. 721; and see *Nash* v. *Coates*, 3 B. & Ad. 839; *Ward* v. *Burbury*, 18 Beav. 190; *Doe* v. *Cafe*, 7 Exch. 675; [*Re Lashmar*, (1891) 1 Ch. (C.A.) 258, 269; *Re Adams and Perry's Contract*, (1899) 1 Ch. 554]. Note, *Harton* v. *Harton*, 7 T. R. 652, can scarcely be reconciled with principle, and seems to have been disapproved by Lord Eldon in *Hawkins* v. *Luscombe*, 2 Sw. 391; but Sir J. Wigram considered himself bound by it in *Brown* v. *Whiteway*, 8 Hare, 145, the Court of Q. B. recognised its authority, at least to a partial extent, in *Toller* v. *Attwood*, 15 Q. B. 951; [and it has been recently recognised by the House of

copyhold was *devised to* A. *and his heirs* upon trust for the separate use of B. a *feme covert* during her life, and after her decease the testatrix devised the same to such uses as B. should appoint, and in default of appointment to the right heirs of B., it was thought by Judge Heath that the trustee took a base fee determinable by an executory devise over on the death of the *feme covert*, and by Judge Chambre that the devise amounted only to an estate *pur autre vie* (*a*). So where a testator devised *leaseholds for years* to trustees upon trust for A. for life, and after the death of A. the testator bequeathed them to B., it was held that the trustees had the legal estate during the life of A. only (*b*). Thus in freeholds, copyholds, and leaseholds, where there is an indefinite devise to trustees and their heirs, executors, or administrators, upon certain trusts confined to the life of one person, followed by a simple devise to another for the absolute interest, in each case the estate of the trustees is limited by implication to the life of the person who takes the life interest (*c*).

It has sometimes been argued that where *freeholds* are coupled with *copyholds* or *leaseholds* upon certain trusts, if the legal estate of the copyholds or leaseholds be vested in the trustees, there is a kind of attraction which will cause the legal estate of the freeholds also to be vested in the trustees; but whatever attraction may arise from the presumption that the different kinds of property were meant to be held together during the continuance of the trusts affecting them, there is no such attraction as will keep the legal estates of any species of property vested in the trustees beyond the period limited for the trusts of that property (*d*). It seems, however, that in a *deed*, where the construction adheres more strictly to the letter, a limitation to trustees and *their heirs* upon trust to pay an annuity for life only, with remainders over, would have conferred the fee simple (*e*).

Limitation to trustees and their heirs to preserve contingent remainders, the words "during the life of," &c., being omitted.

2. In a *devise* to A. for life, remainder to trustees and their heirs to preserve contingent remainders (the words "during the life of A.," being omitted), with remainders over, the trustees are construed to take not a fee simple, but an estate for the life of

Lords in *Van Grutten* v. *Foxwell*, (1897) A. C. 658, 662, 681, 683; and see *Re Adams and Perry's Contract*, (1899) 1 Ch. 554].

(*a*) *Doe* v. *Barthorp*, 5 Taunt. 382; *Baker* v. *White*, 20 L. R. Eq. 166; and see *Ward* v. *Burbury*, 18 Beav. 190; *Doe d. Players* v. *Nicholls*, 1 B. & C. 342; *Doe* v. *Cafe*, 7 Exch. 675; [*Re Townsend*, (1895) 1 Ch. 716].

(*b*) *Stevenson* v. *Mayor of Liverpool*, 10 L. R. Q. B. 81.

(*c*) *Baker* v. *White*, 20 L. R. Eq. 177 *per cur.*

(*d*) *Baker* v. *White*, 20 L. R. Eq. 166; [and see *Re Townsend*, (1895) 1 Ch. 716].

(*e*) *Wykham* v. *Wykham*, 11 East, 458; see *S. C.* 18 Ves. 419, and following pages; 3 Taunt. 316.

A. (*a*). And Sir W. Grant expressed himself in favour of a similar construction where the instrument was a deed (*b*); but it has since been decided that in the latter case a fee simple passes (*c*), unless it be quite clear upon the face of the deed itself that the words "during the life of A." were meant to be in the deed, and were wanting through inadvertence (*d*). Of course there can be no such restriction of the estate by implication where the natural sense of the words admits of a fair and reasonable construction; as if, before the Real Property Act, 1845 (*e*), the fee simple in the trustees would have supported contingent limitations that would otherwise have been left at the mercy of the tenant for life (*f*).

[Where devise to trustees and their heirs is not cut down in any determinate event.]

[But unless there be something on the face of the will which cuts down a devise to trustees and their heirs in some determinate event, the words of the devise must have their full natural effect as giving an estate of inheritance to the trustees (*g*). Thus, where freeholds and copyholds were devised to trustees and their heirs upon trust to pay the rents to T. for her life for her separate use, and after her decease the trustees were to stand possessed of the estates in trust for such persons and purposes as T. should by will appoint, it was held that it was implied that the trustees were to take an estate lasting beyond the life of T., and that T. having made an appointment by will, they took an estate of inheritance (*h*).]

Trust to lease, &c., confers fee simple.

3. If a devise be to trustees and their heirs upon a trust that cannot be executed without an absolute control over the property, as in trust to lease for an indefinite number of years (*i*), or to raise a sum of money by sale (*j*), and subject thereto to

(*a*) *Doe* v. *Hicks*, 7 T. R. 433; *Haddelsley* v. *Adams*, 22 Beav. 267; as to *Boteler* v. *Allington*, 1 B. C. C. 72, see *Doe* v. *Hicks*, 7 T. R. 435, and *Wykham* v. *Wykham*, 18 Ves. 418; and see *Nash* v. *Coates*, 3 B. & Ad. 839.

(*b*) *Curtis* v. *Price*, 12 Ves. 89; but see *Wykham* v. *Wykham*, 18 Ves. 419, and following pages.

(*c*) *Colmore* v. *Tyndall*, 2 Y. & J. 605; *Lewis* v. *Rees*, 3 K. & J. 132; *Cooper* v. *Kynock*, 7 L. R. Ch. App. 398.

(*d*) *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198.

(*e*) 8 & 9 Vict. c. 106, s. 8.

(*f*) *Venables* v. *Morris*, 7 T. R. 342, 348; and see *Curtis* v. *Price*, 12 Ves. 100; *Doe* v. *Hicks*, 7 T. R. 437; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 169; 2 Dr. & War. 16.

[(*g*) *Re Townsend*, (1895) 1 Ch. 716, 721, *per* Stirling, J.; *Doe* v. *Davies*, 1 Q. B. Rep. 430; *Poad* v. *Watson*, 6 E. & B. 606; *Collier* v. *Walters*, L. R. 17 Eq. 252.]

[(*h*) *Re Townsend*, (1895) 1 Ch. 716, 723, distinguishing *Doe* v. *Barthorp*, 5 Taunt. 382.]

(*i*) *Doe* v. *Willan*, 2 B. & Ald. 84; but see *Heardson* v. *Williamson*, 1 Keen, 33; *Ackland* v. *Lutley*, 9 Ad. & Ell. 879.

(*j*) *Wright* v. *Pearson*, 1 Eden, 123; *Bagshaw* v. *Spencer*, 1 Ves. 142; *Glover* v. *Monckton*, 3 Bing. 13; *Bale* v. *Coleman*, 2 Eq. Ca. Ab. 309; note

uses in strict settlement, the trustees will not be held to take a mere *power* so as to let in the statute to execute the uses in strict settlement, but will be construed to take the legal *estate* in fee, and the uses that are limited will stand as equitable interests.

Charge of debts.

So if copyholds be devised to *trustees* (*who are also appointed executors of the testator*) and the survivor of them, and the heirs of such survivor, charged with debts, and subject thereto upon trust to pay the rents to the testator's daughter for life, and after her death the copyholds are devised by the testator directly to the heirs of the body of such tenant for life, here, as the charge of debts may require the fee simple to be in the trustees, they take the legal estate, not only for the life of the tenant for life, but absolutely, and the issue in tail take only equitable estates (*a*).

[So where a testator directs his debts to be paid, or directs them to be paid by his executors, and devises real estate to trustees and their heirs upon trusts which do not exhaust the fee, and then devises the real estate after the determination of the preceding trusts directly to a third person, and *appoints the trustees his executors*, the trustees take the entire legal fee by virtue of the charge of debts (*b*).]

Present rule regulating devises to trustees.

4. Recent cases have established the following important qualification of the rule now under consideration, viz. that where an estate is in the first instance given to trustees and their heirs upon trusts which do not exhaust the equitable fee simple, and

(*e*); *Sandford* v. *Irby*, 3 B. & Ald. 654; *Jones* v. *Morgan*, 1 B. C. C. 206; for a correct report of the will, see Fearne's C. R. Appendix, No. 3. It has been observed in the "Treatise of Powers" (Sug. Pow. 111, 8th ed.), that this rule was not attended to in the case of *Hawker* v. *Hawker*, 3 B. & Ald. 537. The devise was probably considered to be of a double aspect, viz. to the trustees and their heirs upon trust to sell, &c., if one event happened, and upon trust for the daughter, &c., if another event happened, and as the latter series of limitations took effect, and therefore no power of sale was to be exercised by the trustees, it was not necessary under the circumstances to arm them with the inheritance. The case of *Warter* v. *Hutchinson*, 5 Moore, 143; 1 B. & C. 721, is more difficult to be reconciled with the rule we are discussing. The construction appears to have been that, as the limitation to the trustees and their heirs was expressly limited to the period *until A. attained twenty-one*, the estate was intended to be a chattel interest only, and the charges were to be raised either by sale or mortgage of that chattel interest, or out of the inheritance by virtue of an implied power.

(*a*) *Creaton* v. *Creaton*, 3 Sm. & G. 386; [and see *Re Brooke*, (1894) 1 Ch. 43, *ante*, p. 236].

[(*b*) *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Re Tangueray-Willaume & Landau*, 20 Ch. D. (C.A.) 465; *Marshall* v. *Gingell*, 21 Ch. D. 790; *Spence* v. *Spence*, 12 C. B. N.S. 199; *Re Lashmar*, (1891) 1 Ch. 258, 265.]

for which a particular estate short of the legal fee in the trustees would be sufficient, but discretionary powers are superadded which cannot be exercised by the trustees without arming them with the means of passing the fee simple, there the trustees do not take a particular estate by way of vested interest with a power under the Statute of Uses or by a common law authority of passing the fee, but they retain the legal fee simple given to them in the first instance, on the footing that they were meant to exercise the discretion given to them by virtue of their *ownership*, and not by the mere operation of a *power* (*a*). Baron Parke observed, in the leading case (*b*), "When an estate is given to trustees, all the trusts must *primâ facie* at least be performed by them by virtue and in respect of the estate vested in them.—The fee is in terms devised to them, and it would be a very strained and artificial construction to hold, first, that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust required, and then, when the trust does require the whole fee simple, to hold that that must be supplied by way of *power* defeating the estate to the subsequent devisees, and not out of the *interest* of the trustees."

Devise to uses.

5. The rule of construction laid down in this case has since been followed, even where the language of the subsequent limitations has been peculiarly applicable to a devise of the legal estate, as where, after the primary devise to the trustees and their heirs upon limited trusts with discretionary powers, the estate was expressed to be limited in strict settlement, by a declaration of *uses* to that effect (*c*).

Where the powers do not affect the fee.

6. But where the devise, before the Wills Act, was to trustees and their heirs upon trust for a person for life, and after her death upon certain trusts during the minority of her children, followed by a direct devise to the children on the youngest attaining 21, without words of limitation (and therefore construed to give life estates only) with a *mere power of leasing for* 21 *years*, to be exercised during the continuance of the trust, without any purpose affecting the fee simple, and which power of leasing

(*a*) *Watson* v. *Pearson*, 2 Exch. 581; *Blagrave* v. *Blagrave*, 4 Exch. 550; *Davies* v. *Davies*, 1 Q. B. 430; *Doe* v. *Cadogan*, 7 Ad. & Ell. 636; *Rackham* v. *Siddall*, 1 Mac. & G. 607; *Poad* v. *Watson*, 6 Ell. & Bl. 606; and see *Watkins* v. *Frederick*, 11 H. L. Cas. 358; [*Re Townsend*, (1895) 1 Ch. 716].

(*b*) *Watson* v. *Pearson*, 2 Exch. 593.

(*c*) *Blagrave* v. *Blagrave*, 4 Exch. 550; *Rackham* v. *Siddall*, 1 Mac. & G. 607; [and see *Berry* v. *Berry*, 7 Ch. D. 657].

extended to other estates also, which were clearly devised to the beneficiaries directly, it was held that the mere power of leasing was not sufficient to countervail the rule that the legal estate was not to be extended beyond the necessity of the trust, and that under all the circumstances the trustees took an estate for the life of the mother and the minority of the children with a *power* of leasing (*a*).

Wills Act.

7. The law upon the subject has undergone some alteration from the provisions of the Wills Act 1837 (7 W. 4. and 1 Vict. c. 26).

By the 30th section it is declared, "that where any real estate (other than or not being a presentation to a church) shall be devised to any *trustee or executor*, such devise shall be construed to pass *the fee simple*, or other the *whole estate or interest* which the testator had power to dispose of by will in such real estate, unless a *definite term of years*, absolute or determinable, or an *estate of freehold* shall thereby be given to him, *expressly* or by *implication*."

And by the following section it is enacted, "that where any real estate shall be devised to a trustee *without any express limitations of the estate* to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee *the fee simple* or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied."

Effect of the Act.

The effect of these provisions is by no means clear, but it is conceived that a *definite* chattel interest, as a term of 99 years, or a simple *freehold*, as an estate for the life of A., may still either be limited expressly to trustees or be raised by implication; and that in cases where before the Act an *indefinite* chattel interest would have passed, as in a devise to trustees (without the word "heirs") to pay debts, or a freehold with an indefinite interest superadded, as in *Doe* v. *Simpson* (*b*), there the words of the will are for the future made to pass the fee simple (*c*).

(*a*) *Doe* v. *Cafe*, 7 Exch. 675; and see *Adams* v. *Adams*, 6 Q. B. 860; *Lambert* v. *Browne*, 5 Ir. R. C. L. 218.

(*b*) 5 East, 162.

(*c*) See the observations on the above clauses, H. Sugden on Wills, p. 119; 2 Jarm. on Wills, 4th ed. p. 320.

SECTION II

THE PROPERTIES AND DEVOLUTION OF THE LEGAL ESTATE IN THE TRUSTEE

THIS branch of our subject we propose to consider, First, with reference to the common law; and Secondly, with reference to the construction of particular statutes.

First. Of the legal estate at common law.

Legal estate at common law.

1. It may be stated as a general rule, that the legal estate in the hands of the trustee has at common law precisely the same properties and incidents as if the trustee were the usufructuary owner.

Of dower, curtesy, &c.

If real estate be put in trust it is subject at law in the hands of the trustee to curtesy (*a*), and dower (*b*), and in the case of copyhold to freebench (*c*); and until a late Act the trust estate was liable to forfeiture (*d*), and on the decease of the trustee, if there was no heir, it fell by escheat to the lord (*e*); but by the Trustee Act, 1850 (13 & 14 Vict. c. 60), ss. 15, 46 (substituted for 4 & 5 W. 4. c. 23), the legal estate of trust property was protected from forfeiture and escheat (*f*). And by the Land Transfer Act, 1875 (*g*), it was enacted that, "Upon the death of a bare trustee (*h*) *intestate* as to any corporeal or incorporeal

(*a*) *Bennet* v. *Davis*, 2 P. W. 319.

(*b*) *Noel* v. *Jevon*. Freem. 43; *Nash* v. *Preston*, Cro. Car. 190.

(*c*) *Hinton* v. *Hinton*, 2 Ves. sen. 631, 638; *Bevant* v. *Pope*, Freem. 71; and see *Brown* v. *Raindle*, 3 Ves. 256.

(*d*) *Pawlett* v. *Attorney-General*, Hard. 466, *per* Lord Hale; *Geary* v. *Bearcroft*, Cart. 67, *per Cur*; *King* v. *Mildmay*, 5 B. & Ad. 254.

(*e*) Jenk. 190, c. 92.

(*f*) See *post*, p. 248.

(*g*) 38 & 39 Vict. c. 87, s. 48, repealing the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 5.

(*h*) In a recent case a discussion arose as to the meaning of the expression a *bare trustee*. V. C. Hall observed, "Where there is a trustee whose trust is to convey and the time has arrived for a conveyance by him, he is, I think, a bare trustee," and then adverting to Dart's "Vendors and Purchasers," in which it is laid down, that "a *bare trustee* would probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been *requested by them so to convey it*," the V. C. approved of the statement, save only that the words, "and has been requested by them so to convey it," should be left out, inasmuch as they were not an important or necessary ingredient. But [the late author of this work has doubted the propriety of this omission on the ground that] if an estate be vested in trustees in trust to sell and divide the proceeds amongst a class, the trustees are bound to convey by the direction of the class if *sui juris*, but are not bare trustees until the joint request to convey has countermanded the trust for sale. *Christie* v.

hereditament, of which such trustee was seised in fee simple, such hereditament should vest, like a chattel real, in the legal personal representative from time to time of such trustee." But the Act was not to apply to lands registered under the same Act. [This enactment is, however, in the case of deaths occurring after the 31st December 1881, repealed, and its place supplied by a provision that "where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage (*a*), in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers"(*b*).

[Under the Conveyancing Act, 1881, legal estate devolves to personal representative.]

Ovington, 1 Ch. D. 279. [In a subsequent case, Sir G. Jessel, M.R., withheld his approval of the above definition of a "bare trustee," and, while expressly abstaining from deciding the point, intimated an opinion that a "bare trustee," meant a trustee without any beneficial interest, whether he had active duties to perform or not. See *Morgan* v. *Swansea Urban Authority*, 9 Ch. D. 582. But in a later case V. C. Bacon held that trustees of real estate devised upon trust for sale, the sale of which had been ordered in an action to administer the testator's estate, were bare trustees, although they took *beneficial interests* in the proceeds of sale; *Re Docwra*, 29 Ch. D. 693; and yet more recently Stirling, J., has preferred to follow *Christie* v. *Ovington* rather than *Morgan* v. *Swansea Urban Authority*; see *Re Cunningham and Frayling*, (1891) 2 Ch. 567, 571. However, in *London and County Bank* v. *Goddard*, (1891) 1 Ch. 642, North, J., upon the construction of s. 16 of the Trustee Act, 1893, intimated an opinion to the same effect as that of Jessel, M.R., in *Morgan* v. *Swansea Urban Authority*.]

[(*a*) By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c 78), s. 4, the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee was admitted, was empowered on payment of all sums secured by the mortgage to convey or surrender the mortgaged estate. This section was held not to apply to a transfer of a mortgage of a freehold estate; *Re Spradbery's Mortgage*, 14 Ch. D. 514; or to a sale by the executors, under a power in the mortgage deed; *Re White's Mortgage*, 51 L. J. N.S. Ch. 856; and has, in the case of a death occurring after the 31st December, 1881, been repealed by 44 & 45 Vict. c. 41, s. 30.]

[(*b*) 44 & 45 Vict. c. 41, s. 30. Executors of a surviving trustee who

The section was held to apply to copyholds (*a*), but by the Copyhold Act, 1894, it is provided that the section "shall not apply to land of copyhold or customary tenure *vested in the tenant on the Court rolls* on trust or by way of mortgage" (*b*). And now by the Land Transfer Act, 1897, it is enacted that "where real estate is vested in any person" dying on or after January 1st, 1898, "without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him" (*c*), but the expression "real estate" is not to be "deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant" (*d*). The expression "personal representatives," as here used, means those who are named as executors, whether they have actually obtained a grant of probate or not, and therefore where a testator has died after the commencement of the Act, the concurrence of all his executors, whether or not they have proved the will, is necessary to convey his real estate (*e*).]

[Land Transfer Act, 1897.]

Trust chattels subject to forfeiture, &c.

2. So chattels real and personal held upon trust were forfeitable until the Act of 4 & 5 W. 4. c. 23 (which extends to personal as well as real estate), for the offence of the trustee (*f*); but in the case of two joint trustees, a moiety only was forfeited, and the King and the other trustee were tenants in common (*g*).

have entered into possession of the settled property and acted as trustees, may nevertheless be superseded by an appointment of new trustees under a power contained in the settlement, and become compellable to hand over all trust deeds and documents; *Re Routledge*, (1909) 1 Ch. 280.]

[(*a*) *Re Hughes*, W. N., 1884, p. 53.]

[(*b*) 57 & 58 Vict. c. 46, s. 88, replacing s. 45 of the Copyhold Act, 1887, 50 & 51 Vict. c. 73. The effect of the last mentioned provision was held to be retrospective, so that the legal estate in copyholds which had devolved upon the personal representatives of a sole trustee dying after the 31st of December, 1881, and before the passing of the Act of 1887, was divested from them, and vested in the customary heir or devisee, but the validity of any disposition previously made by such representatives was unaffected; *Re Mill's Trusts*, 37 Ch. D. 312; *S. C.* on appeal, 40 Ch. D. 14, where, however, there was no decision upon this point, but see the queries of Lindley, L. J., at p. 18.]

[(*c*) 60 & 61 Vict. c. 65, s. 1, sub-s. 1.]

[(*d*) Sub-s. 4. The concluding words apply to land of copyhold tenure as well as customary freehold, and therefore an equitable interest in copyholds, on the death of the owner, devolves on the personal representative: *Re Somerville and Turner's Contract*, (1903) 2 Ch. 583.]

[(*e*) *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58.]

(*f*) *Pawlett* v. *Attorney-General*, Hard. 466, *per* Lord Hale; *Wikes's case*, Lane, 54; *Scounden* v. *Hawley*, Comb. 172, *per* Dolben, J.; Jenk. 219, c. 66; Ib. 245, c. 30.

(*g*) *Wikes's case*, Lane, 54.

On the decease of the trustee the chattel, as part of his personal estate at law, devolves on his executor or administrator. And if the executor die after probate, having appointed an executor, the chattel becomes vested in that executor. Devolve on executor.

3. Until the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), if an executor had renounced probate, the renunciation, though *primâ facie* absolute (*a*), might have been retracted at any time before a new administration was granted. Hence where two executors were named and one renounced, and the acting executor died, having appointed executors but predeceased his co-executor, it was necessary to take out letters of administration to the original testator, for the acting executor, not being the survivor, did not transmit the interest, and the renouncing executor declined to act (*b*). But now by 20 & 21 Vict. c. 77, s. 79, where an executor *renounces probate*, the rights of such executor are made to cease; and the representation to the testator and the administration of his effects, without further renunciation, go, devolve, and are committed as if such person had not been appointed executor (*c*). But the Act does not apply to the case of a person who renounced before the Act came into operation, and if he renounced before the Act, any second renunciation after the Act for the purpose of bringing himself within it is *ultra vires* and nugatory (*d*). A disclaimer, or renunciation by answer in Chancery was held not to operate as a renunciation within the Act (*e*), and a renunciation is not complete until it has been entered and recorded in the proper office (*f*). But it has not been settled that an executor after renunciation may not on proper grounds retract his renunciation (*g*). By the Probate Amendment Act, 1858 (21 & 22 Vict. c. 95), s. 22, whenever an executor survives the testator, but dies without having taken probate, or is cited to take probate and does not appear, the right of such person in respect of the executorship shall wholly cease, and representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. Renunciation by one executor.

4. If the lands comprised in a trust term were situate in a different diocese from that in which the trustee was domiciled, Whether term in a trustee requires a prerogative probate.

(*a*) *Venables* v. *East India Company*, 2 Exch. 633.
(*b*) *Arnold* v. *Blencowe*, 1 Cox, 426.
(*c*) *In the Goods of C. Lorrimer*, 10 W. R. 809; 2 S. & T. 471.
(*d*) *Re Whitham*, 1 L. R. P. & D. 303; *In the Goods of Delacour*, 9 Ir. R. Eq. 86.
(*e*) *Chalon* v. *Webster*, W.N., 1873, p. 189.
(*f*) *In the Goods of Morant*, 3 L. R. P. & D. 151.
(*g*) *In the Goods of Gill*, 3 L. R. P. & D. 113.

it seems that previously to the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), which created the Court of Probate, a *prerogative* probate or limited administration was necessary before the term could have been legally transferred (*a*). If there be a difficulty in the way of probate or grant of *general* letters of administration, *special* letters of administration limited to the *trust property* may be taken out (*b*).

Administration limited to trust property.

5. A chattel found by the sheriff in the possession of a debtor is *primâ facie* the debtor's own property, and as such is liable to be taken in execution for his debt, but if the sheriff, knowing the chattel to be bound by a clear trust for another, were to sell it for the debt of the trustee, it would be a tortious act in him (*c*), and the creditor who received the proceeds would be accountable as a trustee (*d*), and the *cestui que trust* might, upon seizure by the sheriff, establish his equitable title at law upon an interpleader summons (*e*).

Whether a chattel may be taken in execution for the *debt* of the trustee.

On the other hand, if a person be the *cestui que trust* of an equitable chattel, the sheriff may take it in execution for the debt of the *cestui que trust;* and this is so even when the *cestui que trust* claims under an agreement for valuable consideration for the settlement of after-acquired property (*f*). But such an agreement is a roving one and executory, and does not give the *cestui que trust* the privileges of the specific purchaser until actual possession of the chattel under the agreement, and the interest of the *cestui que trust* may therefore be defeated by a judgment creditor of the settlor, who takes out execution before actual possession by the *cestui que trust* (*g*).

6. *Assets* in the hands of an *executor* are regarded as a species of trust property, even by the common law, which in respect of them has engrafted upon itself a *quasi* equitable jurisdiction: as, if an executrix marry, she may by will, without the consent of her husband, appoint an executor in whom the assets will vest, and who will thus become the executor of the original testator (*h*), and though the husband during the coverture has power to dispose

The common law recognises assets in the hands of an executor to be trust property.

(*a*) See *Crosley* v. *Archdeacon of Sudbury*, 3 Hagg. 201.

(*b*) *In the Goods of Prothero*, 3 L. R. P. & D. 209.

(*c*) *Farr* v. *Newman*, 4 T. R. 621, *per* Ashurst, J., and see *Blake* v. *Done*, 7 H. & N. 465; and p. 274, *post*, as to judgments. See now the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.

(*d*) *Foley* v. *Burnell*, 1 B. C. C. 278.

(*e*) *Duncan* v. *Cashin*, 10 L. R. C. P. 554.

(*f*) *Interpleader Summons*, W. N. 1875, p. 203; W. N. 1876, p. 64.

(*g*) *Holroyd* v. *Marshall*, 2 De G. F. & J. 596; [and see *Re Malet's Trusts*, 17 L. R. Ir. 424].

(*h*) *Scammel* v. *Wilkinson*, 2 East, 552; *Hodsden* v. *Lloyd*, 2 B. C. C. 543, *per* Lord Thurlow.

of the assets in the course of administration (*a*), he will not be entitled to them in his marital right by survivorship (*b*); and if the wife survive, she is liable for the devastavit committed by her husband (*c*); nor can the assets be taken in execution for the debt of the executor (*d*), [unless under special circumstances, as where the executor has been allowed to retain the assets for a considerable time, and deal with them as his absolute property (*e*), so that the Court can infer a gift by the testator's creditors to the executor (*f*); but possession by the executor of the assets for a long time, if in accordance with the trusts, will not raise such an inference (*g*); and if, under the old law as to forfeiture, the executor] committed felony or treason, the assets were exempted from forfeiture to the Crown (*h*); and if the executor die intestate, instead of vesting in his administrator, they vest in the administrator *de bonis non* of the testator (*i*).

Attachment.

7. Attachment by the custom of the City of London does not apply to debts [where the beneficial interest is vested in a person other than the defendant sued in the Mayor's Court, and the garnishee has notice of the trust (*j*)].

Trustee may deal with the trust estate by act *inter vivos*.

8. A trust estate, whether real or personal, may, *at law*, be conveyed, assigned, or encumbered by the trustee, like a beneficial estate; and, if there be co-trustees, each may exercise the like powers of ownership over his own proportion. Thus if lands be vested in trustees as joint tenants, each may at law receive the rents (*k*), and each may at law sever the joint tenancy by a conveyance of the share (*l*); and if the trust estate be stock, each may receive the dividends without any authority from the co-trustee.

General words.

But, in dealings with the trust estate, the Court has regard to the trust, and will not construe *general* words to pass the trust

(*a*) *Thrustout* v. *Coppin*, 2 W. Black. Rep. 801; [this will not be the case where the marriage has taken place or the executorship has arisen since 1st January, 1883; see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)].

(*b*) Co. Lit. 351 a, 351 b; *Stow* v. *Drinkwater*, Lofft, 83.

(*c*) *Soady* v. *Turnbull*, 1 L. R. Ch. App. 494.

(*d*) *Farr* v. *Newman*, 4 T. R. 621; [*Re Morgan*, 18 Ch. D. (C.A.) 93].

[(*e*) *Ray* v. *Ray*, G. Coop. 264; and see *Kitchen* v. *Ibbetson*, 17 L. R. Eq. 46; *Re Fells*, 4 Ch. D. 509; *Re Morgan*, 18 Ch. D. (C.A.) 93.]

[(*f*) *Re Morgan*, 18 Ch. D. (C.A.) 93, 101, *per* Fry, J.]

[(*g*) *Fenwick* v. *Laycock*, 2 Q. B. 108; *Re Morgan*, 18 Ch. D. (C. A.) 93; and see *Ex parte Barber*, 42 L. T. N.S. 411; 28 W. R. 522.]

(*h*) *Farr* v. *Newman*, 4 T. R. 628, *per* Grose, J.; [see now the Forfeiture Act, 1870 (33 & 34 Vict. c. 23)].

(*i*) Ib. *per eundem*; *Rachfield* v. *Careless*, 2 P. W. 161, *per* Powis, J.

[(*j*) *Westoby* v. *Day*, 2 Ell. & Bl. 605; *Lewis* v. *Wallis*, Sir T. Jones, 222.]

(*k*) *Townley* v. *Sherborne*, Bridg. 35.

(*l*) *Boursot* v. *Savage*, 2 L. R. Eq. 134; [*Taylor* v. *London and County Banking Company*, (1901) 2 Ch. (C.A.) 231].

estate where the assurance, if so construed, would amount to a breach of trust (*a*).

Might devise or bequeath it.

9. As the trustee might at law dispose of the property in his lifetime, so he might devise or bequeath it at his death; [but in the case of a trustee or mortgagee (*b*) dying after the 31st December 1881, any "estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal," will, *notwithstanding any testamentary disposition*, devolve on the personal representative of the trustee or mortgagee, in the same manner as if it were a chattel real (*c*). The title, therefore, to such property must now be made through the legal personal representative].

But a trust estate will not in all cases *pass by the same words* in a will as a beneficial ownership would, for wherever the estate does not pass by operation of law solely, but through the medium of the intention, it becomes necessary, in order to ascertain the effect of the instrument, to take into consideration the particular circumstances of the trust.

In what cases the trust estate will pass by a general devise.

10. Whether a trust estate shall pass inclusively in a *general devise* is a question that has been frequently under discussion, [and notwithstanding the change in the law introduced by the Conveyancing and Law of Property Act, 1881 (*d*), is still a question of importance where the death of the trustee occurred prior to the commencement of that Act]. The rule as originally established was, that a general expression would carry a dry trust estate (*e*), but afterwards there were some misgivings upon the subject (*f*) (1); and the Court at last acceded to the

(*a*) *Fausset* v. *Carpenter*, 2 Dow. & Cl. 232; 5 Bligh, N.S. 75; and see St Leonards' H. L. Cases, 76; *Re Waley's Trust*, 3 Eq. R. 380.

[(*b*) Other than a trustee of copyholds admitted tenant on the Court rolls, 57 & 58 Vict. c. 46, s. 88, *ante*, p. 248.]

[(*c*) 44 & 45 Vict. c. 41, s. 30, and see *ante*, pp. 247, 248.]

[(*d*) 44 & 45 Vict. c. 41, s. 30.]

(*e*) *Marlow* v. *Smith*, 2 P. W. 198.

(*f*) See *Braybroke* v. *Inskip*, 8 Ves. 437.

How the opinion arose that a general devise would not pass a trust estate.

(1) The doubt appears to have originated in part from an expression of Lord Hardwicke in *Casborne* v. *Scarfe*, 1 Atk. 605, that by a devise of all lands, tenements and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed. But Lord Hardwicke was not speaking here of the legal estate, but of the beneficial interest in the mortgage. The same thing was said in the same sense in *Strode* v. *Russel*, 2 Vern. 625. Lord Hardwicke's authority has been cited on both sides of the question (compare *Duke of Leeds* v. *Munday*, 3 Ves. 348, with *Ex parte Sergison*, 4 Ves. 147); but that he approved of the old rule is evident from *Ex parte Bowes*, cited in Mr Sanders's note to *Casborne* v. *Scarfe*, 1 Atk. 605. Lord Northington and Lord Thurlow are said to have entertained the same opinion. (See *Ex parte Sergison*, 4 Ves. 147; but, as to Lord Thurlow, see an *obiter dictum*, *Pickering* v. *Vowles*, 1 B. C. C. 198.)

proposition that general words would *not* pass trust estates, unless there appeared a positive intention that they should so pass (*a*). The question was reconsidered before Lord Eldon, when the result of the cases, after a careful examination of them, was declared to be, that where the will contained words large enough, and there was no expression authorising a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own (as complicated limitations, or any purpose inconsistent with as probable intention to devise as to let it descend), in such a case the trust estate would pass (*b*).

Charge of debts, &c., will exclude the trust estate.

11. A *charge* of debts, legacies, annuities, &c., and *a fortiori*, a direction to *sell*, was considered a sufficient indication of an intention not to include a mere trust estate (*c*); as where a testator having a trust estate and also estates of his own, gave and devised "all his real estate, whatsoever and wheresoever, to G. T., her heirs and assigns for ever, charged with 50*l.* to his friend W.," it was held that the trust estate did not pass (*d*). And so where a testator gave, devised, and bequeathed to trustees all such real estates as were then vested in him by way of mortgage, the better to enable his said trustees to recover, get in, and receive the principal moneys and interest which might be due thereon, it was ruled that the devise extended only to mortgages vested in the testator beneficially, and did not pass the legal estate in fee vested in the testator *upon trust* for another (*e*).

What expressions will or will not exclude the trust estate.

12. The expression "*my* real estates" did not restrict the meaning to those vested in the testator beneficially (*f*), nor did a devise to A., his heirs and assigns, "to and for *his and their own use and benefit*" (*g*), nor a devise to A. and her heirs, to be disposed

(*a*) *Attorney-General* v. *Buller*, 5 Ves. 340.

(*b*) *Braybroke* v. *Inskip*, 8 Ves. 436; see *Roe* v. *Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Langford* v. *Auger*, 4 Hare, 313.

(*c*) *Roe* v. *Reade*, 8 T. R. 118; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Attorney-General* v. *Buller*, 5 Ves. 339; *Ex parte Marshall*, 9 Sim. 555; *Ex parte Morgan*, 10 Ves. 101; *Sylvester* v. *Jarman*, 10 Price, 78; *Re Morley's Trust*, 10 Hare, 293; [*Re Smith's Estate*, 4 Ch. D. 70; *Re Bellis's Trusts*, 5 Ch. D. 504;] See *Wall* v. *Bright*, 1 J. & W. 494; [see, however, *Re Brown & Sibley's Contract*, 3 Ch. D. 156, where V. C. Malins was of opinion that where there was a general devise of real estate charged with debts and legacies, the legal estate in trust property would pass, notwithstanding the charge, which attached only on property which the testator was competent to charge with debts and legacies; and see as to this case *Re Bellis's Trusts*, *ubi sup.*].

(*d*) *Rackham* v. *Siddall*, 16 Sim. 297; 1 Mac. & G. 607; *Hope* v. *Liddell*, 21 Beav. 183; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58.

(*e*) *Ex parte Morgan*, 10 Ves. 101; and see *Sylvester* v. *Jarman*, 10 Price, 78; *Ex parte Brettel*, 6 Ves. 577.

(*f*) *Braybroke* v. *Inskip*, 8 Ves. 425.

(*g*) *Ex parte Shaw*, 8 Sim. 159; *Bainbridge* v. *Lord Ashburton*, 2 Y. &

of by her by will or otherwise, as she may think fit (*a*): though under a devise to a woman for her *separate use*, as the words import a beneficial enjoyment, a dry legal estate would not pass (*b*); but a devise to a woman, "her heirs and assigns, for her and *their* own sole and absolute use," expresses only the absolute interest, and does not create a separate estate (*c*). Whether a residuary devise of lands to persons as tenants in common in *equal shares* would pass a trust estate was never expressly decided, but a judicial opinion was expressed that such a devise would not pass a dry trust estate (*d*). A devise to the testator's *nephews and nieces* share and share alike as tenants in common, and not as joint tenants, as the class was unascertained at the date of the will, did not pass a trust estate (*e*). And if the devise were for A. for life or in tail, with remainders over, in strict settlement, the trust estate would not pass (*f*). "Where there is a limitation of real estate," said Lord Eldon, "in strict settlement, with a vast number of limitations, contingent remainders, executory devises, powers of jointuring, leasing, and raising sums of money, it is impossible to say the intention could be to give a dry trust estate" (*g*).

Distinction as to legal estate in mortgages.

13. The question whether the legal estate in a *mortgage in fee* passed by a general devise in the will of the mortgagee, stood on a different footing. The mortgagee has a *beneficial* interest in the property as a security, a distinction not always sufficiently adverted to, but which is strongly in favour of the legal estate passing to the person who is to receive the mortgage money (*h*). The legal estate clearly passed by a general devise of *securities for money* (*i*), and neither a general trust to sell and convert (*j*), nor a charge of debts (*k*), would prevent it from so passing. And it is conceived, notwithstanding a former decision

C. 347; *Sharpe* v. *Sharpe*, 12 Jur. 598; and compare *Ex parte Brettel*, 6 Ves. 577, with *Braybroke* v. *Inskip*, 8 Ves. 434.

(*a*) *Ex parte Shaw*, 8 Sim. 159.

(*b*) *Lindsell* v. *Thacker*, 12 Sim. 178. The marginal note of the Report is quite contrary to the decision.

(*c*) *Lewis* v. *Mathews*, 2 L. R. Eq. 177.

(*d*) *Martin* v. *Laverton*, 9 L. R. Eq. 568, *per* V. C. Malins; and see cases there referred to; [*Re Morley's Trust*, 10 Hare, 293].

(*e*) *Re Finney's Estate*, 3 Giff. 465.

(*f*) *Thompson* v. *Grant*, 4 Madd. 438; *Re Horsfall*, 1 Maclel. & Younge, 292; *Galliers* v. *Moss*, 9 B. & C. 267; *Ex parte Bowes*, cited in Mr Sanders's note to *Casborne* v. *Scarfe*, 1 Atk. 603.

(*g*) *Braybroke* v. *Inskip*, 8 Ves. 434.

(*h*) *Doe* v. *Bennett*, 6 Exch. 892; and comments of Vice-Chancellor Kindersley on this case, *Re Cantley*, 17 Jur. 124; [and see *Heath* v. *Pugh*, 6 Q. B. D. 345, 360].

(*i*) *King's Mortgage*, 5 De G. & Sm. 644, and cases there reviewed; *Knight* v. *Robinson*, 2 K. & J. 503; *Rippen* v. *Priest*, 13 C. B. N.S. 308; *Ex parte Whitacre*, cited 1 Sand. Uses and Trusts, 359, 4th ed.

(*j*) *Ex parte Barber*, 5 Sim. 451; *Mather* v. *Thomas*, 6 Sim. 115.

(*k*) *Field's Mortgage*, 9 Hare, 414; overruling *Renvoize* v. *Cooper*, 10 Price, 78.

of the Court of Exchequer (*a*), that the case of a *general devise and bequest* of real and personal estate charged with debts or legacies admits of no substantial distinction (*b*). But the legal estate was held not to pass by a general devise of real estate, if there were *special trusts* for sale or other limitations, &c., which would be inapplicable to an estate in mortgage (*c*). [The distinction between mortgaged estates and trust estates has ceased (except as to copyholds) to be material where the mortgagee or trustee dies after the 31st December 1881; as in either case the power of disposing of the legal estate is now vested in the personal representatives of the mortgagee or trustee so dying (*d*).]

[Distinction now not material.]

14. The rule that trust estates passed under a general devise assumed that a testator by making such a devise did not commit a breach of trust, otherwise general words would not have been construed to carry the trust estate (*e*). However, it was observed in one case by the late Vice-Chancellor of England, that in his opinion it was not lawful for a trustee to dispose of the estate, but that he ought to permit it to descend; and that there was no material difference between a conveyance *inter vivos* and a devise, for the latter was nothing but a *post-mortem* conveyance (*f*). But Lord Langdale considered that there was a wide distinction between a conveyance in the trustee's lifetime and a devise by his will; for during his life he had a personal discretion confided to him, which he could not delegate, but the settlor could not have reposed any personal confidence in the trustee's heir, for it could not be known beforehand who such heir would be; and that if the estate were allowed to descend, it might become vested in married women, infants, or bankrupts, or persons out of the jurisdiction; and he could not therefore hold it to be a breach of trust to transmit the estate by will to trustworthy devisees (*g*). [But this question has, since the recent alteration in the law under which the trust estate (*h*) devolves as a chattel real, ceased to be of much practical interest.]

Power of a trustee in equity to devise the trust estate.

(*a*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*b*) Now so decided. *Re Stevens' Trusts*, 6 L. R. Eq. 597; [*Re Brown and Sibley's Contract*, 3 Ch. D. 163]. But see *Re Packman and Moss*, 1 Ch. D. 214.

(*c*) *Re Cantley*, 17 Jur. 124; *Martin* v. *Laverton*, 9 L. R. Eq. 563; *Thirtle* v. *Vaughan*, 24 L. T. 5; *Re Finney's Estate*, 3 Giff. 465; [*Re Smith's Estate*, 4 Ch. D. 70].

[(*d*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30; but as to copyholds see Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88, *ante*, p. 248.]

(*e*) See *ante*, p. 252, and the authorities cited in note (*a*) Ib.

(*f*) *Cooke* v. *Crawford*, 13 Sim. 98; and see *Beasley* v. *Wilkinson*, 13 Jur. 649.

(*g*) *Titley* v. *Wolstenholme*, 7 Beav. 425; and see *Macdonald* v. *Walker*, 14 Beav. 556; *Wilson* v. *Bennet*, 5 De G. & Sm. 479.

[(*h*) Except as to copyholds where the trustee has been admitted, *ante*, p. 248.]

Whether a devisee can execute the trust.

15. How far a *devisee* of the trust estate can execute the trust, will depend on the intention of the settlor, to be collected from the terms in which the instrument is expressed. Thus, real or personal estate *may* be so vested in A. that A. alone shall *personally* execute the trust; and in such a case, the *heir* or *executor* of A., though he took the legal estate, could not act as trustee (*a*); and *a fortiori* in such a case the *devisee*, though made the depositary of the legal estate, would have no authority to execute the trust (*b*). [It was laid down in former editions of this work that] if a settlor vested an estate in A. upon trust that A. and his *heirs* should sell, and A. devised the estate, neither the heir nor devisee could sell; not the *heir*, for as regards this estate the descent had been intercepted and there was no heir, and not the *devisee*, for he was not the person to whom the execution of the trust was committed (*c*). [This proposition was founded upon *Cooke* v. *Crawford*, and subsequent cases, but in the case of *Osborne to Rowlett* (*d*), Sir G. Jessel, M.R., after an elaborate discussion of the cases, came to the conclusion that *Cooke* v. *Crawford* was wrongly decided, and he held that where real estate was devised to trustees and their heirs, in trust for sale, the trust was annexed to the estate, and that as the surviving trustee might have lawfully devised the trust estate, the devisee might execute the trust, and he expressly overruled *Cooke* v. *Crawford*. In a subsequent case, however, before the Court of Appeal (*e*), in which the precise point did not arise, L.JJ. James and Baggallay expressed a doubt whether *Osborne*] *to Rowlett* was rightly decided, and the question must in the present state of the authorities be considered as an open one. It may be observed that the M.R. justified his decision on the ground that the decision in *Cooke* v. *Crawford* was, in his opinion, based on the assumed principle that a trustee, unless authorised so to do, could not lawfully devise the trust estate, and that, as that principle has been overruled by subsequent cases, *Cooke* v. *Crawford* has ceased to be a binding authority, but it is submitted that the real ground for the decision in *Cooke* v. *Crawford* was that the authority to execute the trust must be directly given by

(*a*) See *Mortimer* v. *Ireland*, 11 Jur. 721.

(*b*) *Mortimer* v. *Ireland*, 11 Jur. 721; *S. C.* before Vice-Chancellor Wigram, 6 Hare, 196.

(*c*) *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennet*, 5 De G. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; 3 E. & E. 685.

[(*d*) 13 Ch. D. 774.]

[(*e*) *Re Morton and Hallet*, 15 Ch. D. (C.A.) 143; and see *Re Ingleby and Book, &c., Insurance Company*, 13 L. R. Ir. 326.]

the original settlor or testator, and that the surviving trustee by devising the estate to a person not so authorised did not enable the devisee to execute the trust (*a*). It is submitted that this principle has not been called in question, whatever exceptions have been taken to the observations in *Cooke* v. *Crawford* as to the duty of a trustee to let trust estates descend, and that however strong the argument might be (if the matter were one of first impression) in favour of holding that the trust may be executed by any person to whom the estate comes consistently with the provision of the original settlement or will, it is too late now to overrule *Cooke* v. *Crawford*, and the subsequent cases, and to introduce a new principle. In a subsequent case in Ireland, where a testatrix appointed A. and B. executors and trustees of her will, and devised real estate to them upon trust that they or the survivor should pay the rents to A. for his life, and after his death sell the estate, it was held that the executors of B., who survived A., could not make a title, notwithstanding the 30th section of the Conveyancing and Law of Property Act, 1881 (*b*), and in a more recent case Stirling, J., said that he did not think he ought to force upon a purchaser a title which depended on *Cooke* v. *Crawford* not being good law (*c*). In a subsequent case the principle that the person to execute a trust must be one who is in some way pointed out by the creator of the trust was adopted, and the testator, who died in 1883, having devised his residuary estate to four persons *nominatim*, without more (the words "and their heirs" being omitted) upon trust for sale, it was held that the executors of the last survivor of the four could not execute the trust (*d*).]

16. In another case (*e*), where leaseholds were assigned to two trustees, *their executors and administrators*, upon trust, and the surviving trustee devised the leaseholds to *A. and B. upon the same trusts*, and appointed *A., B., and C. executors*, on a petition by A. and B. to the Court to have the trust fund, the proceeds of the leaseholds, paid out to them, Vice-Chancellor Kindersley refused, observing that the surviving trustee had no authority to bequeath the execution of the trust, but could only pass the legal estate. The petition was then amended by joining C. as a co-petitioner, so that the petition was now that of the legatees, Re Burtt's estate.

[(*a*) See Sudg. V. & P. 14th ed. p. 665.]

[(*b*) *Re Ingleby and Boak, &c., Insurance Company*, 13 L. R. Ir. 326.]

[(*c*) *Re Rumney*, (1897) 2 Ch. (C.A.) 351.]

[(*d*) *Re Crunden and Meux's Contract*, (1909) 1 Ch. 690.]

(*e*) *Re Burtt's Estate*, 1 Drew. 319; [and see *Re Parker*, (1894) 1 Ch. 707, 721].

and also of the *executors;* but the Vice-Chancellor still refused, on the ground that the testator had himself declared, that his executors as such should not be trustees, and, therefore, since, by the bequest, he had taken the legal estate from those who ought to have been trustees, there must be an appointment of new trustees.

Where the trust is confided to the trustee and his assigns.

17. But it frequently happens that an estate is vested in A. upon trust, that A., his heirs, executors, administrators, and *assigns* shall hold upon the trust; and the question then is, whether a *devisee* of A. may, as falling under the description of *assigns,* not only take the estate, but also execute the trust? In *Titley* v. *Wolstenholme* (*a*), where the settlement *contained no power of appointment of new trustees,* it was held that as a conveyance in the lifetime of the trustee to a stranger would have been a breach of trust, the word assign could mean only a devisee taking under a *post-mortem* conveyance, when the personal confidence in the trustee necessarily ceased; and, consequently, that the devisees had not only the legal estate, but were properly trustees within the scope of the settlor's intention.

Titley *v.* Wolstenholme doubted.

18. This case seems to have raised some scruple in the mind of V. C. afterwards L. J. Knight Bruce, for he observed that, "What he should have done if *Titley* v. *Wolstenholme* had come before him he need not say, nor was he sure" (*b*). And the reasoning upon which Lord Langdale proceeded is not quite conclusive, for the word "*assigns*" does not necessarily imply a devise, as it would be satisfied by holding it to refer to a tenant by the curtesy or dowress, who would be assigns in law. However, the case was referred to, without disapprobation, by Lord Cottenham (*c*), and was approved by V. C. Stuart (*d*).

Hall *v.* May.

19. In *Hall* v. *May* (*e*), V. C. Wood went further, and held that under a trust containing the word *assigns,* and *also a power to appoint new trustees,* the devisee could make a title. It was conceded that the word "assigns" would not have enabled a trustee to transfer the trust by act *inter vivos,* and it could not be disputed that, as the instrument contained a power of appointment of new trustees, the assigns introduced by virtue of the power would give a meaning to the word "assigns" without having recourse to a devise. It was therefore necessary to lay down a broader principle than that acted upon in *Titley* v.

(*a*) 7 Beav. 425. See *Saloway* v. *Strawbridge,* 1 K. & J. 371; 7 De G. M. & G. 594, which, however, was the case of a mortgage.

(*b*) *Ockelston* v. *Heap,* 1 De G. & Sm. 642.

(*c*) *Mortimer* v. *Ireland,* 11 Jur. 721.

(*d*) *Ashton* v. *Wood,* 3 Sm. & G. 436.

(*e*) 3 K. & J. 585.

Wolstenholme, and the doctrines upon which the Vice-Chancellor proceeded appear to have been substantially these—"That a settlor must have intended to provide a permanent machinery for the execution of the trust; that he could not have reposed any personal confidence in the trustee's heir, who was unknown, and could not be ascertained beforehand; that the settlor must have contemplated the possibility that on the death of the trustee the heir might be an infant, or lunatic, or bankrupt, or insolvent, and so either incapable or unfit to discharge the office; that it might therefore be reasonably inferred that the settlor meant by confiding the trust to the trustee, his heirs and *assigns*, to give the trustee a discretionary power of preventing these inconveniences by vesting the estate in a devisee; and that the circumstance that the settlor had given to the surviving trustee a power of appointing new trustees by *deed*, rather favoured the view that he also intended, when using the word 'assigns,' to confer on the trustee a right to devise the trust estate." The Court was also actuated by the feeling that many titles must have been accepted upon the footing of this enlarged construction. The decision was perhaps a bold one, but having been made, it is not likely to be disturbed.

[20. Where a testator devised freehold and copyhold estates to trustees and their heirs upon trust that they "his said trustees or the trustees or trustee for the time being of that his will" should sell the estates, it was held that the customary heir of the surviving trustee to whom the estates had descended could execute the trust as to the copyholds (*a*). And where a testatrix devised to the persons who should at her death be trustees of her father's will, and at her death all the original trustees of her father's will and all the trustees appointed in their place were dead, the executors of the last surviving trustee who had acted in the trusts were held to be the duly appointed trustees of the will of the testatrix (*b*). [Trust exercisable by heir or executor.]

21. Where under the 30th section of the Conveyancing and Law of Property Act, 1881 (*c*), trust or mortgage estates become vested in the personal representatives of a trustee or mortgagee, they are for the purposes of the section to "be deemed in law his heirs and assigns within the meaning of all trusts and powers." The wording of this section is not clear, but it is conceived that it [44 & 45 Vict. c. 41.]

[(*a*) *Re Morton and Hallett*, 15 Ch. D. (C.A.) 143; *Re Cunningham and Frayling*, (1891) 2 Ch. 567; *Re Rumney*, (1897) 2 Ch. (C.A.) 351.]

[(*b*) *Re Waidanis*, (1908) 1 Ch. 123, where *Ockleston* v. *Heap* (*sup.*) was treated as overruled by *Hall* v. *May* (*sup.*)].

[(*c*) See *ante*, p. 247.]

enables the personal representatives to execute any trusts or powers which were originally confided to or reposed in the trustee, his heirs or assigns, and that they may therefore sell in any case where there was a trust for sale or power of sale in the heirs or assigns of the last surviving trustee. In a recent case where a testator devised real estate to trustees, their heirs and assigns, and conferred a power of sale on his "trustees for the time being," it was held that the power was exercisable by the executors of the last surviving trustee (*a*).]

An estate contracted to be sold will be included in a general devise.

22. A vendor, after the contract for sale, but before the completion of it, is a trustee for the purchaser *sub modo* only, and the estate may pass by a general devise in his will, where it would not have been included had the testator been a mere and express trustee (*b*). [But by the Conveyancing and Law of Property Act, 1881, sect. 4, it is enacted that where at the death of any person there is subsisting a contract *enforceable against his heir or devisee* for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of the Act, have power to convey the land, for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract. But a conveyance made under this section is not to affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate, and the section applies only in cases of death after the 31st December 1881 (*c*).]

[Personal representative can convey.]

Trustee has the privileges and burdens of the legal estate.

23. As the dry legal estate in the hands of the trustee is, [subject to the statutory modifications above referred to,] affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the *legal* privileges, and subjects him to all the *legal* burdens, that are incident to the usufructuary possession (*d*).

Trustee must bring actions, &c.

Thus the trustee can bring any action respecting the trust estate in a court of law, the *cestui que trust*, though the absolute

[(*a*) *Re Pixton and Tong*, 46 W. R. 187, and see *Re Crunden and Meux's Contract*, (1909) 1 Ch. 690.]

(*b*) *Wall* v. *Bright*, 1 J. & W. 494; [considered and explained in *Lysaght* v. *Edwards*, 2 Ch. D. 499, where the contract having become binding by acceptance of the title before the death of the vendor, the land was held to pass under a devise of trust estates; and see *Re Thomas*, 34 Ch. D. 166. In *Surrey Commercial Docks* v. *Kerr*, W. N., 1878, p. 163, the legal estate in a property which the testator had in his lifetime contracted to sell was held to pass under a residuary devise to trustees upon trust to sell].

[(*c*) *Cf.* Sect. 30 of the same Act, 44 & 45 Vict. c. 41, *ante*, p. 247.]

(*d*) *Burgess* v. *Wheate*, 1 Eden, 251, *per* Lord Northington.

owner in equity, being at law regarded in the light of a stranger (*a*). So the trustee of a manor is the person to appoint the steward of it (*b*), and the trustee of an advowson to present to the church (*c*), but in either case he has the mere *legal right*, and is bound in *equity* to observe the directions of his *cestui que trust* (*d*).

Trustee must prove in bankruptcy.

24. So where a debtor to the trust estate becomes bankrupt, the trustee may prove for the debt, and that without the concurrence of the *cestui que trust* (*e*), unless it be such a simple trust as where A. is trustee for B. absolutely, and then it rests in the discretion of the judge to require the concurrence of the *cestui que trust*, for who knows but that B. may have already received the money (*f*). If the *trustee* himself become *bankrupt* a *cestui que trust* may obtain an order to prove for the whole sum, and will be entitled to vote at the choice of the creditor's trustee (*g*). [A mere trustee of a debt for a person absolutely entitled and under no disability, cannot present a bankruptcy petition against the debtor without the concurrence of his *cestui que trust;* for as the *cestui que trust* who was competent to do so might have released the debt, "it might well happen that there was no real debt at all, although in legal parlance there might be a debt" (*h*); and it makes no difference that the trustee has obtained final judgment against the debtor for the amount, and has served a bankruptcy notice on the debtor under sect. 4, sub-sect. (g) of the Bankruptcy Act, 1883 (*i*). But the trustee

Case of trustee a bankrupt.

(*a*) See *Allen* v. *Imlett*, Holt, 461 ; *Gibson* v. *Winter*, 4 B. & Ad. 96 ; *May* v. *Taylor*, 6 M. & Gr. 261. [*Re Hayward*, (1901) 1 Ch: 221.] But see now the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25.

(*b*) *Mott* v. *Buxton*, 7 Ves. 201 ; and see Cary, 14.

(*c*) See *Re Shrewsbury School*, 1 M. & Cr. 647 ; *Hill* v. *Bishop of London*, 1 Atk. 618.

(*d*) *Attorney-General* v. *Parker*, 3 Atk. 577, *per* Lord Hardwicke ; *Attorney-General* v. *Forster*, 10 Ves. 338, *per* Lord Eldon ; *Attorney-General* v. *Newcombe*, 14 Ves. 7, *per eundem ; Kensey* v. *Langham*, Cas. *t.* Talb. 144, *per* Lord Talbot ; *Amhurst* v. *Dawling*, 2 Vern. 401 ; *Barret* v. *Glubb*, Sir W. Black Rep. 1053, *per* De Grey, J. [A trustee of a second mortgage who is bankrupt does not sufficiently represent his *cestui que trust* for the purpose of a *foreclosure* action, and *quære* whether he would even if solvent ; *Francis* v. *Harrison*, 43 Ch. D. 183 ; and see *Griffith* v. *Pound*, 45 Ch. D. 553, 567 ; *Wavell* v. *Mitchell*, 64 L. T. N.S. 560 ; Seton, 6th ed. p. 1935. Trustees of a separation deed, suing on a covenant by the husband for payment of an annuity to the wife, are not nominal plaintiffs who can be required to give security for costs ; *White* v. *Butt*, (1909) 1 K. B. (C.A.) 50.]

(*e*) *Ex parte Green*, 2 D. & Ch. 116, *per Cur.*

(*f*) *Ex parte Dubois*, 1 Cox, 310 ; and see *Ex parte Battier*, Buck, 426 ; *Ex parte Gray*, 4 D. & Ch. 778 ; [*Ex parte Culley*, 9 Ch. D. (C.A.) 307].

(*g*) *Ex parte Cadwallader*, 4 De G. F. & J. 499.

[(*h*) *Ex parte Culley*, 9 Ch. D. (C.A.) 307 ; *Ex parte Dearle*, 14 Q. B. D. (C.A.) 184, 191.]

[(*i*) *Ex parte Dearle, sup.*]

can serve a good bankruptcy notice without the concurrence of the *cestui que trust* (*a*).]

Trustee formerly voted for coroners.

25. The trustee as the legal proprietor had originally the right of voting for *coroners* (*b*) (1); but by 58 G. 3. c. 95, sect. 2, it was transferred to the *cestui que trust* in possession. This Act, however, was afterwards repealed (*c*), [and now under the Local Government Act, 1888, coroners are no longer elected by the freeholders (*d*)].

Trustee's right to vote for a member of Parliament.

26. So the trustee was the person entitled at *common law* to vote for *members of Parliament* (*e*). But by the 74th section of the Parliamentary Voting Act, 1843 (6 & 7 Vict. c. 18) (*f*), it is enacted, that "no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, *though he may receive the same through the hands of the trustee*, shall and may vote for the same notwithstanding such trust," and by the 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the right of voting is conferred upon persons who are seised at law or *in equity*, of lands or tenements of the yearly value of five pounds. [But a person entitled to a share of the proceeds of the sale of real estate held on a trust for conversion has not such an estate as will entitle him to vote (*g*).]

Trustees liable to rates.

27. Again, trustees are liable to be *rated* for the property vested in them (*h*), unless they are trustees *exclusively* for public purposes without any profit to themselves or a particular class, as trustees of court-houses, prisons, or the like (*i*).

Trustee pays the fine on admission to copyholds.

28. The trustee of a *copyhold* must pay a fine on his

[(*a*) *S. C.*; and see *Re Palmer*; *Ex parte Brims*, (1898) 1 Q. B. 419.]

(*b*) *Burgess* v. *Wheate*, 1 Eden, 251.

(*c*) The Coroners Act, 1844 (7 & 8 Vict. c. 92); *Regina* v. *Day*, 2 Ell. & Bl. 859.

[(*d*) 51 & 52 Vict. c. 41, s. 5.]

(*e*) *Burgess* v. *Wheate*, 1 Eden, 251, *per* Lord Northington.

(*f*) As to the effect of certain intermediate statutes, see 3rd ed. p. 270.

[(*g*) *Spencer* v. *Harrison*, 5 C. P. D. 97.]

(*h*) *Regina* v. *Sterry*, 12 Ad. & Ell. 84; *Regina* v. *Stapleton*, 4 B. & S. 629.

(*i*) *Regina* v. *Shee*, 4 Q. B. 2; *Mayor of Manchester* v. *Overseers of Manchester*, 17 Q. B. 859; *Regina* v. *Harrogate Commissioners*, 15 Q. B. 1012; [and see *West Bromich School Board* v. *Overseers of West Bromich*, 13 Q. B. D. (C.A.) 929; *Tunnicliffe* v. *Birkdale Overseers*, 20 Q. B. D. (C.A.) 450].

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(1) And Lord Northington added for "sheriffs" (*Burgess* v. *Wheate*, 1 Eden, 251), but the election of sheriffs had been transferred from the people to the Chancellor, Treasurer, and Judges, by 9 E. 2 st. 2, before the establishment of trusts.

admission (*a*), but as the fine follows the admission the lord cannot refuse admission until the fine is paid (*b*); and on the decease of a trustee, a heriot becomes due to the lord (*c*); and where the trustee died intestate, and the customary heir *before admission* devised the estate, the lord was held to be entitled to a double fine on the admission of the devisee, as it carried with it also the admission of the devisor (*d*). [But the lord is only entitled to a fine in respect of transmission of the legal interest, and not in respect of a devolution of the equitable title so long as the legal estate remains in a tenant on the rolls (*e*), and] where a trustee died intestate, and the Court under the Trustee Acts appointed a new trustee in the place of the deceased trustee, and the lord demanded two fines, one for the admission of the customary heir of the old trustee, and another for the admission of the new trustee, it was held that he could claim but one fine, viz. for the admission of the new trustee (*f*); and where two or more trustees have been admitted *jointly*, on the decease of *one* neither fine nor heriot is due; not a fine for admission, because, joint tenants being seised *per my et per tout*, the estate is vested in the survivors or survivor by the original grant, and not a heriot because, however many in number the trustees may be, they all form but one tenant to the lord, and therefore no heriot is demandable until the death of the longest liver (*g*). [On the death of a sole trustee of copyholds, who has not been admitted, and is therefore not the tenant on the Court rolls, the copyholds vest, under sect. 30 of the Conveyancing and Law of Property Act, 1881, in his legal personal representatives (*h*), who must pay the ordinary fines on their admission. But if the trustee has been admitted and is therefore tenant on the Court rolls, this enactment does not apply, having to this extent been repealed by sect. 88 of the Copyhold Act, 1894 (*i*), and therefore on the death of such sole trustee of copyholds they vest in the *customary heir or the* devisee of trust estates. Where the equitable tenant for life of

(*a*) *Earl of Bath* v. *Abney*, 1 Dick. 260; *S. C.* 1 Burr. 206. [A trustee entitled to admittance to copyholds may now be admitted by his attorney duly appointed, whether orally or in writing; Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 84, sub-s. 2.]

(*b*) *Regina* v. *Wellesley*, 2 Ell. & Bl. 924.

(*c*) *Trinity College* v. *Browne*, 1 Vern. 441; see *Car* v. *Ellison*, 3 Atk. 77.

(*d*) *Lord Londesborough* v. *Foster*, 3 B. & S. 805; 9 Jur. (N.S.) 1173.

[(*e*) *Hall* v. *Bromley*, 35 Ch. D. (C.A.) 642.]

(*f*) *Bristow* v. *Booth*, 5 L. R. C. P. 81.

(*g*) See 2 Watk. Cop. 147.

[(*h*) 44 & 45 Vict. c. 41, s. 30; *Re Hughes*, W. N., 1884, p. 53.]

[(*i*) 57 & 58 Vict. c. 46, s. 88, replacing s. 45 of 50 & 51 Vict. c. 73; and see *Re Mill's Trusts*, 37 Ch. D. 312; S. C. on appeal, 40 Ch. D. 18, and *ante*, p. 248.]

copyholds sells under the powers of the Settled Land Act, 1882, sect. 20, the lord is only entitled to one fine (*a*).] If a copyhold be devised to trustees for *five hundred years* on certain trusts, with remainder to A. B. in fee, and the lord admits A. B. not as remainderman, but as a present tenant and upon payment of a full fine, the lord has a perfect tenant, and cannot compel the *termors* to be admitted (*b*).

Principle on which the fine is assessed.

Where a number of trustees are admitted as the joint owners of the trust estate, the fine is to be assessed upon the following principle: for the first life is to be allowed the fine usually paid on the admission of a single tenant, for the second life one-half the sum taken for the first, and for the third one-half the sum taken for the second, &c.; the result of which will be, that, however great the number of trustees admitted, the amount of the whole fine will never be double of that paid upon the first life (*c*). And on every change of trustees the same fine is demandable, even where some of the surrenderees are the survivors of the old trustees, for they take a new estate (*d*). In order to avoid these onerous fines, where the estate devolves on several trustees, all the trustees but one may disclaim or release to that one, who can then be admitted, and the lord can then claim only a single fine (*e*). But there may be some risk in adopting this course otherwise than with the sanction of the Court, since to vest the legal estate in one trustee alone must in strictness be viewed as a breach of trust, and the expected pecuniary advantage might, by the early death

[(*a*) *Re Naylor and Spendla's Contract*, 34 Ch. D. (C.A.) 217.]

(*b*) *Everingham* v. *Ivatt*, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388. The Court in this case adverted to several points of practical importance, which are worth noticing. Thus: 1. It is commonly said that an admission is void, except so far as it follows the uses of the surrender or will; but the Court held that the excess of the admission is void only as against the parties interested, and that the lord may be estopped by his own act. 2. Where the termors have been admitted, the lord may require the admission of the executor of the last survivor, for the lord is entitled to a tenant or to possession. 3. The admission of the tenant for life or for years is a constructive admission of the remainderman, but such an admission does not disentitle the lord to call for a subsequent admission of the remainderman, where the custom of the manor gives the lord a fine in respect of the remainder. 4. The lord is not bound to admit a remainderman, but if he do admit him *as such remainderman*, although this admission may be a constructive admission of the particular estate, the lord may afterwards require the tenant for life or years to be admitted for the purposes of a new fine.

(*c*) *Wilson* v. *Hoare*, 2 B. & Ad. 350, see 360; 10 Ad. & Ell. 236, and 1 Scriven, Copyh. 164, 165, 6th ed.; 184, 193, 7th ed.

(*d*) *Sheppard* v. *Woodford*, 5 M. & W. 608; but see *Wilson* v. *Hoare*, 10 Ad. & Ell. 236.

(*e*) *Wellesley* v. *Withers*, 4 Ell. & Bl. 750; and see *Paterson* v. *Paterson*, 2 L. R. Eq. 31; *S. C.* 35 Beav. 506; *Re Flitcroft*, 1 Jur. N. S. 418.

of the trustee who is admitted in the lifetime of his co-trustees be turned into a loss, and then the trustees might be held liable for the detriment to the trust estate. The last contingency might be guarded against by an insurance, effected either at an annual premium, or for a gross sum payable in advance. But besides this, where discretionary powers are annexed to the trusteeship, the severance of the estate from the ordinary devolution of the *trust* might affect the powers; as, if a power of sale be given to the *heir* of the *survivor*, and A. is admitted and B. survives, can the heir [or legal personal representative (*a*)] of B. sell? (*b*).

Disclaimer to avoid a fine.

Where a copyhold has been surrendered to several trustees, there can be no disclaimer by one trustee, for the purpose of vesting the entire estate in the co-trustees, where that one trustee, by having acted as owner, has virtually accepted the estate (*c*). And where a testator devised to three trustees, whom he appointed executors, and one disclaimed and the two others proved the will, but, wishing to escape the double fine, put forward the heir to be admitted as the person upon whom the estate descended until the devisees were admitted, it was held that the lord was justified in refusing to admit the heir; and the Court, in the exercise of its discretionary power, would not issue a mandamus to compel him (*d*). But in the same case, the lord having made the usual proclamation, and the heir having tendered himself for admission, and the lord having refused to admit him on the ground that the estate was in the devisees, who refused to come in, it was ruled that, as the devisees had no title until admittance, and the estate descended to the heir, the lord was not justified in seizing for want of a tenant (*e*).

Reimbursement.

29. Though the manorial burdens in respect of copyholds fall upon the trustee personally at law, he is of course entitled in equity to reimburse himself the expenditure out of the trust estate (*f*).

Trustee of leaseholds.

30. The trustee of a *leasehold* estate is liable upon the covenants of the lease just as if he were the real owner (*g*). But the trust estate must indemnify him in equity. [It is the duty of a trustee of a leasehold property to keep it free from the risk of

[(*a*) See Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30; and see *ante*, p. 247.]

(*b*) *Wilson* v. *Bennett*, 5 De G. & Sm. 475.

(*c*) *Bence* v. *Gilpin*, 3 L. R. Ex. 76.

(*d*) *Queen* v. *Garland*, 5 L. R. Q. B. 269; [and see now Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30].

(*e*) *Garland* v. *Mead*, 6 L. R. Q. B. 441.

(*f*) *Rivet's case*, Moore, 890.

(*g*) *White* v. *Hunt*, 6 L. R. Ex. 32, [and see *Ramage* v. *Womack*, (1900) 1 Q. B. 116].

forfeiture; and for that purpose he is entitled to have the covenants in the lease performed out of the rents of the property which come to his hands, and is not bound to be satisfied with an indemnity against the consequences of a breach of the covenants. And where a tenant for life of leasehold houses had been allowed by the trustees to receive the rents and profits, and the houses had not been kept in a proper state of repair, the Court, at the instance of one of the trustees, appointed a receiver (*a*). But this case turned upon the special wording of the will, and did not lay down any general principle as to the mutual rights of tenants for life and remaindermen, and in the absence of any directions in the will there is no obligation on a tenant for life to put leasehold property in such a state of repair as to comply with the covenants of the lease granted to the testator (*b*); and, after some divergence of judicial opinion (*c*), it appears to be now settled that an equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest as between himself and the testator's estate, to perform the tenant's continuing obligations under the lease, but is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant occurring before the testator's death (*d*); and where the tenant for life was to receive "the income to be derived from" the letting of the leaseholds, it was held by Stirling, J., that, *as from the testator's death*, she must bear the expense of ground-rents, rates, taxes, insurance, and other outgoings (*e*); and where the direction was that the trustees should allow the testator's widow to occupy his house during her life with use of furniture, it was held by the Vice-Chancellor of Ireland that she was liable to pay rent and taxes, and to repair, but that it was the duty of the trustees to keep the premises insured against loss by fire (*f*). A tenant for life of leaseholds as between him and the remainderman, is not liable for permissive waste, nor is his estate liable for repairs made necessary by breach of covenant during the tenancy for life (*g*).]

If trustee trade in that character, he is amenable to the bankrupt laws.

31. If a trustee carry on a *trade* in the due execution of his trust, he makes himself amenable to the operation of the

[(*a*) *Re Fowler*, 16 Ch. D. 723.]

[(*b*) *Re Courtier*, 34 Ch. D. 136; *Brereton* v. *Day*, (1895) 1 I. R. 519.]

[(*c*) See *Re Baring*, (1893) 1 Ch. 61; *Re Tomlinson*, (1898) 1 Ch. 232.]

[(*d*) *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54; and see *Re Waldron and Bogue's Contract*, (1904) 1 I. R. 240.]

[(*e*) *Re Redding*, (1897) 1 Ch. 876.]

[(*f*) *Kingham* v. *Kingham*, (1897) 1 I. R. 170.]

[(*g*) *Re Parry and Hopkin*, (1900) 1 Ch. 160.]

bankrupt law in the same manner as if he had traded on his own account (*a*), and the debts contracted by him in such trade are not debts of the testator, but his own debts (*b*), and on his decease his lands, as those of a trader, were liable under Sir Samuel Romilly's Act (*c*) to the discharge of simple contract debts (*d*). Now, by the Administration of Estates Act, 1833 (3 & 4 W. 4. c. 104), the lands of all persons, traders or otherwise, are liable to their simple contract debts; and by the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), simple contract debts are payable *pari passu* with specialty debts. But an executor carrying on a business in pursuance of the directions of a will, is entitled to be indemnified out of the estate, as against the persons claiming under the will, though not as against creditors who claim paramount to the will (*e*).

Shares in companies.

32. If trustees be holders of shares in a company, their liabilities are the same as if they were the beneficial owners, though the fact of their trusteeship be noticed in the company's books (*f*); [and they cannot be heard to say that their liability is to be only a liability to the extent of the estate of their testator (*g*)].

Secondly. Of the legal estate in the trustee with reference to the construction of particular statutes.

How the legal estate is affected by the bankruptcy of the trustee.

[1. By the Bankruptcy Act, 1883 (*h*), it is enacted, that "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, shall, immediately on the

(*a*) *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119, *per* Lord Eldon; *Hankey* v. *Hammond*, cited in marginal note to 1 Cooke's Bank. Law, 84, 3rd ed.; and see *Re Phœnix Life Insurance Company*, 2 J. & H. 229; *Lucas* v. *Williams*, No. 1, 4 De G. F. & J. 436; *Farhall* v. *Farhall*, 7 L. R. Ch. App. 123.

(*b*) *Farhall* v. *Farhall*, 7 L. R. Ch. App. 123; reversing *S. C.* 12 L. R. Eq. 98; *Owen* v. *Delamere*, 15 L. R. Eq. 134; [*Re Morgan*, 18 Ch. D. (C.A.) 93;] see *Hall* v. *Fennell*, 9 Ir. R. Eq. 615.

(*c*) 47 G. 3. c. 74. Repealed and re-enacted by the Debts Recovery Act, 1830, (11 G. 4 & 1 Will. 4 c. 47).

(*d*) *Longuet* v. *Hockley*, Feb. 16, 1836, Exch. MS. See a short statement of this case at p. 273, note (*b*), of 3rd edition; and see *Lucas* v. *Williams*, 3 Giff. 150.

(*e*) *Lucas* v. *Williams*, No. 2, 4 De G. F. & J. 439; [*Re Gorton*, 40 Ch. D. (C.A.) 536; *S. C.* in D. P. *nom. Dowse* v. *Gorton*, (1891) A. C. 190; and see *post*, Chap. XXV. s. 2].

(*f*) *Re Phœnix Life Assurance Company*, 2 J. & H. 229; *Re Leeds Banking Company, Fearnside's case, Dobson's case*, 12 Jur. N.S. 60; *Lumsden* v. *Buchanan*, 4 Macq. H. L. C. 950; *Imperial Mercantile Credit Association, Chapman and Barker's case*, 3 L. R. Eq. 361; [and see *Muir* v. *City of Glasgow Bank*, 4 App. Cas. 337; *Bell's case*, Ib. 547; *Alexander Mitchell's case*, Ib. 548; *Rutherford's case*, Ib; *Buchan's case*, Ib. 549; *Ker's case*, Ib.; *Cunninghame* v. *Glasgow Bank*, Ib. 607; *Gillespie* v. *Same*, Ib. 632].

[(*g*) *Re Cheshire Banking Company*, 32 Ch. D. (C.A.) 301, 309.]

[(*h*) 46 & 47 Vict. c. 52, ss. 44, 54; and see the analogous ss. 15 & 17 in the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71.]

debtor being adjudged bankrupt, vest in the trustee," and until a trustee is appointed, the official receiver is to be the trustee for the purposes of the Act.]

Assignees take differently from heirs and executors.

2. The operation of the Bankruptcy Acts was thus commented upon by Lord Chief Justice Willes: "The assignees under a commission of bankruptcy, are not to be considered as *general assignees* of all the real and personal estate of which the bankrupt was seised and possessed, as *heirs* and *executors* are of the estate of their ancestors and testators, for nothing vests in the assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts" (*a*).

The trust estate does not pass to the trustee in bankruptcy of the trustee.

3. It is clear, therefore, that in the case of a *bare trust*, the property, whether real (*b*) or personal (*c*), did not vest by the bankruptcy in the assignees, even *at law*. And the proposition applies not only to *express trustees*, but also to *trustees virtute officii*, as executors, administrators (*d*), factors (*e*), &c.; and by the Bankruptcy Act, 1883 (*f*), it is *expressly* enacted that the property [of the bankrupt divisible among his creditors shall not comprise property held by the bankrupt on trust for any other person].

Nor the property into which the trust estate has been converted.

4. Where the trust estate or fund has been converted into property of a different character, the new acquisition will equally be protected against the effects of the bankruptcy; for the product or substitute of the original thing must follow the nature of the thing from which it proceeded (*g*). Thus, if goods consigned to

(*a*) *Scott* v. *Surman*, Willes, 402.

(*b*) *Ex parte Gennys*, 1 Mont. & Mac. 258; *Houghton* v. *Kœnig*, 18 C. B. 235.

(*c*) See *Winch* v. *Keeley*, 1 T. R. 619; *Carpenter* v. *Marnell*, 3 B. & P. 40; *Gladstone* v. *Hadwen*, 1 M. & S. 517; *Boddington* v. *Castelli*, 1 Ell. & Bl. 879; *Westoby* v. *Day*, 2 Ell. & Bl. 605.

(*d*) *Howard* v. *Jemmett*, 3 Burr. 1369, *per* Lord Mansfield; *Ex parte Butler*, 1 Atk. 213, *per* Lord Hardwicke; *Viner* v. *Cadell*, 3 Esp. 88; *Farr* v. *Newman*, 4 T. R. 629, *per* Grose, J.; see *Ex parte Ellis*, 1 Atk. 101.

(*e*) *Godfrey* v. *Furzo*, 3 P. W. 186, *per* Lord King; *Tooke* v. *Hollingworth*, 5 T. R. 226, *per* Lord Kenyon; *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Delauney* v. *Barker*, 2 Stark. 539; *Boddy* v. *Esdaile*, 1 Car. & P. 62; see *Ex parte Dumas*, 2 Ves. 582; *S. C.* 1 Atk. 232; *Paul* v. *Birch*, 2 Atk. 623; *Ryall* v. *Rolle*, 1 Atk. 172; *Ex parte Chion*, note (A) to *Godfrey* v. *Furzo*, 3 P. W. 187; [*Re Rogers*, 8 Morr. 243, followed in *Re Drucker*, (1902) 2 K. B. (C.A.) 239, where money advanced by the debtor's solicitor and paid by him to particular creditors for the special purpose of obtaining the withdrawal by them of bankruptcy proceedings against the debtor was held to be impressed with a trust].

[(*f*) 46 & 47 Vict. c. 52, s. 44, as also in the Act of 1869 (32 & 33 Vict. c. 71) s. 15.]

(*g*) See *Taylor* v. *Plumer*, 3 M. & S. 575; *Scott* v. *Surman*, Willes, 404; [*Ex parte Cooke*, 4 Ch. D. (C.A.) 123; *Patten* v. *Bond*, 60 L. T. N.S. 583, 585; 37 W. R. 373].

a factor be sold by him and reduced into money, so long as the money can be identified, as where it has been kept in a bag, the employer, and not the creditors, will have the benefit of that specific sum (*a*). When money is said to have no *ear-mark*, the meaning is no more than this, that, being the currency of the country, it cannot be followed when once it has passed in circulation (*b*).

[5. So, where money was paid into a bank by a firm of brewers, and an agent was allowed to draw upon the account in order to provide himself with funds for purchasing barley to be malted for the brewers, and the agent bought large quantities of barley and also (although not authorised so to do) of malt, and drew largely upon the account, but in lieu of paying for the barley and malt, misappropriated the moneys which he received, and subsequently became a bankrupt, it was held (1) that the moneys drawn out by the agent were impressed with a trust under which he was bound to appropriate them in the cash purchase of barley; (2) that even if the barley and malt which remained at the time of the bankruptcy in his possession were not bought in accordance with the authority given to him, and the legal property in them was not in the brewers but in the agent, he was a trustee of them for the brewers to the extent of the moneys advanced by the brewers, for they were the product of or substitute for the original trust property, and as such subject to the trust; and (3) that the bankrupt or his representative could not be allowed to set up the bankrupt's fraud and abuse of trust to defeat the title of his *cestui que trust* (*c*).] [Harris *v.* Truman.]

6. So, if the factor sell the goods and take *notes* in payment, the value of the notes, notwithstanding the bankruptcy, may be recovered by action from the creditor's trustee (*d*); for, though negotiable securities are said, like money, to have no ear-mark, the expression does not intend that such securities in the hands of a bankrupt have run into the general mass of his property, and pass to his creditors, but only that negotiable securities, as a circulating medium in lieu of money, cannot be recovered from a person to whom they have been legally negotiated (*e*). Factor selling and taking notes.

7. So, if a factor sell the goods of his employer for money Factor selling for money payable at a future day.

(*a*) *Tooke* v. *Hollingworth*, 5 T. R. 227, *per* Lord Kenyon; see *Taylor* v. *Plumer*, 3 M. & S. 571; [*Re Ulster Building Society*, 25 L. R. Ir. 24, 29].

(*b*) *Miller* v. *Race*, 1 Burr. 457, *per* Lord Mansfield.

[(*c*) *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. (C.A.) 264.]

(*d*) *Anon. case*, cited *Ex parte Dumas*, 2 Ves. 586.

(*e*) *Hartop* v. *Hoare*, 3 Atk. 50, *per* Lee, C.J.; *Miller* v. *Race*, 1 Burr. 457.

payable at a future day, and become bankrupt, and the creditors' trustee receives the money, he will be answerable for it to the merchant by whom the factor was employed (*a*).

Tortious conversion of the trust property.

8. In another case the conversion had been in *breach of the factor's duty* (*b*); and it was argued that, as the principal would not have been bound to accept the property which the agent had wrongfully purchased, the Court ought not to give a *lien* to the principal upon the tortious acquisition; but the Court said, it was impossible that an abuse of trust could confer any right on the person abusing it, or those claiming in privity with him (*c*).

Stockbroker selling.

[9. So, if a trustee employ a stockbroker to sell out consols and invest the proceeds on behalf of the trust estate, the money arising from the sale is trust money, and may be followed into the hands of the trustee in bankruptcy of the broker (*d*); and where money was borrowed for the purpose of purchasing a specific property which was to be mortgaged to secure the loan, and the borrower, in lieu of applying the money for the specific purpose, paid it into a bank and drew upon it, and subsequently became bankrupt, it was held that the lender could follow and claim so much of the money as remained in the bank unapplied (*e*).]

In whose name actions must be brought to recover the trust estate from the creditors' trustee.

10. Where the legal property does not pass, any action against the creditors' trustee must be brought by the bankrupt himself, for he is the person possessed of the legal right (*f*); but in the case of a *factor*, an action may also be brought by the principal, for the absolute property remains with the employer, and a special property only vests in the agent (*g*). But, if *bills* be remitted to a factor, and made payable to him or his order, it has been doubted whether the property does not so vest in the factor, that no action of trover can be maintained by the principal (*h*).

Where the trust estate has become amalgamated with the trustee's other property, the *cestui que trust* must prove for the amount.

11. If the property possessed by the bankrupt in his character of trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust

(*a*) *Ryall* v. *Rolle*, 1 Atk. 172, *per* Burnet, J.; *Taylor* v. *Plumer*, 3 M. & S. 577; *Zinck* v. *Walker*, 2 W. Bl. 1154; *Garratt* v. *Cullum*, Bull. N. P. 42.

(*b*) *Taylor* v. *Plumer*, 3 M. & S. 562; see *Ryall* v. *Rolle*, 1 Atk. 172.

(*c*) *Taylor* v. *Plumer*, 3 M. & S. 574, *per* Lord Ellenborough; [*Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. (C.A.) 264].

[(*d*) *Ex parte Cooke*, 4 Ch. D. (C.A.) 123.]

[(*e*) *Gibert* v. *Gonard*, 54 L. J. N.S. Ch. 439.]

(*f*) *Winch* v. *Keeley*, 1 T. R. 619; *Carpenter* v. *Marnell*, 3 B. & P. 40.

(*g*) *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Delauney* v. *Barker*, 2 Stark. 539; *Boddy* v. *Esdaile*, 1 Car. 62.

(*h*) *Ex parte Dumas*, 2 Ves. 583.

has then no other remedy but to come in as a general creditor and prove for the amount of the loss (*a*). But, in one case, though the trust money had *got into* the general fund, it was held, but under very particular circumstances, to have subsequently *got out again* (*b*).

Case of a bankrupt trustee having a beneficial interest.

12. As a general rule, where the bankrupt has a substantial beneficial interest, however small, in property legally vested in him, such property passes to the trustee, who takes as trustee for the creditors and other parties interested (*c*). It is conceived, however, that the rule would not apply to a case where a bankrupt is expressly a trustee, though he may himself have some partial beneficial interest, for his act ought not to work a prejudice to others, and as a conveyance by the bankrupt himself to a stranger would be a breach of trust, it can hardly be supposed that the Bankruptcy Act could be construed to have a similar tortious effect (*d*). Where the trust is constructive and the equity doubtful, the Court has sometimes directed the trustee to concur in conveying (*e*). And where the *legal* property passes, the *cestuis que trust* may have the same relief in equity against the creditors' trustee, as they would have been entitled to against the bankrupt himself (*f*).

Of trust chattels left in the possession of the bankrupt trustee.

[13. By the Bankruptcy Act, 1883, it is enacted that the property of the bankrupt divisible amongst his creditors shall comprise "all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt *in his trade or business*, by the consent and permission of the true

(*a*) *Ex parte Dumas*, 1 Atk. 234, *per* Lord Hardwicke; *Ryall* v. *Rolle*, 1 Atk. 172, *per* Burnet, J.; *Scott* v. *Surman*, Willes, 403, 404, *per* Willes, C.J.; [*Ex parte Dale and Co.*, 11 Ch. D. 772; and see *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696; *Re Oatway*, (1903) 2 Ch. 356, 359; *Mutton* v. *Peat*, (1900) 2 Ch. (C.A.) 79; (1899) 2 Ch. 556].

(*b*) *Ex parte Sayers*, 5 Ves. 169.

(*c*) *Carpenter* v. *Marnell*, 3 B. & P. 40; *Parnham* v. *Hurst*, 8 M. & W. 743; *Leslie* v. *Guthrie*, 1 Bing. N. C. 697; *D'Arnay* v. *Chesneau*, 13 M. & W. 809. See *Boddington* v. *Castelli*, 1 Ell. & Bl. 879.

(*d*) See *Fausset* v. *Carpenter*, cited *ante*, p. 252, as to the effect of a conveyance expressed in general words upon a trust estate.

(*e*) *Bennet* v. *Davis*, 2 P. W. 316; *Taylor* v. *Wheeler*, 2 Vern. 564; *Ex parte Gennys*, Mont. & Mac. 258.

(*f*) *Bennet* v. *Davis*, 2 P. W. 316; *Taylor* v. *Wheeler*, 2 Vern. 564; *Mitford* v. *Mitford*, 9 Ves. 100, *per* Sir W. Grant; *Ex parte Dumas*, 2 Ves. 585, *per* Lord Hardwicke; *Hinton* v. *Hinton*, 2 Ves. 633, *per eundem*; *Grant* v. *Mills*, 2 V. & B. 309, *per* Sir W. Grant; *Jones* v. *Mossop*, 3 Hare, 572, *per* Sir J. Wigram; *Tyrrell* v. *Hope*, 2 Atk. 558; *Bowles* v. *Rogers*, 6 Ves. 95, note (*a*); *Ex parte Hansom*, 12 Ves. 349, *per* Lord Eldon; *Ex parte Coysegame*, 1 Atk. 192; *Frith* v. *Cartland*, 2 H. & M. 417; *Fleeming* v. *Howden*, 1 L. R. H. L. Sc. 372; [*Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. (C.A.) 264;] see *Mestaer* v. *Gillespie*, 11 Ves. 624; *Ex parte Herbert*, 13 Ves. 188; *Waring* v. *Coventry*, 2 M. & K. 406.

owner, under such circumstances that he is the reputed owner thereof." Thus, although all persons (traders or not) can now be made bankrupts, only those engaged in some trade or business come under the operation of the order and disposition clause; and, as it would seem, then only as to goods affected by such trade or business. The same section also provides that "*things in action* other than debts due or growing due to the bankrupt in the course of his *trade or business* shall *not* be deemed *goods* within the meaning of the section" (*a*).

It should be observed that this section differs from the corresponding section in the Bankruptcy Act, 1869 (*b*), which applied to the goods in the order and disposition of the bankrupt trader, whether in his trade or business or not (*c*). Under these sections it was at one time considered that shares in companies were not things in action within the Acts (*d*); but this view has been overruled in the House of Lords (*e*), and it has also been held that debentures of a company, by which they undertake to pay a sum of money and interest, and charge their undertaking and property with the payment thereof (*f*), and policies of life assurance (*g*), and equitable interests in shares which are registered in the names of other persons (*h*), are such things in action.]

No forfeiture where they are in his possession according to the title.

It has been decided under the corresponding clause in the previous Bankruptcy Acts, that the enactment does not apply where the possession of the goods by the bankrupt can be satisfactorily accounted for by the circumstances of the title, as, if a trustee be in possession of effects upon trust for payment of debts, and become bankrupt (*i*), or if goods be vested in A. upon trust to permit B. to have the enjoyment during his life, and B. becomes bankrupt while in possession under his equitable title (*j*); or if A. for valuable consideration assign his goods to a trustee for A.'s wife for her separate use, and the goods are in the house occupied by A. and his wife at the date of his bankruptcy (*k*).

[(*a*) 46 & 47 Vict. c. 52, s. 44.]

[(*b*) 32 & 33 Vict. c. 71, s. 15.]

[(*c*) *Re Jenkinson*, 15 Q. B. D. 441; *Colonial Bank* v. *Whinney*, 30 Ch. D. (C.A.) 261.]

[(*d*) *Union Bank of Manchester, Re Jackson*, 12 L. R. Eq. 354.]

[(*e*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, reversing *S. C.* 30 Ch. D. (C.A.) 261.]

[(*f*) *Re Pryce*, 4 Ch. D. 685.]

[(*g*) *Ex parte Ibbetson*, 8 Ch. D. (C.A.) 519.]

[(*h*) *Ex parte Barry*, 17 L. R. Eq. 113.]

(*i*) *Copeman* v. *Gallant*, 1 P. W. 314; and see under the Bankruptcy Act, 1869, *Ex parte Barry*, 17 L. R. Eq. 113.

(*j*) *Ex parte Martin*, 19 Ves. 491; *S. C.* 2 Rose, 331; see *Ex parte Horwood*, 1 Mont. & Mac. 169; Mont. 24; *Jarman* v. *Woolloton*, 3 T. R. 618; *Ex parte Massey*, 2 Mont. and Ayr. 173; *Ex parte Elliston*, 2 Mont. and Ayr. 365; *Ex parte Geaves*, 8 De G. M. & G. 291; 2 Jur. N.S. 651; *Re Bankhead's Trust*, 2 K. & J. 560.

(*k*) *Ex parte Cox*, 1 Ch. D. 302.

[So property which belongs to a married woman for her separate use, but as to which the husband, by reason of there being no other trustee, is a trustee for the wife, does not pass to his trustee in bankruptcy (*a*); and farming stock of a testator left in the hands of the widow as tenant for life under the will was, under the circumstances of the case, held to be sufficiently ear-marked as trust property so that only the life-interest passed to the trustee in bankruptcy (*b*).] But if a residue be given to trustees upon trust to *sell* with all convenient speed, and to invest the proceeds in the purchase of an annuity for the lives of A. (one of the trustees) and her children, the amount to be paid to A. for the benefit of the children, and if, instead of selling, the trustees permit A. to retain possession for a length of time, the goods are forfeited, such possession being contrary to the title (*c*).

Executors and administrators.

14. The order and disposition clause does not extend to a lawful and necessary possession *en auter droit*, as that by executors and administrators (*d*); but there will be no exemption from the forfeiture if the executor can be proved to have dismissed the character of personal representative, and to have assumed that of absolute owner (*e*).

Factors.

15. So goods in the possession of *factors*, in the ordinary course of their trade, are not forfeitable under the clause (*f*).

Reversions.

16. The clause affects interests in reversion as well as in possession (*g*), though such interests are contingent (*h*), and the circumstance that notice was given to the trustee, after the bankruptcy, but before the appointment of assignees in bankruptcy, has been held not to prevent the operation of the Act (*i*).

Deposits.

17. Under the old Bankruptcy Acts, no forfeiture was incurred

[(*a*) *Ex parte Sibeth*, 14 Q. B. D. (C.A.) 417.]

[(*b*) *Ex parte Barber*, 28 W. R. 522.]

(*c*) *Ex parte Moore*, 2 Mont. D. & De G. 616; and see *Fox* v. *Fisher*, 3 B. & Ald. 135; *Ex parte Thomas*, 3 Mont. D. & De G. 40.

(*d*) *Ex parte Marsh*, 1 Atk. 158; *Joy* v. *Campbell*, 1 Sch. & Lef. 328.

(*e*) *Fox* v. *Fisher*, 3 B. & Ald. 135; *Ex parte Moore*, 2 Mont. D. & De G. 616; *Ex parte Thomas*, 3 Mont. D. & De G. 40; see *Quick* v. *Staines*, 1 B. & P. 293; *Whale* v. *Booth*, cited *Farr* v. *Newman*, 4 T. R. 625, note (*a*).

(*f*) *Mace* v. *Caddell*, Cowp. 232; *Ex parte Pease*, 19 Ves. 46, *per* Lord Eldon; *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Whitfield* v. *Brand*, 16 M. & W. 282; [contra, stands used to show off goods in the shop of a mantle-maker; *Sharman* v. *Mason*, (1899) 2 Q. B. 679; explained, *Re William Watson* & Co., (1904) 2 K. B. (C.A.) 753].

(*g*) *Bartlett* v. *Bartlett*, 1 De G. & J. 127; *Re Rawbone's Trust*, 3 K. & J. 300, 476; *Rickards* v. *Gledstanes*, 3 Giff. 298; [and see *Rutter* v. *Everett*, (1895) 2 Ch. 872].

(*h*) *Hensley* v. *Wills*, 16 L. T. N.S. 582; *Davidson* v. *Chalmers*, 33 Beav. 653.

(*i*) *Re Tichener*, 35 Beav. 317.

where the security for a *chose en action*, as a policy, was deposited with a banker, not by way of equitable assignment so as to give the banker the right to receive the money, but by way of *lien*, so as to disable the bankrupt from receiving the money (*a*). But the case was otherwise where the depositee had a right conferred upon him to receive the money, for then the *chose en action* was forfeited (*b*).

Ignorance.

18. The clause has been held not to apply where the true owner was ignorant of his being such, for if he did not know that he was the true owner, how could he have given any consent as such (*c*). And where the bankrupt held in trust for a corporation which had no power to possess such property, it was ruled that the corporation, being a mere abstraction of law, and incapable of action beyond the limits of its own legal powers, could not consent as *true* owner (*d*). [And the consent of an infant, or of a married woman restrained from anticipation, will not avail (*e*).]

Incapacity.

Whether bare trustee a "true owner."

19. Whether the permission of a *bare trustee* can be said to be that of the "*true owner*," to the prejudice of his innocent *cestui que trust* is a question of some difficulty (*f*). It has been decided that a *cestui que trust* absolutely entitled is a *true owner* within the meaning of the Act (*g*). But here the trustee is a mere passive depositary, and can do *no* act without the direction of his *cestui que trust* (*h*); but the case is different, where, as in a marriage settlement, a fund is vested in trustees in trust for persons under disability or not in existence, and it is therefore intended that they should act on behalf of all parties as the absolute proprietors. It would seem that here the trustees are regarded as the true owners, and that if the funds are left by the trustees in the order and disposition of the bankrupt, they are so left with the consent of the true owners (*i*).

Of judgments against the trustee.

20. *Judgments*, at least so far as they affect *lands* (for execution

(*a*) *Gibson* v. *Overbury*, 7 M. & W. 555.

(*b*) *Green* v. *Ingham*, 2 L. R. C. P. 525.

(*c*) *Re Rawbone's Trust*, 3 K. & J. 300, 476; [*Re Mills*, (1895) 2 Ch. (C.A.) 564;] and see *Ex parte Ford*, 1 Ch. D. (C.A.) 521; *In re Hickey*, 10 Ir. Rep. Eq. 117.

(*d*) *Great Eastern Railway Company* v. *Turner*, 8 L. R. Ch. App. 149.

[(*e*) *Re Mills*, *ubi sup.*]

(*f*) See *Ex parte Richardson*, Buck, 480; *Ex parte Horwood*, 1 Mont. & Mac. 169; Mont. 24; *Viner* v. *Cadell*, 3 Esp. 88; *Ex parte Geaves*, 8 De G. M. & G. 291.

(*g*) *Ex parte Burbridge*, 1 Deac. 131; 4 Deac. & Ch. 87; and see *Day* v. *Day*, 1 De G. & J. 144.

[(*h*) See *Ex parte Culley*, 9 Ch. D. (C.A.) 307; *Ex parte Dearle*, 14 Q. B. D. (C.A.) 184, which show that a mere trustee of a debt for an absolute beneficial owner not under disability cannot alone sustain a petition for adjudication of bankruptcy against the debtor; and see *Ex parte Ward*, 60 L. J. Q. B. 574.]

(*i*) *Ex parte Caldwell*, 13 L. R. Eq. 188; *Darby* v. *Smith*, 8 T. R. 82; *Ex parte Dale*, Buck, 365; and see [*Re Mills*, *ubi sup.*]; *Hensley* v. *Wills*, 16 L. T. N.S. 582.

against goods and chattels is by common law), derive their origin from certain statutory enactments (*a*).

Had trusts been established at the time when these statutes were passed, the construction would probably have been the same as in the case of the Bankruptcy Acts, that is, judgments would have been held to bind those lands only of which the conusee was seised beneficially; but trusts at the period of which we are speaking had not made their appearance, and therefore judgments have been held to bind all lands of the conusee, whether vested in him beneficially, or in the character of trustee. But of course the *cestui que trust* will be protected from the legal process by application to a Court of Equity (*b*).

[21. A garnishee order *nisi* to attach a debt due to a trustee will not be made absolute, if a *primâ facie* case be made out that the money sought to be attached is trust money, but the money will be ordered into Court to abide the event of an enquiry whether it be trust money or not (*c*).] [Garnishee order.]

SECTION III

WHAT PERSONS TAKING THE LEGAL ESTATE WILL BE BOUND BY THE TRUST

1. The universal rule, as trusts are now regulated, is, that all persons who take *through or under the trustee* (except purchasers for valuable consideration without notice), shall be liable to the trust. General rule.

2. On the death of the trustee, the *heir* (*d*), *executor, or administrator*, becomes the *legal* owner of the property; but as he merely represents the ancestor, testator, or intestate, he takes in the same character, and is therefore bound by the same equity. Heir and executor bound by the trust.

3. So, if a trustee devise the estate, the *devisee* takes the estate subject to the trust (*e*). So the devisee.

(*a*) 11 E. 1; 13 E. 1, st. 1, c. 18; 13 E. 1, st. 3; 27 E. 3, st. 2, c. 9; see Co. Lit. 289, b.

(*b*) *Finch* v. *Earl of Winchelsea*, 1 P. W. 277; *Burgh* v. *Francis*, 1 Eq. Ca. Ab. 320; *Medley* v. *Martin*, Finch, 63; *Prior* v. *Penpraze*, 4 Price, 99; *Langton* v. *Horton*, 1 Hare, 560, *per* Sir J. Wigram. See *ante*, p. 250, as to chattels taken in execution.

[(*c*) *Roberts* v. *Death*, 8 Q. B. D. (C.A.) 319.]

[(*d*) See now the Conveyancing Act, 1881, (44 & 45 Vict. c. 41) s. 30; the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 1.]

(*e*) *Marlow* v. *Smith*, 2 P. W. 201, *per* Sir J. Jekyll; *Lord Grenville* v. *Blyth*, 16 Ves. 231, *per* Sir W. Grant.

And assigns by acts *inter vivos*.

4. So all *assigns* of the trust by acts *inter vivos* (except purchasers for valuable consideration without notice), will be bound by the trust (*a*).

So assigns in the *post*.

5. Assigns in the *post*, or by operation of law, are also invested with the character of trustee; as if a trustee marry, the wife is at *law* entitled to her dower, and if a female trustee marry, the husband is at *law* entitled to his curtesy, but in *equity* both the *dowress* (*b*) and *tenant by the curtesy* (*c*) are compellable to recognise the right of the *cestui que trust*. So a *creditor* of the trustee extending the trust estate under an *elegit* (*d*), or taking a trust chattel by writ of execution (*e*), and by the same rule the creditors' trustee under a bankruptcy (*f*), are made subject to the equity.

Forfeiture.

6. And if the trustee commit a *forfeiture*, the lord, as he succeeds to the identical estate of the forfeitor, must take the property with all the engagements and incumbrances attached to it, and is therefore liable to the trust (*g*). In the case of a forfeiture to the Crown, it was formerly held that there was no equity against the Crown (*h*); but in modern times the equity

(*a*) See *infra*.

(*b*) *Pawlett* v. *Attorney-General*, Hard. 469, *per* Lord Hale; *Noel* v. *Jevan*, Freem. 43; *Hinton* v. *Hinton*, 2 Ves. 634, *per* Lord Hardwicke.

(*c*) *Bennet* v. *Davis*, 2 P. W. 319.

(*d*) *Kennedy* v. *Daly*, 1 Sch. & Lef. 373, *per* Lord Redesdale; *Finch* v. *Earl of Winchelsea*, 1 P. W. 277; *Burgh* v. *Burgh*, Rep. *t.* Finch, 28. In the case of *Whitworth* v. *Gaugain*, 1 Cr. & Ph. 325, where a person made a deposit of title-deeds, and then a judgment was entered up against him, Lord Cottenham expressed a doubt whether the judgment creditor, *if he had no notice*, would be bound by the prior equity. However, such a doctrine was not tenable, for a judgment creditor is *not a purchaser for valuable consideration*; *Brace* v. *Duchess of Marlborough*, 2 P. W. 491. He advances money, but not on the security of this estate. He may take the person of his debtor, or his goods and chattels, and if he is put in possession of the lands, it is not as purchaser of them, but by course of law. The cause was afterwards heard, and Lord Cottenham's doubts were displaced by a decision the other way, 3 Hare, 416; 1 Ph. 728. In *Watts* v. *Porter*, 3 Ell. & Bl. 743, three of the four judges, while approving of *Whitworth* v. *Gaugain*, refused to apply the principle of it to a case of stock. The remaining judge differed, and held that in personal, as in real estate, the specific incumbrancer, though he gives no notice to the trustee, prevails over the judgment creditor, though he has obtained a charging order. It is conceived that the single judge took the clearer view. Those who determined the other way, seem to have assumed that notice was necessary for the transfer of an equitable interest, which is not true as between assignor and assignee, but only as between two contending assignees. The case of *Watts* v. *Porter* has since been disapproved by the highest authorities; *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 34; *Scott* v. *Hastings*, 4 K. & J. 633. [And see *Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. (C.A.) 238; *Re Leavesley*, (1891) 2 Ch. (C.A.) 1, and *post*, Chap. XXVIII. s. 7.]

(*e*) *Foley* v. *Burnell*, 1 B. C. C. 278, *per* Lord Thurlow.

(*f*) See *ante*, p. 273, note (*f*).

(*g*) *Burgess* v. *Wheate*, 1 Eden, 203, *per* Sir T. Clarke; Ib. 252, *per* Lord Henley.

(*h*) *Wikes's case*, Lane, 54, agreed.

was admitted, though the precise nature of the remedy was never distinctly ascertained (*a*).

7. A lord taking by *escheat* stands on a somewhat different footing, for he does not take through or under the trustee at all; he is not an *assign* of the trustee either in the *per* or *post*; nor does he, as in forfeiture, succeed to the place of the trustee, but claims by a title paramount of his own, by virtue of a condition originally annexed to the land, and wholly independent of the creation of the trust. Escheat.

Lord Mansfield was of opinion, however, in *Burgess* v. *Wheate* (*b*), that a trust ought to be binding on the lord, and cited the opinions said to have been expressed by Lord Chief Justice Bridgman and Sir John Trevor (*c*); but as to the words attributed to the former, it appears from his own note-book, that they were never spoken (*d*); and the observation of Sir John Trevor was at the utmost a mere *obiter dictum*. Sir Thomas Clarke, on the other hand, who assisted Lord Mansfield in the case of *Burgess* v. *Wheate*, thought that *cestui que trust* was no more relievable against the lord by escheat, than against a sale by the trustee to a purchaser without notice (*e*); and Lord Northington's inclination was apparently the same way, though as the point was not necessarily involved in the question before him, he declined to conclude himself by any express and direct opinion (*f*). It is clear that the lord was not bound by a *use*. However, it must be admitted that in modern times the Courts have acted on more liberal principles; and it has been actually decided that where the fee out of which a mortgage term has been carved escheats to the lord, he may redeem (*g*), and if the lord may take a benefit through the tenant, it seems to follow that he must sustain an onus. Indeed, an opinion to that effect has been enunciated by Lord Justice James when Vice-Chancellor (*h*), and also by an Equity Court in Ireland (*i*). Now that the enactments, to be noticed presently (*j*), have been passed, it is unlikely that the point will ever call for a decision. Burgess *v.* Wheate.

8. In *copyholds* there is, properly speaking, no such thing as escheat. The freehold and inheritance are vested in the lord of Copyholds.

(*a*) *Burgess* v. *Wheate*, 1 Eden, 252; and see *Pawlett* v. *Attorney-General*, Hard. 467, which was a case of forfeiture, though treated by Lord Hale as a case of escheat. And see *ante*, p. 29.

(*b*) 1 Eden. 177, see p. 229; and see observations upon Lord Mansfield's argument in 3rd edit. p. 281.

(*c*) *Burgess* v. *Wheate*, 1 Eden, 230.

(*d*) See Ib. 230, note (*a*); and see Sir T. Clarke's observations, Ib. 202.

(*e*) Ib. 1 Eden, 203.

(*f*) Ib. 1 Eden, 246.

(*g*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

(*h*) *Re Martinez' Trust*, 22 L. T. N.S. 403.

(*i*) *White* v. *Baylor*, 10 Ir. Eq. Rep. 54; and see *Evans* v. *Brown*, 5 Beav. 116.

[(*j*) See *post*, p. 279.]

the manor, and the tenant has no claim but according to the entry on the Court roll. If the tenant be a trustee, and no trust appears on the roll, there can be no pretence for charging the lord with an equity to which he never assented (*a*); but if a surrender be made upon a trust either *expressed* or *referred to* on the roll, the lord is stopped by this evidence of his will, and cannot afterwards claim in contradiction to his grant (*b*).

Customary freeholds.

9. *Customary freeholds* held not at the will of the lord, but according to the custom of the manor, stand on the same footing as copyholds in reference to escheat (*c*), for it is now established that customary freeholds are in fact copyholds, but of a privileged character (*d*).

Equity of redemption.

10. A distinction was taken by Lord Hale between a *trust* and an *equity of redemption*. "A trust," said his Lordship, "is created by the contract of the party, and he may direct it as he pleaseth, and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it who come in in privity of estate; but a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise (*e*), because it is an ancient right which the party is entitled to in equity" (*f*). But upon this distinction it must be observed, that even a trust will at the present day bind persons who take derivatively from the trustee, though in the *post;* and notwithstanding an equity of redemption amounts to what Lord Hale calls a *title* (*g*), there seems to be no reason why in the case of escheat the lord, who takes by title paramount, should be bound by an equity of redemption any more than by a simple trust (*h*). In a later case (*i*), however, the distinction

Viscount Downe v. Morris.

(*a*) *Attorney - General* v. *Duke of Leeds*, 2 M. & K. 343; and see *Peachy* v. *Duke of Somerset*, 1 Str. 454; *Burgess* v. *Wheate*, 1 Eden, 231.

(*b*) *Burgess* v. *Wheate*, 1 Eden, 231, *per* Lord Mansfield; *Weaver* v. *Maule*, 2 R. & M. 97; and see *Everingham* v. *Ivatt*, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388; [*Gallard* v. *Hawkins*, 27 Ch. D. 298].

(*c*) *Weaver* v. *Maule*, 2 R. & M. 100, *per* Sir John Leach.

(*d*) *Duke of Portland* v. *Hill*, 12 Jur. N.S. 286.

(*e*) *Semble* not a purchaser without notice; see *Harding* v. *Hardrett*, Rep. *t.* Finch, 9; *Spurgeon* v. *Collier*, 1 Eden, 55.

(*f*) *Pawlett* v. *Attorney - General*, Hard. 469; and see *Bacon* v. *Bacon*, Tothill, 133; *Burgess* v. *Wheate*, 1 Eden, 206; *Tucker* v. *Thurstan*, 17 Ves. 133.

(*g*) See *Pawlett* v. *Attorney-General*, Hard. 467.

(*h*) See *Burgess* v. *Wheate*, 1 Eden, 255; *Attorney - General* v. *Duke of Leeds*, 2 M. & K. 344. *Pawlett* v. *Attorney-General*, Hard. 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but of *forfeiture*.

(*i*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

between an equity of redemption and a trust was observed upon, and the Court expressed an opinion that a lord who was in by escheat would be bound by an equity of redemption, if not by a trust (*a*).

Real estate assets in hands of assign or lord taking by escheat.

11. The Administration of Estates Act, 1833 (3 & 4 W. 4. c. 104), which subjects a person's real estate to the payment of his simple contract debts, annexes the quality of assets to the estate itself (*b*), and subject to the right of alienation by the heir or devisee (*c*), creates a charge on the estate for the benefit of the creditors (*d*), [which, however, does not take effect until a judgment has been obtained (*e*); and it has been held that a debtor's estate is assets in the hands of a voluntary assign of the heir or devisee (*f*), and] even in the hands of the lord taking by escheat (*g*).

13 & 14 Vict. c. 60.

12. The law relating to the forfeiture and escheat of trust estates, except so far as it illustrates general principles, has now, by the interference of the Legislature, become of little importance; for by the Trustee Act, 1850 (13 & 14 Vict. c. 60), it is enacted in effect, by sect. 15 (*h*), that in case of *failure of heirs of a trustee*, the Court of Chancery shall have power, upon summary application, to transfer the legal estate (*i*); and by sect. 46 (*j*), the trust property shall not escheat or be forfeited by reason of the *attainder* or *conviction for any offence of the trustee;* [and by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 30, in the case of the death of a trustee after the 31st December, 1881, the legal estate in realty devolves upon the legal personal representative of the trustee (*k*), and may be disposed of and dealt with by him as if it were a chattel real].

(*a*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

[(*b*) The real estate is made an asset from the time of the debtor's decease, not merely the corpus, but the fruit, and the rents and profits are necessarily included; *Re Hyatt*, 38 Ch. D. 609.]

(*c*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Hynes* v. *Redington*, 10 Ir. Ch. Rep. 194; *Pimm* v. *Insall*, 7 Hare, 193; 1 Mac. & G. 449; and see *Dilkes* v. *Broadmead*, 2 Giff. 113; [*Re Hedgely*, 34 Ch. D. 379, 384].

(*d*) *Evans* v. *Brown*, 5 Beav. 116. (*N.B.*—This case was appealed and compromised [and ultimately the real estate was sold to pay debts, see *Tyler* v. *Thomson*, 25 Beav. 47, referred to in *Re Hyatt*, 38 Ch. D. 609, at p. 620].) See also *Hamer's Devisees*, 2 De G. M. & G. 366; *Beale* v. *Symonds*, 16 Beav. 406; *Kinderley* v. *Jervis*, 22 Beav. 1.

[(*e*) *Re Moon*, (1907) 2 Ch. 304.]

[(*f*) *Re Hyatt*, 38 Ch. D. 609.]

(*g*) *Evans* v. *Brown*, 5 Beav. 116; and see *Viscount Downe* v. *Morris*, 3 Hare, 394.

[(*h*) Now replaced by ss. 26 and 32 of the Trustee Act, 1893 (56 & 57 Vict. c. 53).]

(*i*) See *Re Martinez' Trust*, 22 L. T. N.S. 403; and *post*, Appendix, No. 2.

[(*j*) Now replaced by s. 48 of the Trustee Act, 1893 (56 & 57 Vict. c. 53).]

[(*k*) Other than a trustee of copyholds, who is tenant on the Court rolls; see the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88, and *ante*, pp. 247, 248.]

Outlawry of the trustee.

13. If a trustee be *outlawed* for *treason* or *felony*, the outlawry amounts to conviction (*a*), and the ordinary consequences of forfeiture or escheat (*b*) are averted by the above enactments. But an outlawry on an indictment for a *misdemeanour* or in a *personal action* (*c*) is not equivalent to a conviction of the offence, but merely of a contempt of Court (*d*), punishable with forfeiture of the life rent of the outlaw's lands, and of his chattels, real and personal, absolutely, and in this case, therefore, the statutes do not apply.

A disseisor not bound by the trust.

14. A *disseisor* is not an assign of the trustee either in the *per* or *post*, for he does not claim through or under the trustee, but holds by a wrongful title of his own, and adversely to the trust. The first resolution in *Sir Moyle Finch's case* was, that "a disseisor was subject to no trust, nor any *subpœna* was maintainable against him, not only because he was not in the *post*, but because the right of inheritance or freehold was determinable at the common law, and not in Chancery, neither had the *cestui que trust* (while he had his being) any remedy in that case" (*e*). And we may add the authority of Lord St Leonards, who, in his edition of Gilbert on Uses, observes: "At this day every one is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que trust* with him, although I had notice of the trust" (*f*) (1). And the same thing may be inferred from the terms of the section of the Statute of Limitations relating to express trusts. (*g*).

(*a*) Co. lit. 391 b.; *Holloway's case*, 3 Mod. 42; *Rex* v. *Ayloff*, 1b. 72.
(*b*) See *ante*, pp. 26, 27.
[(*c*) Outlawry in civil actions is now abolished. See 42 & 43 Vict. c. 59.]
(*d*) *Rex* v. *Tippin*, Salk. 494.
(*e*) *Sir Moyle Finch's case*, 4 Inst. 85.
(*f*) Gilbert on Uses, Sugd. ed. 249.
(*g*) Real Property Limitation Act, 1833 (3 & 4 W. 4 c. 27), s. 25.

(1) And an outstanding term in a trustee would have attended the inheritance gained by the disseisin. *Reynolds* v. *Jones*, 2 Sim. & St. 206; and see *Turner* v. *Buck*, 22 Vin. Ab. 21; *Doe* v. *Price*, 16 M. & W. 603.

CHAPTER XIII

GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE

FROM the *estate* of the trustee we pass on to the consideration of his *office*, and upon this subject we shall, in the first place, investigate the *general* properties of the office as: *First*, A trustee having once accepted the trust cannot afterwards renounce it. *Secondly*, He cannot delegate it. *Thirdly*, In the case of co-trustees the office must be exercised by all the trustees jointly. *Fourthly*, On the death of one trustee there is survivorship, that is, the trust will pass to the survivors or survivor. *Fifthly*, One trustee shall not be liable for the acts of his co-trustee. *Sixthly*, A trustee shall derive no personal benefit from the trusteeship.

First. A trustee who has accepted the trust cannot afterwards *renounce.*

Trustee cannot renounce after acceptance.

1. It is a rule, without any exception, that a person who has once undertaken the office, either by actual or constructive acceptance, cannot discharge himself from liability by a subsequent *renunciation.* The only mode by which he can obtain a release is either under the sanction of a Court of Equity, *or* by virtue of a special power in the instrument creating the trust, [*or* of a statutory power (*a*)], *or* with the consent of all the parties interested in the estate and being *sui juris* (*b*).

Executor cannot renounce after he has acted.

Thus, where A. was named executor, and acted in behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and B. obtained letters of administration *cum testamento annexo*, and possessed himself of assets, and died insolvent, it was held that A., having acted, could not afterwards discharge himself, and was responsible for the *devastavit* committed by B. (*c*).

[(*a*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10, 11.]

(*b*) See *Doyle* v. *Blake*, 2 Sch. & Lef. 245; *Chalmer* v. *Bradley*, 1 J. & W. 68; *Read* v. *Truelove*, Amb. 417; *Manson* v. *Baillie*, 2 Macq. H. L. Cas. 80. As to the discharge of the trustee, see Chap. XXVI. *infra.*

(*c*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; see *Lowry* v. *Fulton*, 9 Sim. 123;

Moorecroft *v.* Dowding.

2. Though a trustee may have given a bond for the due execution of the trust, and the *cestui que trust* may have recovered upon the bond, and been paid the money, yet, if the *cestui que trust* afterwards take proceedings to compel a conveyance of the trust estate, the trustee cannot divest himself of his fiduciary character by pleading that the penalty of the bond was a stated damage for the breach of trust, and that on payment of the penalty the trustee should be released. A conveyance, however, will not be decreed without an allowance to the trustee of the penalty recovered upon the bond, with interest at the usual rate (*a*).

Secondly. The office of trustee, being one of personal confidence, cannot be *delegated.*

Trustee cannot delegate the office.

1. "Trustees," said Lord Langdale, "who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons; and if they do so they remain subject to responsibility towards their *cestuis que trust* for whom they have undertaken the duty" (*b*). If a trustee, therefore, [unnecessarily (*c*)] confide the application of the trust fund to the care of another, whether a stranger (*d*), or his own attorney or solicitor (*e*), or even co-trustee or co-executor (*f*), he

[but *quære* whether the liability of the named executor in such a case is not limited to those assets which he received; *Re Stevens*, (1898) 1 Ch. 178, *per* Vaughan Williams, L. J., referring to Williams on Exors, 9th ed. pp. 1736 *et seq.*].

(*a*) *Moorecroft* v. *Dowding*, 2 P. W. 314.

(*b*) *Turner* v. *Corney*, 5 Beav. 517. [As to the power to appoint a deputy under the Public Trustee Act, 1906, see *post*, Chap. XXIII.]

[(*c*) See *post*, p. 284.]

(*d*) *Adams* v. *Clifton*, 1 Russ. 297; *Hardwick* v. *Mynd*, 1 Anst. 109; *Venables* v. *Foyle*, 1 Ch. Ca. 2; case cited by Sir J. Jekyll, *Walker* v. *Symonds*, 3 Sw. 79, note (*a*); *Char. Corp.* v. *Sutton*, 2 Atk. 405; *Kilbee* v. *Sneyd*, 2 Moll. 199, *per* Sir A. Hart; *Douglas* v. *Browne*, Mont. 93; *Ex parte Booth*, Id. 248; *Turner* v. *Corney*, 5 Beav. 515; [*Robinson* v. *Harkin*, (1896) 2 Ch. 415].

(*e*) *Chambers* v. *Minchin*, 7 Ves. 196, *per* Lord Eldon; *Ex parte Townsend*, 1 Moll. 139; *Griffiths* v. *Porter*, 25 Beav. 236; *Ghost* v. *Waller*, 9 Beav. 497; *Bostock* v. *Floyer*, 1 L. R. Eq. 26; *S. C.* 35 Beav. 603; *Wood* v. *Weightman*, 13 L. R. Eq. 434; *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411; [*Dewar* v. *Brooke*, 54 L. J. N.S. Ch. 830; 52 L. T. N.S. 489; 33 W. R. 497; *Baylis* v. *Dick*, W. N. 1878, p. 81;] but see *Re Bird*, 16 L. R. Eq. 203.

(*f*) *Langford* v. *Gascoyne*, 11 Ves. 333; *Harrison* v. *Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, note (*y*) 6th ed.; *Davis* v. *Spurling*, 1 R. & M. 66, *per* Sir J. Leach; *Kilbee* v. *Sneyd*, 2 Moll. 200, 212, *per* Sir A. Hart; *Lane* v. *Wroth*, and *Stanley* v. *Darington*, cited in *Anonymous case*, Mos. 36; *Marriott* v. *Kinnersley*, Taml. 470; *Ex parte Winnall*, 3 D. & Ch. 22; *Anon.* Mos. 35; *Clough* v. *Bond*, 3 M. & Cr. 497, *per* Lord Cottenham; *Dines* v. *Scott*, T. & R. 861, *per* Lord Eldon; *Trutch* v. *Lamprell*, 20 Beav. 116; *Thompson* v. *Finch*, 22 Beav. 316; 6 De G. M. & G. 560; *Cowel* v. *Gatcombe*, 27 Beav. 568; *Eaves* v. *Hickson*, 30 Beav. 136; [*Rodbard* v. *Cooke*, 25 W. R. 555; *Robinson* v. *Harkin*, (1896) 2 Ch. 415; *Wyman* v. *Paterson*, (1900) A. C. (H. L. Sc.) 271; *Lowe* v. *Shields*, (1902) 1 I. R. (C.A.) 320].

will be personally responsible for any loss that may result (*a*). But trustees were held not to be responsible where they drew a cheque and delivered it to a co-trustee, but crossed with the names of bankers to whom the money was meant to be paid, and to whom it was payable in the due execution of the trust, and the co-trustee (as the Court assumed) erased the crossing and received the money himself, for such a receipt was a fraud on the trustees, and not the result of any act of theirs (*b*); and a trustee, who had properly employed his co-trustee as broker, and accepted a share of the commission (which, however, was repaid before action brought) was not liable for loss occasioned by the fraud of the co-trustee (*c*). [But where it was the duty of executors to purchase stock, and in lieu thereof a cheque was drawn in favour of the legatee, and the money was lost by the fraud of one executor, his co-executor was held liable (*d*).]

Balchen *v.* Scott.

2. The case of *Balchen* v. *Scott* (*e*) is no exception to the general rule; for there an executor had received a bill of exchange by the post from a debtor to the estate, and transmitted it to his co-executor, and it was held that by this proceeding the executor had *not acted* in the trust (*f*), and therefore was no more answerable for the application of the money by the co-executor than any stranger would have been under similar circumstances.

Churchill *v.* Hobson.

3. In *Churchill* v. *Hobson* (*g*), an executor had paid 500*l.* into the hands of his co-executor, who misapplied it, and it was ruled by the Court that he was not bound to make it good; but the decision is universally considered as having turned upon the circumstance that the co-executor was a *banker*, and had been trusted by the testator in his lifetime, besides being made his executor at his death (*h*). Lord Harcourt, in his judgment, observed: "The co-executor having been the cashier with whom the testator in his lifetime chose to intrust his money, the

(*a*) See *post*, p. 284.

(*b*) *Barnard* v. *Bagshaw*, 3 De G. J. & S., 355.

[(*c*) *Shepherd* v. *Harris*, (1905) 2 Ch. 310.]

[(*d*) *Re Bennison*, 60 L. T. N.S. 859.]

(*e*) 2 Ves. jun. 678.

(*f*) As the executor had proved the will he would be deemed at the present day to have accepted the trust. See *ante*, p. 225.

(*g*) 1 P. W. 241.

(*h*) See *Harrison* v. *Graham*, 3 Hill's MSS., cited 1 P. W. 241, note (*y*), 6th ed.; *Chambers* v. *Minchin*, 7 Ves. 198. [Where one of the co-executors was a banker, and trust money was paid not into his bank but to his account at the Bank of Ireland, and drawn out by him, it was held that his co-executor in handing the money over to him had not done what an ordinary prudent man would have done with his own money, and that both executors were jointly and severally liable for the loss: *Lowe* v. *Shields*, (1902) 1 I. R. (C.A.) 320.]

executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

Trustee may delegate by testator's direction.

4. But trustees cannot be answerable, if they merely follow the testator's directions. Thus a testator by his will recommended his executors to employ A. (who had been in the testator's own employment) as their clerk or agent. The executors gave A. a power of attorney to receive debts, and A. subsequently became insolvent. It was contended that the executors were answerable for the default of A., but Sir A. Hart said that if a testator pointed out an agent to be employed by the executor, and such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money (*a*).

Trustee acting as agent.

5. And an executor cannot be answerable for having handed over money which he had no legal right to retain. Thus, a testator appointed A., B., and C. his executors, and empowered one of them, A., to sell certain freehold premises, and directed the proceeds of the sale to be applied and disposed of in the same manner as his personal estate. A. employed B., as his agent, to make the sale, who, having disposed of the property, paid the proceeds to A., by whom the money was misapplied. It was held that B. was not answerable for this, the money having come to his hands, not in the character of executor, but of agent (*b*).

Delegation permitted where there is a moral necessity for it.

6. And trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. "There are," said Lord Hardwicke, "two sorts of necessity: first *legal* necessity; and secondly, *moral* necessity. As to the *first* a distinction prevails. Where two *executors* join in giving a discharge for money, and one of them only receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if *trustees* join in giving a discharge, and only one receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoint rents to be paid to

(*a*) *Kilbee* v. *Sneyd*, 2 Moll. 199, 200; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 245.

(*b*) *Davis* v. *Spurling*, 1 R. & M. 64; *S. C.* Taml. 199; and see *Crisp* v. *Spranger*, Nels. 109; *Keane* v. *Robarts*, 4 Mad. 332, see 356, 359; *Re Fryer*, 3 K. & J. 317; *Home* v. *Pringle*, 8 Cl. & F. 264.

a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents: for none of these cases are on account of necessity, but because the persons acted in the usual method of business" (*a*). And Lord Loughborough in very similar terms observed: "If the business was transacted in the *ordinary* manner, unless there were some circumstances to create suspicion, surely the allowance is fair" (*b*). "Necessity," said Lord Cottenham, "which includes the *regular course of business*, will exonerate" (*c*). And Lord Redesdale, in the same spirit, observed: "An executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts: he is considered to do this of *necessity:* he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way" (*d*). [And Lord Watson in a recent case in the House of Lords (*e*) observed: "Whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt* (*f*), avail themselves of the services of others wherever such employment is according to the usual course of business."]

In conformity with these principles, where A. and B. were assignees of a bankrupt, and A. signed the dividend cheques upon

Application of foregoing principles.

(*a*) *Ex parte Belchier*, Amb. 219; [*Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1; and see *Re Weall*, 42 Ch. D. 674].

(*b*) *Bacon* v. *Bacon*, 5 Ves. 335.

(*c*) *Clough* v. *Bond*, 3 M. & Cr. 497; [*Re Gasquoine*, (1894) 1 Ch. (C.A.) 470].

(*d*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341; and see [*Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1;] *Bacon* v. *Bacon*, 5 Ves. 331, and compare *Chambers* v. *Minchin*, 7 Ves. 193, and *Langford* v. *Gascoyne*, 11 Ves. 335; and see *Davis* v. *Spurling*, 1 R. & M. 66; *Munch* v. *Cockrell*, 5 M. & Cr. 214; *Re Bird*, 16 L. R. Eq. 203; [*Re Lord De Clifford's Estate*, (1900) 2 Ch. 707].

[(*e*) *Learoyd* v. *Whiteley*, 12 App. Cas. 734; see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 360. "A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is his conclusion—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs," *per* Kekewich, J., *Re Weall*, 42 Ch. D. 678, citing *Speight* v. *Gaunt*, 9 App. Cas. 1; and see *Robinson* v. *Harkin*, (1896) 2 Ch. 415; *Rochfort* v. *Seaton*, (1896) 1 I. R. 18.]

[(*f*) 9 App. Cas. 1.]

the bankers in favour of the creditors, and delivered them to B., who undertook to affix his signature, and delivered them to the creditors, and B. accordingly signed the cheques, and placed them in his desk, whence they were stolen, and presented at the bank, and paid; on an application to the Court to make A. answerable, Sir J. Leach was of opinion that the delivery of the cheques by A. to B. as his co-assignee, was an act done of necessity in the course of business, and that he was not responsible for the subsequent loss of the cheques (*a*).

[So where a trustee, desiring to invest trust funds, employed a broker in the ordinary course of business, to purchase securities authorised by the trust, and on the receipt of the bought note handed over a cheque for the purchase-money to the broker, who misappropriated it, the trustee was not liable to make good the loss (*b*); and executors who employed their co-executor, a stockbroker of good reputation and trusted by the testator, to convert railway bonds into bonds to bearer, for the purpose of sale and in a regular and convenient course of business, were held to be justified "by necessity" in so doing (*c*). But a trustee negotiating with a municipal corporation through a broker, for a *direct loan* to them, would not be justified in handing over the money to the broker for payment to the corporation, for "there would be no moral necessity or sufficient practical reason from the usage of mankind or otherwise," to justify such a course (*d*); and a trustee who, without exercising due care in selection, employed an "outside" broker, and departed from the usual course of business by depositing with him a large sum for investment in the future, was held liable to make good a consequent loss (*e*). So where trustees of a fund in Scotland allowed the proceeds of a bond to be received by their law agent, and retained by him uninvested for rather more than six months, they were held liable to replace the money which was lost in consequence of their so acting (*f*); and inasmuch as, in the case of a purchase of colonial or other inscribed stocks, it is not the usual course of business for purchasers to attend personally at the bank and accept the transfer, a trustee will not be liable for the fraud of his co-trustee, acting as broker, because he did not himself so attend and accept such a

(*a*) *Ex parte Griffin*, 2 Gl. & J. 114; and see *Wackerbath* v. *Powell*, Buck, 495; *S. C.* 2 Gl. & J. 151; *Kilbee* v. *Sneyd*, 2 Moll. 186.

[(*b*) *Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1.]

[(*c*) *Re Gasquoine*, (1894) 1 Ch. (C.A.) 470.]

[(*d*) *Re Speight*, *ubi sup.*]

[(*e*) *Robinson* v. *Harkin*, (1896) 2 Ch. 415.]

[(*f*) *Wyman* v. *Paterson*, (1900) A. C. (H. L. Sc.) 271.]

transfer, though he would have discovered the fraud if he had done so (*a*).]

Employment of attorney to receive money.

7. But where the assignees of a bankrupt employed an *attorney* to recover debts due to the estate, and the attorney brought actions and received the money and absconded, Sir A. Hart held them accountable on the ground that there was *no necessity* for permitting the attorney to receive one shilling of the money recovered further than his costs, and laid it down, that if the attorney received the money one day and became insolvent the next, the assignees would be liable. And his Lordship said the same point had been decided in an unreported case before Lord Eldon (*b*). Trustees undoubtedly must not let the money *lie* in the hands of the attorney, but that they must not suffer it to pass through his hands in the ordinary course of business, in the recovery of a debt by *action*, was beyond any previous decision; unless, as suggested, it had been so ruled by Lord Eldon. However, we have here the authority of Sir A. Hart, that the plaintiffs' attorney in an action cannot *virtute officii* sign a discharge, and that if the plaintiffs empower him to receive the amount recovered, they are answerable for his receipts as for the act of an agent improperly appointed to sign such receipt.

[Liability for acts of agent.]

8. [If a trustee employs an agent under circumstances which justify the employment, and a loss arises from the insolvency of the agent, the *onus* is on the person seeking to make the trustee liable for the loss, to show that it was attributable to the default of the trustee (*c*).]

Trustee not to require security from his agent.

9. A trustee or executor is not called upon to take any *security* from the agent; for to do that upon every occasion would tend greatly to the hindrance of business (*d*).

How trust money to be transmitted.

10. Where trust money is to be transmitted to a distance, the trustee may do it most conveniently and securely through the medium of a responsible bank, or he may take bills drawn by a person of undoubted credit, and payable at the place whither the money is to be sent (*e*). But the money must be paid in to the account of the *trust estate*, and the bills must be taken in favour of the trustee *in that character*, and if he neglect these precautions, then, if the bank break, or the bills be dishonoured,

Payments into bank must be to the account of the trust.

[(*a*) *Shepherd* v. *Harris*, (1905) 2 Ch. 310.]

(*b*) *Ex parte Townsend*, 1 Moll. 139; see *Anon. case*, 12 Mod. 560; *Re Fryer*, 3 K. & J. 317.

[(*c*) *Re Brier*, 26 Ch. D. (C.A.) 238.]

(*d*) *Ex parte Belchier*, Amb. 220, *per* Lord Hardwicke.

(*e*) *Knight* v. *E. of Plymouth*, 1 Dick. 120; *S. C.* 3 Atk. 480; recognised *Ex-parte Belchier*, Amb. 219, and *Routh* v. *Howell*, 3 Ves. 566; *Joy* v. *Campbell*, 1 Sch. & Lef. 341; and see *Wren* v. *Kirton*, 11 Ves. 380, 385.

the trustee will be liable for the loss to the *cestuis que trust* (*a*).

Rule at law as to liability of executors.

11. The rule formerly applied to *executors* in a Court of Law seems to have been somewhat different from that established in Courts of Equity. An executor once become responsible by actual receipt of any part of the assets could not at law have founded his discharge in respect thereof as against a creditor, either by a plea of reasonable confidence disappointed, or a loss not occasioned by any negligence or default; as if an executor transmitted a sum to his co-executor under circumstances that in equity would have justified the confidence, a Court of law would still have held him responsible for any misapplication by the co-executor, and would not allow him to plead *plene administravit* (*b*). But now that [the rules of equity prevail over the rules of the common law where they conflict, the distinction has disappeared (*c*)].

Delegation of a discretionary trust.

12. If the trust be of a *discretionary* character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void (*d*).

Thus an advowson was vested in twenty-five of the principal inhabitants of a parish upon trust to elect and present a proper preacher, and some of the trustees having deputed *proxies* to vote at the election, Lord Hardwicke held that, as the election had been conducted in this manner, it could not be supported (*e*).

[Trustees may, however, enquire what are the wishes and opinions of others, especially of those who are interested, before finally determining what in the exercise of their own discretion they think expedient, and will not be held to act against their own judgment, if they should in the end disregard objections to which they had previously given weight (*f*).]

Not permitted, though to a co-trustee.

13. And a *discretionary* trust can no more be delegated to a *co-executor* or *co-trustee* than to a stranger (*g*). Thus, where a sum of money was given to three executors upon trust to

(*a*) See *Wren* v. *Kirton*, 11 Ves. 380, 381; *Massey* v. *Banner*, 1 J. & W. 247. [As to payments through bank under Public Trustee Act, 1906, see *post* Chap. XXIII.]

(*b*) *Cross* v. *Smith*, 7 East, 246; and see *Jones* v. *Lewis*, 2 Ves. 241.

[(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 11; *Job* v. *Job*, 6 Ch. D. 562; and see *Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. D. (C.A.) 364.]

(*d*) See *Alexander* v. *Alexander*, 2 Ves. 643; *Bradford* v. *Belfield*, 2 Sim. 264; *Hitch* v. *Leworthy*, 2 Hare, 200.

(*e*) *Attorney-General* v. *Scott*, 1 Ves. 413, see 417; *Wilson* v. *Dennison*, Amb. 82; *S. C.* 7 B. P. C. 296.

[(*f*) *Fraser* v. *Murdoch*, 6 App. Cas. 855.]

(*g*) *Crewe* v. *Dicken*, 4 Ves. 97.

distribute in charity at their own discretion, and the executors assumed each the independent control of one-third, Lord Hardwicke said: "I am of opinion the executors could not divide the charity into three parts, and each executor nominate a third absolutely, because the determination of the property of *every* object was left by the testator to the direction of *all* the executors" (*a*).

Transfer of the trust estate does not transfer the power.

14. Of course if a trustee convey the estate, the mere transfer of the estate will not have the effect of carrying with it the trust or power to the grantee (*b*). And so if a trustee devise the estate, the devisee cannot administer a discretionary trust unless the original settlement contemplated such an event, and by vesting the powers in the trustee and his assigns, annexed the powers to the estate in the hands of the devisee (*c*).

Delegation distinguished from appointment of a proxy.

15. It must be noticed that the appointment of an *attorney* or *proxy* is not in all cases a *delegation* of the *trust*. When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney, or signify his will by proxy. Thus in the case before cited (*d*), where the trust was to elect and present a proper clerk to a benefice, Lord Hardwicke had no doubt that so far as related to the mere act of presentation, the trustees, having themselves fixed upon the object, might have signed the presentation by proxy; "a trustee who had a legal estate might make an attorney to do legal acts."

[Appointment of surveyor.]

[16. Trustees who are exercising the statutory power of sale conferred by the Lands Clauses Consolidation Act, 1845, cannot appoint one of themselves to be the surveyor to value the land under the 9th section of the Act, for the appointment of a surveyor under that section is intended as a check on the action of the trustees (*e*).]

Thirdly. In the case of co-trustees the office is a *joint* one.

Trust a joint office.

1. Where the administration of the trust is vested in *co-trustees*, they all form as it were but one collective trustee, and

(*a*) *Attorney-General* v. *Gleg*, 1 Atk. 356.

(*b*) *Crewe* v. *Dicken*, 4 Ves. 97, see 100; *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Bradford* v. *Belfield*, 2 Sim. 264; *Cole* v. *Wade*, 16 Ves. 47, *per* Sir W. Grant; *Kingham* v. *Lee*, 15 Sim. 400, *per* Sir L. Shadwell; [and see *Re Rumney*, (1897) 2 Ch. (C.A.) 351].

(*c*) *Re Burtt's Estate*, 1 Drew. 319; and see *ante*, p. 257; [but see *Osborne to Rowlett*, 13 Ch. D. 774].

(*d*) *Attorney-General* v. *Scott*, 1 Ves. 413; and see *Ex parte Rigby*, 19 Ves. 463.

[(*e*) *Peters* v. *Lewes and East Grinstead Railway Company*, 16 Ch. D. 703; 18 Ch. D. (C.A.) 429.]

therefore must execute the duties of the office in their *joint* capacity (*a*). It is not uncommon to hear one of several trustees spoken of as the *acting* trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court (*b*). However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both (*c*). But such sanction or approval must be strictly proved (*d*).

[Notice of renewal.]

[2. Notice of an intention to exercise a right of renewal of a lease of property vested in several trustees is good if served upon one only of the trustees (*e*).]

Receipts.

3. A receipt for money must, in the absence of a receipt clause specially worded, receive the joint authentication of the whole body of trustees, and not of the majority merely, or it will not be valid (*f*). And therefore where the trustees are numerous, it is common in orders of the Court to insert a special direction that the moneys *may* be paid to any two or more of them (*g*).

All the trustees must prove.

4. Again, if a debtor to the trust becomes bankrupt, *all* the trustees should join in the proof (*h*), but under particular circumstances the Court will make an order for *some* of the trustees to prove, but even then the Court has occasionally inserted a direction that the dividends shall be *payable* to *all* the trustees (*i*).

Acknowledgment of debt by one trustee.

5. If a mortgage be made to two trustees so described and the statutory period elapse, an interim acknowledgment by *one* of the trustees will not prevent the operation of the Statute of Limitations in bar of redemption (*j*).

In public trusts the majority of the trustees may bind the rest.

6. Where there are several trustees, and the trust is of a *public*

(*a*) See *Ex parte Griffin*, 2 Gl. & J. 116; [*Re Lever*, 76 L. T. N.S. 71; as to the effect of a special direction that all the powers of the trustees should be exercised by the testator's son so long as he was a trustee, see *Arnott* v. *Arnott*, (1899) 1 I. R. 201].

(*b*) *Doily* v. *Sherrartt*, 2 Eq. Ca. Ab. 742, marginal note to (D). *Re Congregational Church, Smethwick*, W. N. 1866, p. 196; [*Luke* v. *South Kensington Hotel Company*, 7 Ch. D. 789; 11 Ch. D. (C.A.) 121].

(*c*) *Messeena* v. *Carr*, 9 L. R. Eq. 260; [and see *Brazier* v. *Camp*, 63 L. J. Q. B. 257].

(*d*) See *Lee* v. *Sankey*, 15 L. R. Eq. 204.

[(*e*) *Nicholson* v. *Smith*, 22 Ch. D. 640.]

(*f*) *Walker* v. *Symonds*, 3 Sw. 63; *Hall* v. *Franck*, 11 Beav. 519; *Lee* v. *Sankey*, 15 L. R. Eq. 204.

(*g*) See *Attorney-General* v. *Brickdale*, 8 Beav. 223.

(*h*) *Ex parte Smith*, 1 Deac. 391, *per* Sir T. Erskine.

(*i*) *Ex parte Smith*, 1 Deac. 385.

(*j*) *Richardson* v. *Younge*, 6 L. R. Ch. App. 478; [and see *Re Macdonald*, (1897) 2 Ch. 181, *post*, Chap. XVIII. s. 2].

character, the act of the *majority* is held to be the act of the whole number (*a*); as where there were seven trustees and they met for the purpose of electing a schoolmaster, and at the meeting five of the trustees concurred in the appointment, but two dissented, the act of the majority was considered to bind the minority (*b*). But of course the act of the majority does not bind the minority, so far as the act is beyond the proper sphere of the duty of the trustees (*c*). [Nor can a majority, in the absence of express statutory authority, pass the legal estate which is vested in all (*d*).] And when a *special* power is given to trustees, it cannot be exercised by the majority only, but *all* must join (*e*). Now, by the Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12, it is enacted that a *majority* of *charity* trustees present at a meeting duly constituted, and voting, shall have, and be deemed to have always had, the same power of disposition over the charity property as if it were the act of the whole body; and by the 13th section the majority of the charity trustees may, with the sanction of the Charity Commissioners, *sue* as if they were the sole trustees.

Trustees of charities. Quorum.

7. Where a numerous body are appointed trustees by the Court, as in cases of charity, the Court sometimes, for greater convenience, annexes to the order a direction that part of them shall form a *quorum*.

[Enfranchisement of copyholds.]

[By the Copyhold Act, 1894 (*f*), sect. 44, sub-sect. 2, where the lords or the tenants of copyholds are trustees, and one or more of the trustees is abroad, or is incapable, or refuses to act, any proceedings necessary to be done by the trustees for effecting an enfranchisement under the Act may be done by the other trustee or trustees.]

Dividends and rents.

8. If *stock* be standing in the names of several co-trustees, then, as they are joint tenants, and the Bank does not recognise the trust, any *one* of them may receive the *dividends*, though all must join in the sale of the *corpus;* and the Court itself has occasionally directed the dividends of stock, standing under its control, to be paid to one of several trustees (*g*). And in the case of Bank annuities standing to the credit of trustees of a charity, the Court, to prevent the necessity of recurring applications on changes of trustees, made an order for payment of the

(*a*) *Wilkinson* v. *Malin*, 2 Tyr. 544; *Perry* v. *Shipway*, 1 Giff. 1; and see *Attorney-General* v. *Shearman*, 2 Beav. 104; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139; *Younger* v. *Welham*, 3 Sw. 180.

(*b*) *Wilkinson* v. *Malin*, 2 Tyr. 572.

(*c*) *Ward* v. *Hipwell*, 3 Giff. 547.

[(*d*) *Re Ebsworth and Tidy's Contract*, 42 Ch. D. (C.A.) 23.]

(*e*) See *Re Congregational Church, Smethwick*, W. N. 1866, p. 196.

[(*f*) 57 & 58 Vict. c. 46.]

(*g*) *Re Coulson's Settlement*, 17 L. T. N.S. 27.

dividends "to the trustees or any two of them or to other the trustees for the time being or any two of them" (*a*), and in another case for payment to the "trustees for the time being or one of them" (*b*). Where there are co-trustees of *lands*, any one of them may receive the rents, though all must concur in a conveyance (*c*). But if there be two trustees, and one of them receives the rents and misapplies them, and the other trustee has notice of this, it is the duty of such other trustee to serve a notice on the tenants not to pay their rents to the defaulting trustee alone, and if he omit to do this, or to take the necessary steps for insuring the safety of the rents, as against the defaulting trustee, he will himself become liable (*d*).

Co-trustees should not sever in legal proceedings.

9. As co-trustees are a joint body, the Court requires them, unless under special circumstances, to defend a suit jointly, and if they sever, the extra costs thereby occasioned must be borne by the defaulting party (*e*). It is conceived that this rule, so strictly observed in Court, must not be lost sight of in transactions out of Court, and that co-trustees are bound, unless they can show good reason to the contrary, to act by the same *solicitor* and the same *counsel*. It would be a strange anomaly if four trustees were allowed only one solicitor and one counsel in Court, and four separate solicitors and four separate counsels out of Court. Every trustee should be prepared to act in harmony with his co-trustees, or he should not accept the office. It may be said that as each trustee is responsible for the due administration of the trust, he ought to be at liberty to employ a professional adviser of his own choosing, but this argument would *a fortiori* apply to so important a matter as the defence of a suit, and yet there the Court pays no attention to it.

(*a*) *Milne* v. *Gilbart*, W. N. 1875, p. 128.

(*b*) *In re Foy's Trusts*, 33 L. T. N.S. 161; 23 W. R. 744. [The National Debt Act, 1889 (52 Vict. c. 6, s. 4), provides that where two or more persons are registered as joint holders of stock (by which is meant all stock of any company or corporation, funds or annuities, transferable in the books of the Bank of England or of Ireland), any one of those persons may give an effectual receipt for any dividend on the stock unless notice to the contrary has been given to the bank by any other of the holders.]

(*c*) See *Townley* v. *Sherborne*, Bridg. 35; *Williams* v. *Nixon*, 2 Beav. 472; *Gouldsworth* v. *Knight*, 11 M. & W. 337; [and see *Re Ebsworth & Tidy*, 42 Ch. D. (C.A.) 23].

(*d*) *Gough* v. *Smith*, W. N. 1872, p. 18; reversed under a different state of circumstances, W. N. 1872, p. 66.

[(*e*) See *Re Isaac*, (1897) 1 Ch. (C.A.) 251. If one of the trustees be a defaulter or indebted to the trust estate, the other trustees will be justified in severing from him, *Smith* v. *Dale*, 18 Ch. D. 516, 518; and see *Williams* v. *Wight*, W. N. 1890, p. 50, where the executors of one trustee and the administrator of the other were, under the circumstances, held entitled to appear by separate solicitors; and as to the form of order where the severing trustee has done useful work in the administration of the trust estate, see *Re Isaac*, *ubi sup.*]

Fourthly. On the death of one trustee, the joint office *survives.* Survivorship of the trust.

1. It is a well-known maxim that a *bare authority* committed to several persons is determined by the death of any one; but, if coupled with an *interest*, it passes to the survivors (*a*). Thus, the committees of a lunatic's estate are regarded in the light of mere bailiffs without a spark of interest, and if one of them die, the office is immediately extinguished (*b*). [And where under an order for maintenance two trustees were directed to pay the income of a trust fund to the mother of an infant for the maintenance of the infant during her minority, and one of the trustees died and the survivor continued the payments, it was held by Sir G. Jessel M.R., that the trust for maintenance arose only under the order, and did not survive (*c*); but this view was not acquiesced in by the Court of Appeal, and a distinction was drawn between a power and a positive direction involving no discretion (*d*).] But an executorship or administratorship survives (*e*); for "if," says Lord Talbot, "a joint estate at law will survive, why shall not a joint administration, when they both have a joint estate in it?" (*f*). So a *testamentary* guardianship vests in the survivors (*g*), for, as guardians may bring actions and avow in their own names, may grant leases during the minority of the ward, and demise copyholds even in reversion as lords *pro tempore*, it is evident they have an interest (*h*). It follows that as co-trustees have an authority coupled with an estate or interest, their office also must be impressed with the quality of survivorship (*i*): as if

(*a*) Co. Lit. 113 a, 181 b; *Butler* v. *Bray*, Dyer, 189 b; *Attorney-General* v. *Gleg*, 1 Atk. 356; *S. C.* Amb. 584; Goulds. 2, pl. 4; *Peyton* v. *Bury*, 2 P. W. 628; *Mansell* v. *Vaughan*, Wilm. 49; *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 108, 121, 124; [*Re Bacon*, (1907) 1 Ch. 475. In the case of trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881, the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22, provides that a power or trust given to or vested in two or more trustees jointly, may, subject to any direction to the contrary, be exercised or performed by the survivor or survivors of them for the time being].

(*b*) *Ex parte Lyne*, Cas. *t.* Talbot, 143. [By the Lunacy Rules, 1892, r. 69, the Court may by order direct that the custody of the estate or person shall continue to the surviving or continuing committees or committee.]

[(*c*) *Brown* v. *Smith*, 10 Ch. D. (C.A.) 377; 46 L. J. N.S. Ch. 866.]

[(*d*) *Brown* v. *Smith*, 10 Ch. D. (C.A.) 377, 382.]

(*e*) *Adams* v. *Buckland*, 2 Vern. 514; *Hudson* v. *Hudson*, Cas. *t.* Talb. 127.

(*f*) *Hudson* v. *Hudson*, Cas. *t.* Talb. 129.

[(*g*) See Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 4, as to guardians under that Act.]

(*h*) *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 102. But if joint guardians be appointed by the Court, the office, on the death of one, is at an end; *Bradshaw* v. *Bradshaw*, 1 Russ. 528; *Hall* v. *Jones*, 2 Sim. 41; [Simpson on Infants, 2nd. ed. p. 248].

(*i*) *Hudson* v. *Hudson*, Cas. *t.* Talb. 129, *per* Lord Talbot; Co. Lit. 113 a; *Attorney-General* v. *Glegg*, Amb. 585, *per* Lord Hardwicke; *Gwilliams* v. *Rowel*, Hard. 204; *Billingsley* v *Mathew*, Toth. 168.

land be vested in two trustees upon trust to sell and one of them dies, the other may sell (*a*); and if an advowson be conveyed to trustees upon trust to present a proper clerk, the survivors or survivor may present (*b*). Otherwise, indeed, the more precaution a person took by increasing the number of the trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one. Even where the trust was to raise the sum of 2000*l.* out of the testator's estate "by sale or otherwise, at the discretion of his *trustees*, who should invest the same in the names of the said trustees upon trust," &c., and one of the two trustees died, and the survivor sold, Vice-Chancellor Wood decided that the survivor could make a good title. "I find," he said, "a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust because the co-trustee is dead? If I were to lay down such a rule, it would come to this, that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the Court on the death of one of the trustees" (*c*).

Trust survives, though there be a power of appointment of new trustees.

2. The survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments (*d*): unless there be something in the instrument that specially manifests such an intention (*e*). Even in an Act of Parliament, which declared in very strong terms that the survivors *should* (*f*), *and they were thereby required* to appoint new trustees, the Court said the proviso was analogous to the common one in settlements, and expressed an opinion (for the decision was upon another point), that the clause was not imperative, but merely of a directory character (*g*).

Trustee not liable for his co-trustee.

Fifthly. One trustee shall not be *liable* for the acts or defaults of his *co-trustee.*

(*a*) See Co. Lit. 113 a; *Warburton* v. *Sandys*, 14 Sim. 622; *Watson* v. *Pearson*, 2 Exch. 594; [*Re Bacon*, (1907) 1 Ch. 475].

(*b*) See *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139. If two trustees employ a solicitor, the surviving trustee may obtain a decree for an account against the solicitor without making the representative of the deceased trustee a party; *Slater* v. *Wheeler*, 9 Sim. 156.

(*c*) *Lane* v. *Debenham*, 11 Hare, 188; and see *Hind* v. *Poole*, 1 K. & J. 383.

(*d*) See *Doe* v. *Godwin*, 1 D. & R. 259; *Warburton* v. *Sandys*, 14 Sim. 622; compare *Townsend* v. *Wilson*, 1 B. & Ald. 608, with *Hall* v. *Dewes*, Jac. 193; and see *Attorney-General* v. *Floyer*, 2 Vern. 748; *Jacob* v. *Lucas*, 1 Beav. 436; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139.

(*e*) *Foley* v. *Wontner*, 2 J. & W. 245; and see *Jacob* v. *Lucas*, 1 Beav. 436.

(*f*) As to the force of the words "shall and may" in an Act of Parliament, see *Attorney-General* v. *Lock*, 3 Atk. 166; *Stamper* v. *Millar*, Id. 212; *Rex* v. *Flockwood*, 2 Chit. Rep. 252.

(*g*) *Doe* v. *Godwin*, 1 D. & R. 259,

1. This canon appears to have been first established by the case of *Townley* v. *Sherborne* (*a*) in the reign of Charles the First. Townley *v.* Sherborne.

A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances;* but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands. "The *Lord Keeper Coventry,*" says the reporter, "considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof, and desired *the Lords the Judges Assistant* to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, lest it thould dishearten men to take any trust which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the *Lord Keeper and the Lords the Judges Assistant* afterwards conferring together, and upon mature deliberation conceiving the case to be of great importance, his Lordship was pleased to call unto him also *Mr Justice Crook, Mr Justice Barcley, and Mr Justice Crawley,* for their assistance also in the same, and *appointed precedents to be looked over* as well in the Court of Chancery as in other courts, if any could be found touching the point in question; whereupon several precedents were produced before them, some in the Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his Lordship, after *long and mature deliberation on the case, and serious advice with all the said Judges,* did this day in open Court declare the resolution of his Lordship and the said Judges—That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayed in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint tenants or tenants in common, every one*

(*a*) Bridg. 35; and see *Leigh* v. *Barry,* 3 Atk. 584; *Anon. case,* 12 Mod. 560.

by law may receive either all or as much of the profits as he can come by. It is no breach of trust to permit one of the trustees to *receive* all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. But his Lordship and the said Judges did resolve, that if upon the proofs or circumstances the Court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

Trustee not liable for joining *pro forma* in receipts.

2. Co-trustees (*a*) (as was determined in *Townley* v. *Sherborne*), were *formerly* considered responsible for money if they joined in *signing the receipt* for it; but in later times the rule has been established, that a trustee who joins in a receipt for conformity, but without receiving, shall not be answerable for a misapplication by the trustee who receives (*b*). Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline.

But he must prove that he did not actually receive.

3. But it lies upon a trustee who joins in a receipt to show that the money acknowledged to have been received by all was in fact received by the other or others, and that he himself joined only for conformity (*c*). In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in*

(*a*) *Townley* v. *Sherborne*, Bridg. 35; *Spalding* v. *Shalmer*, 1 Vern. 303; *Sadler* v. *Hobbs*, 2 B. C. C. 114; and see *Bradwell* v. *Catchpole*, cited *Walker* v. *Symonds*, 3 Sw. 78, note (*a*); but said by Lord Cowper, *Fellows* v. *Mitchell*, 2 Vern. 516, to be contrary to natural justice.

(*b*) *Re Fryer*, 3 K. & J. 317; *Brice* v. *Stokes*, 11 Ves. 324, *per* Lord Eldon; *Harden* v. *Parsons*, 1 Eden, 147, *per* Lord Northington; *Westley* v. *Clarke*, 1 Eden, 359, *per eundem*; *Heaton* v. *Marriot*, cited *Aplyn* v. *Brewer*, Pr. Ch. 173; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh* v. *Barry*, 3 Atk. 584, *per eundem*; *Fellows* v. *Mitchell*, 1 P. W. 81; *Gregory* v. *Gregory*, 2 Y. & C. 316, *per* Baron Alderson; *Sadler* v. *Hobbs*, 2 B. C. C. 117, *per* Lord Thurlow; *Chambers* v. *Minchin*, 7 Ves. 198, *per* Lord Eldon; *Lord Shipbrook* v. *Lord Hinchinbrook*, 16 Ves. 479, *per eundem*; *Harrison* v. *Graham*, 3 Hill's MSS. 239, *per* Lord Hardwicke, cited 1 P. W. 241, 6th ed. note (*y*); *Carsey* v. *Barsham*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 344, *per eundem*; *Anon. case*, Mosely, 35; *Ex parte Wackerbath*, 2 Gl. & J. 151. [But the rule, it is conceived, is inapplicable where from the nature of the transaction or the character of the trust, the omission to receive the money is in itself a breach of duty; see the observations of Kay, J., in *Re Flower and the Metropolitan Board of Works*, 27 Ch. D. 592, 597, and see *post*, p. 325.]

(*c*) *Brice* v. *Stokes*, 11 Ves. 234, *per* Lord Eldon; and see *Scurfield* v. *Howes*, 3 B. C. C. 95, Belt's Edition, note (8).

solido; as if a mortgage be devised to three trustees, and the mortgagor with his witness meets them to pay it off, and the money is laid on the table, and the mortgagor, having obtained a reconveyance and receipt for his money, withdraws, each of the trustees in this case will be answerable for the whole (*a*). A joint receipt at law is conclusive evidence that the money came to the hands of both, but a Court of Equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*b*). "Where," said Lord Cowper, "it cannot be distinguished how much was received by one trustee and how much by the other, it is like throwing corn or money into another man's heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part" (*c*).

Trustee joining in a receipt must not permit the money to *lie* in the hands of the co-trustee.

4. And though a trustee joining in a receipt may be safe in *merely permitting* his co-trustee to *receive* in the first instance, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require (*d*). And it is the duty of a trustee not to rely on a mere statement by his co-trustee, that the money has been duly invested, but to ascertain that such is the fact (*e*). Two trustees authorised a co-trustee to remove from their bankers a box containing *active* Spanish stock, for the purpose of converting it into *deferred* Spanish stock, and the co-trustee after the conversion returned the box with only a part of the converted stock in it, and the trustees, who relied on the assurance of the co-trustee to their solicitor that all was right, and did not ascertain the fact, were held liable for the deferred stock which had been misappropriated (*f*).

Executor answerable for joining in receipts *pro forma*.

5. *Co-executors* also, like co-trustees, are generally answerable

(*a*) *Westley* v. *Clarke*, 1 Eden, 359, *per* Lord Henley.

(*b*) *Harden* v. *Parsons*, 1 Eden, 147, *per eundem*; *Wilson* v. *Keating*, 4 De G. & J. 593, *per Cur.*

(*c*) *Fellows* v. *Mitchell*, 1 P. W. 83. For the ordinary and more natural application of this illustration, see *post*, Ch. XXXI. s. 2.

(*d*) *Brice* v. *Stokes*, 11 Ves. 319; *Bone* v. *Cook*, M'Clel. 168; *Gregory* v. *Gregory*, 2 Y. & C. 313; *Thompson* v. *Finch*, 22 Beav. 316; *Lincoln* v. *Wright*, 4 Beav. 427; and see *Re Fryer*, 3 K. & J. 317. This doctrine appears to have been very little regarded in the time of Lord Talbot. See *Attorney-General* v. *Randall*, 21 Vin. Ab. 534.

(*e*) *Thompson* v *Finch*, 22 Beav. 316; 8 De G. M. & G. 560; and see *Hanbury* v. *Kirkland*, 3 Sim. 265.

(*f*) *Mendes* v. *Guedalla*, 2 J. & H. 259; and see *Walker* v. *Symonds*, 3 Sw. 1 (fully stated at p. 292 of the last edition of this work) where trustees were held guilty of a breach of trust in permitting trust money to remain on bills payable to one of their number alone, and in leaving the state of the funds unascertained for five years.

each for his own acts only, and not for the acts of any co-executor (*a*). But in respect of receipts, the case of *co-executors* is materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator (*b*). If an executor join with a co-executor in a receipt, he does a wanton and unnecessary act; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established, that if executors joined in receipts, they should be answerable, each *in solido* for the amount of the money received (*c*).

Westley *v.* Clarke.

6. In *Westley* v. *Clarke* (*d*), Lord Northington expressed an opinion that aimed at breaking down the rule; and by his decision of that case he succeeded in establishing a qualification of it.

Thomson, one of three co-executors, had called in a sum of money secured by a mortgage for a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. Thomson afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said: "The rule that executors joining in a receipt are all liable amounts to no more than this,

(*a*) *Hargthorpe* v. *Milforth*, Cro. Eliz. 318; *Anon.* Dyer, 210 a; Wentw. Off. Ex. 306, 14th ed.; *Williams* v. *Nixon*, 2 Beav. 472.

[(*b*) But one co-executor cannot make a valid transfer of railway shares standing in their joint names, and subject to the Companies Clauses Act, 1845; *Barton* v. *North Staffordshire Railway Co.*, 38 Ch. D. 458. The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), already referred to, see *ante*, p. 248, expressly enacts that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate; and as to the case where a devisee of real estate is one of several co-executors, see *Re Rebbeck*, 63 L. J. Ch. 596; *Re Henson*, (1908) 2 Ch. 356. An acknowledgment of a debt by one executor is sufficient to take the case out of the Statute of Limitations as against the estate, but his co-executor parting with the assets to beneficiaries or others in ignorance that the acknowledgment has been given will not be liable for a devastavit; *Re Macdonald*, (1897) 2 Ch. 181.]

(*c*) *Aplyn* v. *Brewer*, Pr. Ch. 173; *Murrell* v. *Cox*, 2 Vern. 560; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh* v. *Barry*, 3 Atk. 584, *per eundem*; *Harrison* v. *Graham*, 3 Hill's MSS. 239, *per eundem*; cited 1 P. W. 241, 6th ed. note (*y*); *Darwell* v. *Darwell*, 2 Eq. Ca. Ab. 456; *Gregory v. Gregory*, 2 Y. & C. 316, *per* Baron Alderson.

(*d*) 1 Eden, 357; *S. C.* 1 Dick, 329; and see *Candler* v. *Tillett*, 22 Beav. 257; *Harden* v. *Parsons*, 1 Eden, 147, 148; [*Re Gasquoine*, (1894) 1 Ch. (C.A.) 470, 477]. Yet in *Churchill* v. *Hobson*, 1 P. W. 241, note (1) by Mr Cox, his Lordship is reported to have said, according to a note of the case by Sir L. Kenyon, that in *Westley* v. *Clarke* he should have thought the co-executors liable if they had been present at the time the money was paid; and Lord Redesdale, in *Doyle* v. *Blake*, 2 Sch. & Lef. 242, 243, seemed to think that Lord Northington had no intention of *breaking down*, but only of *qualifying* the rule.

that a joint receipt given by executors is a *stronger* proof that they *actually* joined in a receipt, because generally they have no occasion to join for conformity. But, if it appears plainly, that one executor only received, and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor either before or after the act was done, what grounds has any Court in conscience to charge him? The only act that affected the assets was the first that discharged the debt, and, according to the sense of the Bar, transferred the legal estate of the lands. Then *that* the co-executors are not to answer for, and the second is nugatory." His Lordship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor.

Executors joining *pro forma* not answerable where the joining was a nugatory act.

The doctrine propounded in this case, that the joint receipt of co-executors is merely a stronger proof of the actual receipt than in the instance of co-trustees, and that an executor as well as a trustee may rebut the presumption by positive evidence, has since been repeatedly controverted (*a*). The simple point determined, viz. that an executor who signs shall not be answerable when the act of signature is nugatory, may be considered as now settled. Lord Thurlow, indeed, is reported to have questioned the decision in *Westley* v. *Clarke* (*b*): but Lord Alvanley said, "he must enter his dissent against the rule, that executors joining in a receipt were both liable, for he did not hold that an executor could not *in any case* be discharged from a receipt given for conformity: he did not find fault, for instance, with the case of *Westley* v. *Clarke*" (*c*). And, again, he said, "he perfectly concurred in the decision of that case; and the joining in a receipt, though not perhaps absolutely necessary, he would not consider *conclusive*" (*d*). Lord Eldon, in evident allusion to the case of *Westley* v. *Clarke*, admitted that the old rule had been *pared down*, at the same time expressing his opinion that the notion upon which the later cases had proceeded, viz. that the old rule had a tendency to discourage executors from acting, was very ill founded. A plain general rule, he thought, which once laid down was easily understood and might be generally

(*a*) *Sadler* v. *Hobbs*, 2 B. C. C. 114; *Scurfield* v. *Howes*, 3 B. C. C. 90; *Langford* v. *Gascoyne*, 11 Ves. 333; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 243; *Joy* v. *Campbell*, 1 Sch. & Lef. 341; *Chambers* v. *Minchin*, 7 Ves. 198; *Brice* v. *Stokes*, 11 Ves. 325; *Shipbrook* v. *Hinchinbrook*, 16 Ves. 479; *Walker* v. *Symonds*, 3 Sw. 64; *Re Fryer*, 3 Jur. N.S. 485.

(*b*) See *Sadler* v. *Hobbs*, 2 B. C. C. 117.

(*c*) See *Scurfield* v. *Howes*, 3 B. C. C. 94.

(*d*) *Hovey* v. *Blakeman*, 4 Ves. 608,

known, was much more inviting to executors than a rule referring everything to the particular circumstances (*a*).

Present doctrine on the subject.

7. The later doctrine of the Court was thus enunciated by Lord Eldon:—"Though one executor has joined in a receipt, yet whether he is liable shall depend on his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility" (*b*); and in another case he observed that the old rule had been "broken down, leaving every case to be determined by its own circumstances" (*c*). Lord Redesdale laid down the rule thus: "The distinction with respect to mere signing appears to be this—that if a receipt be given for the purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors: if it was so considered by the person paying the money, then the joining in the receipt by the person who did not actually receive amounted to a direction to pay to his co-executor (for it could have no other meaning), and he became responsible for the money, just as if he had actually received it" (*d*). And in another case he said, "where two executors join in a receipt to a debtor, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both. His requiring the discharge of the executor who has not received the money amounts to saying: 'I make this payment to you both, and not to him only who actually receives the money'" (*e*).

Churchill *v.* Hobson.

8. In *Churchill* v. *Hobson* (*f*), Lord Harcourt took a distinction between creditors and legatees (*g*); that in the case of creditors who were entitled to the utmost benefit of the law, the joining of the executors in the receipt might make each liable for the whole; but when the legatees were concerned, who had no remedy for their demand except in equity, it was altogether inequitable that one executor should answer for the receipt of the other. This doctrine was thus commented upon by Lord

(*a*) See *Chambers* v. *Minchin*, 7 Ves. 198; *Brice* v. *Stokes*, 11 Ves. 325; *Walker* v. *Symonds*, 3 Sw. 64.
(*b*) *Walker* v. *Symonds*, 3 Sw. 64.
(*c*) *Shipbrook* v. *Hinchinbrook*, 16 Ves. 479.
(*d*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341.
(*e*) *Doyle* v. *Blake*, 2 Sch. & Lef. 242.
(*f*) 1 P. W. 241.
(*g*) See *Gibbs* v. *Herring*, Pr. Ch. 49.

Northington. "At law," he said, "a joint receipt is conclusive evidence that the money came to them both, and is not to be contradicted; but a Court of Equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*a*); and what is said by Lord Harcourt as to the distinction between a receipt of this kind as to a legatee and a creditor seems to have this meaning—that a *creditor* may at *law* charge both executors on a joint receipt, but that in a court of *Equity*, where alone *legacies* are received, such receipt shall not be conclusive, but the Court will see who actually received, and charge that person accordingly" (*b*). The distinction taken by Lord Harcourt has by subsequent authorities been clearly overruled (*c*).

Executor may be answerable to creditors when not to legatees.

Lord Redesdale, however, has rightly observed, that "there *may* be a case, where executors would be charged as against creditors, though not as against legatees; for legatees are bound by the terms of the will, creditors are not, and therefore, if the testator direct the executors to collect the assets, and pay the proceeds into the hands of A., which is done accordingly, and A. fails, if a creditor remain unpaid, he may charge the executors; but, as regards a legatee, the executors may justify themselves by the directions of the will" (*d*).

Executor responsible for any act which puts assets into the hands of a co-executor.

9. On the same principle that an executor is liable for joining in a receipt, he is responsible for any act by which he reduces any part of the testator's property into the sole possession of his co-executor (*e*), as if an executor join in drawing (*f*), or indorsing (*g*), a bill, or be otherwise instrumental in giving to his co-executor possession of any part of the property (*h*). So it is laid down in an old case, that "if by agreement between the executors one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both" (*i*). So an executor is answerable, if he give a power of attorney, or other

(*a*) See *ante*, p. 296.
(*b*) *Harden* v. *Parsons*, 1 Eden, 147.
(*c*) See *Sadler* v. *Hobbs*, 2 B. C. C. 117; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 239.
(*d*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 245.
(*e*) *Townsend* v. *Barber*, 1 Dick. 356; *Moses* v. *Levi*, 3 Y. & C. 357; *Candler* v. *Tillett*, 22 Beav. 263, *per* M.R.
(*f*) *Sadler* v. *Hobbs*, 2 B. C. C. 114.
(*g*) *Hovey* v. *Blakeman*, 4 Ves. 608, *per* Lord Alvanley.
(*h*) *Clough* v. *Dixon*, 2 M. & Cr. 497, *per* Lord Cottenham; and see *Dines* v. *Scott*, T. & R. 361.
(*i*) *Gill* v. *Attorney-General*, Hard. 314; [*Lewis* v. *Nobbs*, 8 Ch. D. 591;] see *Moses* v. *Levi*, 3 Y. & C. 359; [and as to the liability of one executor *de son tort* for the acts of another, see *Re Ryan*, (1897) 1 I. R. 513].

authority, to his co-executor to collect the assets (*a*), or [unnecessarily (*b*)] deliver to him securities for money which enable him to receive the amount due (*c*).

Executor not answerable for joining where the act is necessary.

10. But under particular circumstances the joining of an executor is as absolutely necessary as the joining of a trustee, and of course in such cases executors and trustees are put upon the same footing in respect of liability.

As in bills of exchange held jointly.

Thus, if a bill of exchange be remitted to two agents payable to them personally, who on the death of their principal are made his executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, will not operate to charge him who does not actually receive (*d*).

And in transfer of stock.

And so where the joining of both executors is necessary to the transfer of stock (*e*).

Unless the act be with improper view.

11. But where the joining of an executor is absolutely indispensable, it is still incumbent on the executor to see that the act in which he joins is perfectly consistent with the due execution of the trust (*f*).

Executor must not depend on mere representation of his co-executor.

12. And the executor will not be excused if he rely on the mere representation of his co-executor as to the necessity or propriety of the act, for the executor has imposed upon him at least ordinary and reasonable diligence to enquire whether the representation is true (*g*).

Greater caution required where the testator has been long dead.

13. And if, *at a period when in the ordinary course of administration the debts should long since have been discharged*, an executor is applied to by his co-executor to join in a transfer of stock for the purpose of payment of debts, and the executor does enquire, and ascertains there are such debts, but afterwards it turns out that the co-executor had in his hands a fund sufficient for the payment of the debts, in such a case the executor who

(*a*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; *Lees* v. *Sanderson*, 4 Sim. 28; *Kilbee* v. *Sneyd*, 2 Moll. 200, *per* Sir A. Hart.

[(*b*) See *Re Gasquoine*, (1894) 1 Ch. (C.A.) 470, 477, and *ante*, p. 286; and see *Lowe* v. *Shields*, (1902) 1 I. R. (C.A.) 320; *ante*, p. 283.]

(*c*) *Candler* v. *Tillett*, 22 Beav. 263, *per* M.R.

(*d*) *Hovey* v. *Blakeman*, 4 Ves. 608, *per* Lord Alvanley.

(*e*) *Chambers* v. *Minchin*, 7 Ves. 197, *per* Lord Eldon; *Shipbrook* v. *Hinchinbrook*, 11 Ves. 254; *S. C.* 16 Ves. 479, *per eundem*; *Terrell* v. *Matthews*, 1 Mac. & G. 434, note; see *Murrell* v. *Cox*, 2 Vern. 570, and compare *Scurfield* v. *Howes*, 3 B. C. C. 94; (Note, the doctrine at the period of the last case had not been settled); and see *Moses* v. *Levi*, 3 Y. & C. 359.

(*f*) *Chambers* v. *Minchin*, 7 Ves. 186; *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; *Underwood* v. *Stevens*, 1 Mer. 712; *Bick* v. *Motley*, 2 M. & K. 312; *Williams* v. *Nixon*, 2 Beav. 472; *Hewett* v. *Foster*, 6 Beav. 259.

(*g*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252, see 254; *Underwood* v. *Stevens*, 1 Mer. 712; *Hewett* v. *Foster*, 6 Beav. 259.

joins in the receipt is liable to the imputation of negligence for not having acquainted himself how the co-executor had dealt with the assets during the preceding period, and is liable for the application of the money he enables the co-executor to receive (*a*).

Executor must not leave the money in the hands of the co-executor.

14. And the executor will be answerable if he *leave* the money, as for two years, in the hands of the co-executor, when by the terms of the trust it ought to have been invested on proper securities (*b*). But an executor will not be called upon to replace so much of the fund as it can be proved the co-executor *bonâ fide* expended towards the purpose of the trust (*c*).

Liability of executor for not getting in money owing from a co-executor.

15. And the executor will be equally answerable, whether the money left in the hands of the defaulting co-executor consists of a debt due from him to the testator, or of property received by him after the testator's death. Thus, in *Styles* v. *Guy* (*d*), a testator appointed three executors, all of whom proved the will, but one of them viz. Guy, was the acting executor. Guy, at the death of the testator, had large assets in his hands, with which he eventually absconded. The two co-executors were held responsible for the loss; and though free from blame morally, had to pay upwards of 20,000*l.* out of their own pockets. They knew, or ought to have known, that Guy was a debtor to the estate; and having by probate accepted the executorship, it was their duty to have recovered the debt from Guy as from any other debtor to the estate, and this they neglected to do for a period of six years.

[Negligence of one executor.]

[16. The act of one executor cannot bind the estate so as to preclude other persons interested in the estate from relying on their legal title. Thus in a recent case a mortgagor, under pretence of obtaining money to pay off mortgages, obtained the deeds from one of the executors of the mortgagee, who was also tenant for life under the mortgagee's will, and subsequently sent back a parcel purporting to contain the deeds, but which, as appeared on the death of the tenant for life, did not contain certain title deeds. The mortgagor subsequently purported to execute a legal mortgage in favour of a bank, and handed over

(*a*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 254, *per* Lord Eldon; *Bick* v. *Motley*, 2 M. & K. 312.

(*b*) *Scurfield* v. *Howes*, 3 B. C. C. 91; *Styles* v. *Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; *Williams* v. *Higgins*, W. N. 1868, p. 49; and see *Lincoln* v. *Wright*, 4 Beav. 427.

(*c*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; *S. C.* 16 Ves. 477; *Williams* v. *Nixon*, 2 Beav. 472; *Kilbee* v. *Sneyd*, 2 Moll. 213, *per* Sir A. Hart; *Underwood* v. *Stevens*, 1 Mer. 712; and see *Brice* v. *Stokes*, 11 Ves. 328; *Hewett* v. *Foster*, 6 Beav. 259.

(*d*) 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; and see *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165; *Candler* v. *Tillett*, 22 Beav. 257; [*Re Gasquoine*, (1894) 1 Ch. (C.A.) 470].

the deeds to them, and it was held that the surviving executor, who was also reversioner, was entitled to priority over the bank, and to delivery up of the title deeds, and it was said that the authorities are adverse in principle to interference against the legal title, except when the owner himself, or some predecessor of his in title, has personally either been guilty of misconduct, or conferred apparent authority to deal with the property as if unincumbered (*a*).]

Co-administrators on same footing as co-executors.

17. The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest (*b*); but it was afterwards determined in the Court of King's Bench, that joint administrators and co-executors stood in this respect precisely on the same footing (*c*).

How trustee ought to act where a breach of trust is committed by a co-trustee.

18. To return to the liabilities of co-trustees: if one trustee be cognisant of a breach of trust committed by another, and either industriously conceal it (*d*), or do not take active measures for the protection of the *cestuis que trust's* interest (*e*), he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction (*f*), and if a breach of trust has been *already committed*, to bring an action for the restoration of the trust fund to its proper condition (*g*), or, at least, to take such other active measures as, with a due regard to all the circumstances of the case, may be considered the most prudential (*h*).

Effect of the indemnity clauses.

19. [Formerly an express clause was] inserted in trust-deeds, that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informed the trustee of the general doctrine of the Court, added nothing to his security against the liabilities of the office. In *Westley* v. *Clarke* (*i*) Lord Northington was inclined to attach some importance to the clause. But equity infuses such a proviso into

[(*a*) *Re Ingham*, (1893) 1 Ch. 352.]

(*b*) *Hudson* v. *Hudson*, 1 Atk. 460.

(*c*) *Willand* v. *Fenn*, cited *Jacomb* v. *Harwood*, 2 Ves. 267.

(*d*) *Boardman* v. *Mosman*, 1 B. C. C. 68.

(*e*) *Brice* v. *Stokes*, 11 Ves. 319; and see *Walker* v. *Symonds*, 3 Sw. 41; *Oliver* v. *Court*, 8 Price, 166; *Re Chertsey Market*, 6 Price, 279; *Attorney-General* v. *Holland*, 2 Y. & C. 699; *Booth* v. *Booth*, 1 Beav. 125; *Williams* v. *Nixon*, 2 Beav. 472; *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 477; *Gough* v. *Smith*, W. N. 1872, p. 18; [*Jackson* v. *Munster Bank*, 15 L. R. Ir. 356].

(*f*) *Re Chertsey Market*, 6 Price, 279.

(*g*) *Franco* v. *Franco*, 3 Ves. 75; *Earl Powlet* v. *Herbert*, 1 Ves. jun. 297.

(*h*) See *Walker* v. *Symonds*, 3 Sw. 71.

(*i*) 1 Eden, 360.

every trust-deed (*a*), and a person can have no better right from the expression of that which, if not expressed, had been virtually implied (*b*). It is clear that, in later cases, the Court has considered it an immaterial circumstance whether the instrument creating the trust contained such a proviso or not (*c*). By the Law of Property Amendment Act, 1859, every instrument creating a trust was to be deemed to contain the usual indemnity and re-imbursement clauses, so that the express introduction of them in deeds and wills might be safely dispensed with (*d*); [and now by the Trustee Act, 1893 (*e*), sect. 24, a trustee, without prejudice to the provisions of the instrument, if any, creating the trust, is to be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is to be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited (*f*), nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may re-imburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers].

Lord St Leonards' Act.

[Statutory indemnity of trustees.]

20. A settlor, however, has full power to abridge the ordinary duties of trustees, and a *special* indemnity clause may be so worded as to exempt trustees from responsibility in respect of acts which would otherwise be breaches of trust. Thus, if a testator declare "that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys," here the testator has not only appointed joint trustees, but has also authorised each of them to delegate his duties to a co-trustee; and, therefore, where two trustees, under such a power, enabled a third to receive moneys,

Special indemnity clause.

(*a*) See *Dawson* v. *Clarke*, 18 Ves. 254.

(*b*) *Worrall* v. *Harford*, 8 Ves. 8.

(*c*) *Brice* v. *Stokes*, 11 Ves. 319; *Bone* v. *Cook*, M'Clel. 168; *S. C.* 13 Price, 332; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Moyle* v. *Moyle*, 2 R. & M. 710; *Sadler* v. *Hobbs*, 2 B. C. C. 114; *Mucklow* v. *Fuller*, Jac. 198; *Pride* v. *Fooks*, 2 Beav. 430; *Williams* v. *Nixon*, 2 Beav. 472; *Fenwick* v. *Greenwell*, 10 Beav. 418; *Drosier* v. *Brereton*, 15 Beav. 221; *Dix* v. *Burford*, 19 Beav. 409; *Brumridge* v. *Brumridge*, 27 Beav. 5; *Rehden* v. *Wesley*, 29 Beav. 213.

(*d*) 22 & 23 Vict. c. 35, s. 31.

[(*e*) 56 & 57 Vict. c. 53.]

[(*f*) *I.e.* properly deposited, see *Re Brier*, 26 Ch. D. (C.A.) 238, 243, *per* Lord Selborne.]

who misapplied them, and the fraud was concealed for two years, the two were held not to be responsible, though but for the special power they would have been declared liable on the ground of *crassa negligentia* (*a*); [and this case has since been followed (*b*)].

Trustee shall derive no advantage from the trust.

Sixthly. A trustee shall not make a *profit* of his office.

1. It is a general rule established to keep trustees in the straight line of their duty, that they shall not derive any personal advantage from the administration of the trust property (*c*). It was upon this principle that Lord Eldon once directed an enquiry, whether the liberty of *sporting* over the trust estate could be let for the benefit of the *cestuis que trust*, and, if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but not to keep up a mere establishment of pleasure (*d*).

Not entitled to the game on the trust estate where it can be let.

Nor to a right of presentation.

2. So, if an *advowson* be devised to trustees, and the next presentation cannot be made productive to the trust estate, the right of presentation does not belong to the trustee, but must be exercised by him for the benefit of the heir-at-law, or of the *cestuis que trust*, according to circumstances. Thus, where an advowson was devised to trustees upon trust during the life of A., to apply the rents and profits in the purchase of an estate to be settled to certain uses upon the death of A., it was decided that the right of presentation (should any vacancy occur) during A.'s life, would, as undisposed of, belong to the heir-at-law (*e*); and, in a later case, where there was a devise to trustees during the life of A. to apply the rents and profits in *payment of debts*, it was held that the right of next presentation during the life of A. was a profit, which ought to be sold for the benefit of the

(*a*) *Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47.

[(*b*) *Pass* v. *Dundas*, 43 L. T. N.S. 665; 29 W. R. 332.]

(*c*) *Burgess* v. *Wheate*, 1 Eden, 226, *per* Lord Mansfield; Ib. 251, *per* Lord Henley; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 126, *per* Lord Redesdale; *Ex parte Andrews*, 2 Rose, 412, *per* Sir T. Plumer; *Middleton* v. *Spicer*, 1 B. C. C. 205, *per* Lord Thurlow; *Docker* v. *Somes*, 2 M. & K. 664, *per* Lord Brougham; *Gubbins* v. *Creed*, 2 Sch. & Lef. 218, *per* Lord Redesdale; and see *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Bentley* v. *Craven*, 18 Beav. 75; [*Bennett* v *Gaslight and Coke Company*, 52 L. J. N.S. Ch. 98; 48 L. T. N.S. 156; *Costa Rica Railway Co.* v. *Forwood*, (1901) 1 Ch. (C.A.) 746]. A legacy therefore to a person as a mere trustee for others, is not invalidated by the fact of such trustee or his wife being an attesting witness to the will. *Cresswell* v. *Cresswell*, 6 L. R. Eq. 69.

(*d*) *Webb* v. *Earl of Shaftsbury*, 7 Ves. 480, see 488; and see *Hutchinson* v. *Morritt*, 3 Y. & C. 547.

(*e*) *Sherrard* v. *Harborough*, Amb. 165; and see *Martin* v. *Martin*, 12 Sim. 579; *Gubbins* v. *Creed*, 2 Sch. & Lef. 218; *Re Shrewsbury School*, 1 M. & Cr. 647.

creditors (*a*). If a testator devise an advowson to trustees for *sale*, the proceeds to be divided amongst certain persons, and a presentation falls, though the heir is absolutely disinherited, the trustees have not the nomination, but it belongs to the *cestuis que trust* (*b*), and where the *cestuis que trust* are tenants in common, they must cast lots for the presentation (*c*).

Trustee may not buy up debts for himself.

3. If trustees or executors buy up any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it (*d*). [And if a trustee takes advantage of his position to buy up fixtures on the trust property, which he afterwards sells at a profit, he cannot personally retain the benefit so acquired (*e*); and the same principle applies to all persons in a fiduciary position, as in the case of a solicitor buying up incumbrances created by his client, for the purpose of relieving the client from embarrassment (*f*).] But if a trustee buy up a debt intending it for *cestuis que trust*, and they refuse to take it or pay the purchase-money, they cannot, after lying by for a length of time, step forward when the speculation turns out profitably and claim the debt for themselves (*g*).

Trustee trading with the trust estate must account for the profits.

4. Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage; or put it into the trade of another person from which he is to derive certain stipulated gains (*h*), or employ it himself for the purposes of his own business or trade (*i*), in all these cases, while the executor or trustee is liable

(*a*) *Cooke* v. *Cholmondeley*, 3 Drew. 1.

(*b*) *Hawkins* v. *Chappel*, 1 Atk. 621; *Johnstone* v. *Baber*, 22 Beav. 562; *Briggs* v. *Sharp*, 20 L. R. Eq. 317; [*Welch* v. *Bishop of Peterborough*, 15 Q. B. D. 432].

(*c*) *Johnstone* v. *Baber*, 6 De G. M. & G. 439; reversing *S. C.* 22 Beav. 562.

(*d*) *Robinson* v. *Pett*, 3 P. W. 251, note (A); *Darcy* v. *Hall*, 1 Vern. 49; *Ex parte Lacey*, 6 Ves. 628, *per* Lord Eldon; *Morret* v. *Paske*, 2 Atk. 54, *per* Lord Hardwicke; *Anon.* 1 Salk. 155; *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7; *Dunch* v. *Kent*, 1 Vern. 260; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Pooley* v. *Quilter*, 4 Drew. 184; 2 De G. & J. 327.

[(*e*) *Armstrong* v. *Armstrong*, 7 L. R. Ir. 207.]

[(*f*) *Macleod* v. *Jones*, 24 Ch. D. (C.A.) 289, where the solicitor was allowed interest at the rate of 5*l.* per cent. on the money employed by him in buying up the incumbrances.]

(*g*) *Barwell* v. *Barwell*, 34 Beav. 371.

(*h*) *Docker* v. *Somes*, 2 M. & K. 664, *per* Lord Brougham.

(*i*) *Docker* v. *Somes*, 2 M. & K. 655; *Willett* v. *Blandford*, 1 Hare, 253; *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723; 3 Jo. & La. T. 64; *Parker* v. *Bloxam*, 20 Beav. 295; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; *Townend* v. *Townend*, 1 Giff. 201; [*Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, n.]. If the trustee or executor be one only

for all losses, he must account to the *cestui que trust* for all clear profits. And where a trustee retired from his trust in consideration of his successor paying him a sum of money, it was held that the money so paid must be treated as forming part of the trust estate, and be accounted for by the retiring trustee (*a*).

Giving to a trustee.

5. Neither can a trustee bargain with his *cestui que trust* for a benefit, and it is even said that a *cestui que trust* cannot *give* a benefit to his trustee (*b*).

Mortgagee regarded as a trustee to some intents.

6. *Mortgagees* are to some, though not to all, intents and purposes trustees (*c*), and in one case (the authority of which, however, has been doubted) where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower, it was decreed that the heir of the mortgagor, on bringing his bill to redeem, might take the purchase at the price paid (*d*).

Partners.

7. *Partners* also stand in a fiduciary relation to each other (*e*), and if on the termination of the partnership by effluxion of time (*f*), or bankruptcy (*g*), or death (*h*), a partner instead of winding up the partnership affairs, retains the whole assets in the trade, so that in effect the partnership continues, he must account for a share of the profits (*i*). But as profits arise not only from *capital*, but also from the application of skill and industry, and other ingredients (*j*), while in former times the Court, from the difficulty of taking the account, often gave interest only (*k*),

of a firm, he must account for his share of the profits; *Vyse* v. *Foster*, 8 L. R. Ch. App. 309; affirmed 7 L. R. H. L. 318; *Jones* v. *Foxall*, 15 Beav. 388. [As to the effect of a special clause in a will enabling the trustee to make a trading profit out of the trust estate, see *Re Sykes*, (1909) 2 Ch. (C.A.) 241.]

(*a*) *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*b*) *Vaughton* v. *Noble*, 30 Beav. 34; see 39.

[(*c*) See *ante*, p. 212, and *Re Doody*, (1893) 1 Ch. (C.A.) 129.]

(*d*) *Baldwin* v. *Banister*, cited *Robinson* v. *Pett*, 3 P. W. 251, note (A); and see comments thereon, *Dobson* v. *Land*, 8 Hare, 220; and compare *Arnold* v. *Garner*, 2 Ph. 231; *Matthison* v. *Clarke*, 3 Drew. 3.

(*e*) *Bentley* v. *Craven*, 18 Beav. 75; *Parsons* v. *Hayward*, 31 Beav. 199. [Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29.]

(*f*) See Lord Eldon's observations, *Crawshay* v. *Collins*, 15 Ves. 226.

(*g*) *Crawshay* v. *Collins*, 15 Ves. 218.

(*h*) *Brown* v. *De Tastet*, Jac. 284; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; [*The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823;] and see *Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, n.

(*i*) [And see Partnership Act, 1890, s. 42, and Lindley on Partnership, p. 592.] In *Knox* v. *Gye*, 5 L. R. H. L. 656, [where the question was as to the application of the Statute of Limitations, as to which see *post*, Chap. XXXI. s. 1], Lord Westbury denied that any fiduciary relation existed between the surviving partner and the representative of the deceased partner, but Lord Hatherley was clearly of opinion to the contrary. See the arguments of these judges *pro* and *con* in the report.

(*j*) See *Vyse* v. *Foster*, 8 L. R. Ch. App. 331; affirmed, 7 L. R. H. L. 318.

(*k*) See the observations in *Docker* v. *Somes*, 2 M. & K. 662.

yet, at the present day, the Court will direct an account of profits, *having regard* to the various ingredients of capital, skill, industry, &c., or will comprise them under the head of "*just allowances*" (*a*).

Traders not partners

8. Where the trader stands in no fiduciary situation, as where he is neither trustee nor executor, nor was the partner of the testator, but trust moneys come to his hands *bonâ fide*, though with a knowledge of the trust, that is, of the breach of trust (as where a trustee or executor lends money without authority to a trader), here the trader, though answerable for principal and interest, is not made to account for the extra profits (*b*). And if a person was in fact a partner with the testator, but without knowing it (*c*), or has *bonâ fide* settled the partnership accounts (*d*), he will be equally protected as if he had not been such a partner. And if the terms of the partnership be that on the death of any partner his share shall be taken by the survivor, at the value estimated at the last stock-taking, and a partner dies having appointed three executors, one of whom is a co-partner, and another afterwards becomes a co-partner, and the testator's share is left in the business and traded with, the two executors who are in the firm are not answerable for profits, but only for the capital of the testator's share with interest. The surviving partners are in this case regarded as purchasers of the share of the deceased, at the price expressed by the articles, and the two executors are answerable on the footing only of having left outstanding a debt, which they ought in a reasonable time to have got in (*e*).

Agents, &c.

9. The foregoing principle that trustees are not to profit by the

(*a*) *Brown* v. *De Tastet*, Jac. 284; *Willett* v. *Blandford*, 1 Hare, 253.

(*b*) *Stroud* v. *Gwyer*, 28 Beav. 130; *Townend* v. *Townend*, 1 Giff. 210; *Simpson* v. *Chapman*, 4 De G. M. & G. 154; *Macdonald* v. *Richardson*, 1 Giff. 81; [*Slade* v. *Chaine*, (1908) 1 Ch. (C.A.) 522]. See *Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, note (6).

(*c*) *Brown* v. *De Tastet*, Jac. 284.

(*d*) *Chambers* v. *Howell*, 11 Beav. 6. And in *Ex parte Watson*, 2 Ves. & B. 414, Lord Eldon seems to speak of *partners* taking with notice, as *debtors* for the money, as if it had been placed with them by way of direct loan.

(*e*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 309; affirmed, 7 L. R. H. L. 318. The judgment of L. J. James should be read, to see the principles upon which the Court now acts. The Court in this case viewed the claim against the surviving partners, though one of them was also executor, as a debt only, and, as such, not giving a right to an account of profits, and the Court observed that, although there had been hundreds, probably thousands, of cases in which traders had been executors, and in which, on taking the accounts, balances, and large balances, had been found due from them, yet where there had been *no active breach of trust*, in the getting in or selling out trust assets, but there had been a mere balance on the account of receipts and payments, the omission to invest the balance had never made the executor liable to account for the profits of his own trade. Ib. p. 335. [And see now the Partnership Act, 1890, ss. 42 (2), 43; Lindley, 512, 587, *et seq.*]

trust [based, as it is, upon the general principle that no one who has a duty to perform shall place himself in a situation in which his interest conflicts with his duty (*a*)], applies to *agents* (*b*), [solicitors who are also mortgagees (*c*),] *guardians* (*d*), who are trustees to the extent of the property come to their hands (*e*), *directors* of a company (*f*), secretary of a company (*g*), [promoters of a company (*h*),] *inspectors* under creditor deeds (*i*), the *mayor* of a corporation (*j*), [one co-partner selling to another a share in the partnership business (*k*)], and generally to all persons clothed with a fiduciary character (*l*).

Heir or devisee purchasing incumbrance.

10. Even an *heir* has been so far regarded as a trustee for *creditors of the ancestor*, that he cannot hold an incumbrance as against them for more than he gave for it (*m*), and it is presumed, though there is no decision upon it, that the rule applies equally to a devisee as between him and the creditors of the testator (*n*).

[(*a*) *Broughton* v. *Broughton*, 5 D. G. M. & G. 160, *per* Lord Cranworth; and see *Re Doody*, (1893) 1 Ch. 129.]

(*b*) *Morret* v. *Paske*, 2 Atk. 54, *per* Lord Hardwicke; [*Grant* v. *Gold Exploration, &c., Syndicate*, (1900) 1 Q. B. (C.A.) 233].

[(*c*) *Re Doody*, *ubi sup.*; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218; *Day* v. *Kelland*, (1900) 2 Ch. (C.A.) 305; *Cheese* v. *Keen*, (1908) 1 Ch. 245; but see now the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), ss. 2, 3.]

(*d*) *Powell* v. *Glover*, 3 P. W. 251, note.

(*e*) *Sleeman* v. *Wilson*, 13 L. R. Eq. 41, *per Cur.*

(*f*) *Great Luxembourg Railway Company* v. *Magnay*, 25 Beav. 586; *Imperial Mercantile Credit Association* v. *Coleman*, 6 L. R. Ch. App. 558; 6 L. R. H. L. 189; *Parker* v. *M'Kenna*, 10 L. R. Ch. App. 96; *In re Imperial Land Company of Marseilles; Ex parte Larking*, 4 Ch. D. (C.A.) 566; [*Nant-yglo and Blaina Ironworks Company* v. *Grave*, 12 Ch. D. 738; *Eden* v. *Redsdales Railway Lighting Company*, 23 Q. B. D. (C.A.) 368; *Re Lands Allotment Company*, (1894) 1 Ch. (C.A.) 616; *Shaw* v. *Holland*, (1900) 2 Ch. (C.A.) 305; *Costa Rica Railway Company* v. *Forwood*, (1901) 1 Ch. (C.A.) 746; *Re Lady Forest (Murchison) Gold Mining Co.*, (1901) 1 Ch. 582; but directors are not to be regarded as trustees for the creditors of the company; *Re Wood's Ships Woodite Company*, 62 L. T. N.S. 760; nor for individual shareholders, whose shares they may therefore purchase without disclosing pending negotiations for the sale of the company's undertaking; *Percival* v. *Wright*, (1902) 2 Ch. 421; nor is a liquidator strictly speaking a trustee either for creditors or contributories; *Knowles* v. *Scott*, (1891) 1 Ch. 717; but see *Pulsford* v. *Devenish*, (1903) 2 Ch. 625].

(*g*) *Re M'Kay's Case*, 2 Ch. D. 1.

[(*h*) *New Sombrero Phosphate Company* v. *Erlanger*, 5 Ch. D. (C.A.) 73; *Bagnall* v. *Carlton*, 6 Ch. D. (C.A.) 371; *Emma Silver Mining Company* v. *Grant*, 11 Ch. D. (C.A.) 918; *Emma Silver Mining Company* v. *Lewis*, 4 C.P.D. 396; and see *Ladywell Mining Company* v. *Brookes*, 34 Ch. D. 398; 35 Ch. D. (C.A.) 400; *Re Leeds and Hanley Theatre of Varieties*, (1902) 2 Ch. (C.A.) 809; and see as to the extent of the duty, *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, (1899) 2 Ch. (C.A.) 392.]

(*i*) *Chaplin* v. *Young* (No. 2), 33 Beav. 414.

(*j*) *Bowes* v. *City of Toronto*, 11 Moore, P. C. C. 463.

[(*k*) *Law* v. *Law*, (1905) 1 Ch. (C.A.) 140.]

(*l*) *Docker* v. *Somes*, 2 M. & K. 665.

(*m*) *Lancaster* v. *Evors*, 10 Beav. 154; and see 1 Ph. 354; *Brathwaite* v. *Brathwaite*, 1 Vern. 334; *Long* v. *Clopton*, 1 Vern. 464; *Darcy* v. *Hall*, 1 Vern. 49; *Morret* v. *Paske*, 2 Atk. 54.

(*n*) See *Long* v. *Clopton*, 1 Vern. 464; *Davis* v. *Barrett*, 14 Beav. 542.

But either an heir or a devisee who was himself an incumbrancer at the death of the ancestor or testator, may buy up a prior (but not a subsequent) incumbrance, and hold it for the whole amount due; for his own incumbrance is by title paramount, and not affected by any trust for creditors, and the Court considers him to that extent as a stranger, and allows him to buy up the prior incumbrance, not as heir or devisee, but for the protection of his own incumbrance (*a*). And if the heir or devisee acquire the prior incumbrance *not by his own act or procurement*, but by the *bounty of another*, as either by gift *inter vivos*, or by will, there seems no reason on principle why the heir or devisee should not hold the prior incumbrance for the whole amount due; and *semble* it can make no difference whether the donor was the prior incumbrancer himself, or was a stranger who had purchased from the incumbrancer at an under-value (*b*).

An heir or devisee may, it seems, hold an incumbrance, which he has bought up himself at an under-value, for the whole amount as against a subsequent incumbrancer, though not as against the general creditors of the ancestor or testator; as if A. be the first incumbrancer, B. the second, and C. the heir or devisee, and C. buys up A.'s incumbrance, here if B. have a charge merely and is not a creditor, or his debt is barred by the statute, there is no thread of trust or confidence running between B. and C., and therefore C. is regarded as a stranger (*c*).

Joint purchasers.

11. One of two *joint purchasers* of an estate has been declared a trustee for the other of a proportionate part of the benefit derived by the former from an incumbrance bought up by him at a less value (*d*).

Tenant for life.

12. An opinion has also been expressed by a high authority, that even a *tenant for life* stands in such a confidential relation towards the remainderman that he cannot as against him hold an incumbrance which he has bought up, for more than he gave for it (*e*).

Trustee may not charge for services.

13. As regards trustees, in the strict sense of the word, the general rule deprives them of any right to receive remuneration for their personal labour and services.

Trustee may not be receiver of the trust estate at a salary.

14. Thus, the trustee of an estate will not [in general, for there is no inflexible rule on the subject (*f*)], be appointed *receiver* of it

(*a*) *Davis* v. *Barrett*, 14 Beav. 542; *Darcy* v. *Hall*, 1 Vern. 49.

(*b*) See *Anon.* 1 Salk. 155.

(*c*) *Davis* v. *Barrett*, 14 Beav. 542. The observations of M.R. are general, but he probably meant no more than this.

(*d*) *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7.

(*e*) *Hill* v. *Browne*, Drur. 433.

[(*f*) *Re Bignell*, (1892) 1 Ch. 59.]

at a salary (*a*); and even should he offer his services gratuitously, he would not be appointed except under particular circumstances, for it is the duty of the trustee to superintend the receiver, and check the accounts with an adverse eye (*b*); but if a person be merely a trustee to preserve contingent remainders, the reasons for excluding him are held not to be applicable (*c*).

Factors, &c.

15. In the absence of any special authority contained in the instrument of trust (*d*), a *trustee* or *executor* who happens to be a factor (*e*), broker (*f*), commission agent (*g*), or auctioneer (*h*), can make no profit in the way of his business from the estate committed to his charge. So trustees who are *bankers* cannot in their character of trustees borrow money of themselves, as bankers, at compound interest, though it be the usage of the bank with ordinary customers (*i*).

Solicitor.

16. A trustee, whether expressly or constructively such (*j*), who is a *solicitor*, cannot charge for his professional labours, but will be allowed merely his costs out of pocket (*k*), unless there be a special contract or direction to that effect (*l*); and even then he cannot charge for matters not strictly belonging to the professional character, such as attendances for paying premiums on policies, or for transfers of stock, attendances on proctors or auctioneers, or attendances on paying legacies or debts (*m*), [unless such non-professional charges are expressly authorised. Where the will authorised a solicitor-trustee to make the usual professional or *other proper and reasonable* charges for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not, charges for business not strictly of a professional character were allowed (*n*). But where the solicitor-trustee was authorised to make the usual professional charges, and was to be entitled "to make the same professional charges, and to receive the same

(*a*) *Sutton* v. *Jones*, 15 Ves. 584; *Sykes* v. *Hastings*, 11 Ves. 363; *Anon.* v. *Jolland*, 8 Ves. 72; *Anon.* 3 Ves. 515; and see *Morison* v. *Morison*, 4 M. & Cr. 215.

(*b*) *Sykes* v. *Hastings*, 11 Ves. 364, *per* Lord Eldon; [and see *Re Lloyd*, 12 Ch. D. (C.A.) 447].

(*c*) *Sutton* v. *Jones*, 15 Ves. 587, *per* Lord Eldon.

(*d*) *Douglas* v. *Archbutt*, 2 De G. & J. 148; *Re Sherwood*, 3 Beav. 338.

(*e*) *Scattergood* v. *Harrison*, Mos. 128.

(*f*) *Arnold* v. *Garner*, 2 Ph. 231.

(*g*) *Sheriff* v. *Axe*, 4 Russ. 33.

(*h*) *Matthison* v. *Clarke*, 3 Drew. 3; *Kirkman* v. *Booth*, 11 Beav. 273.

(*i*) *Crosskill* v. *Bower*, 32 Beav. 86.

(*j*) *Pollard* v. *Doyle*, 1 Dr. & Sm. 319.

(*k*) *New* v. *Jones*, Exch. Aug. 9, 1833; 9 Byth. by Jarm. 338; *Moore* v. *Frowd*, 3 M. & Cr. 46; *Fraser* v. *Palmer*, 4 Y. & C. 515; *York* v. *Brown*, 1 Col. 260; *Broughton* v. *Broughton*, 5 De G. M. & G. 160.

(*l*) *Re Sherwood*, 3 Beav. 338; and see *Douglas* v. *Archbutt*, 2 De. G. & J. 148.

(*m*) *Harbin* v. *Darby*, 28 Beav. 325.

[(*n*) *Re Ames*, 25 Ch. D. 72.]

pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him, in or about the execution of the trusts and powers of the will, or the management and administration of the trust estate, as if he, not being himself a trustee or executor, were employed by the trustee or executor," non-professional charges were disallowed (*a*); and where a testator directed that "any trustee or executor hereunder, being a solicitor or other person engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate, and carrying out the trusts, powers or provisions of this my will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person," it was held that although the clause enabled a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course or not in the ordinary course thereof, yet it did not authorise him to charge for work done outside his profession or business (*b*).] A trustee who in that character invests the trust fund upon mortgage, and acts also as solicitor for the mortgagor, is not accountable to the trust for the professional profits made by the mortgage and which are paid by the mortgagor (*c*). [But a solicitor who is also executor cannot, by postponing probate, entitle himself in the meantime to charge for professional work done for his co-executor in relation to his testator's estate (*d*).

A solicitor-trustee who prepares leases of portions of the trust estate, the costs being paid by the lessees, is accountable, as the work is done on behalf of the trust estate. And where a solicitor-trustee was made defendant to an administration action in which a receiver was appointed, and his firm through their London agents acted for the receiver and made profit costs, it was held that they could not be retained (*e*).

[(*a*) *Re Chapple*, 27 Ch. D. 584; *Re Fish*, (1893) 2 Ch. 413, 425; see the observations of Kay, J., in these cases as to inserting a power authorising non-professional charges.]

[(*b*) *Clarkson* v. *Robinson*, (1900) 2 Ch. 722; and see *Re Chalinder & Herington*, (1906) W. N. 209, where the solicitor was to be "allowed all professional and other charges for his time and trouble, notwithstanding his being such executor and trustee," and it was held that this clause did not authorise charges for work done which was not strictly professional, but might have been performed personally by a trustee who was not a solicitor.]

(*c*) *Whitney* v. *Smith*, 4 L. R. Ch. App. 513.

[(*d*) *Re Barber*, 34 Ch. D. 77; *Robinson* v. *Pett*, 3 P. W. 249.]

[(*e*) *Re Corsellis*, 34 Ch. D. (C.A.) 675.]

But where trustees appoint the partner of one of them, who is a solicitor, steward of a manor which forms part of the trust estate, such partner is not accountable in respect of fees for manorial business received by him in his capacity of steward (*a*).

A declaration in a will that a solicitor-trustee may charge profit costs is a gift to him of a beneficial interest within sect. 15 of the Wills Act, and is therefore void if he is one of the attesting witnesses (*b*), and, as a legatee cannot compete with creditors, is ineffectual if the estate is insolvent (*c*).]

Partners.

As the solicitor-trustee himself cannot charge, so neither can the charge be made by a *firm* of which he is a partner (*d*), even though the business be done by one of the partners who is not a trustee (*e*); but a country solicitor defending a suit in Chancery as executor, through a *town agent*, will be allowed such proportion of the agent's bill in respect of the defence, as such agent is entitled to receive (*f*); and a trustee may employ his partner as the solicitor to the trust, and pay the usual professional charges, if by the articles of partnership the trustee is not to participate in the profits or have any benefit from such charges (*g*).

Cradock *v.* Piper.

17. In *Cradock* v. *Piper* (*h*), the principle of the rule was held not to apply where several *co-trustees* were made defendants to a suit, this being a matter thrust upon them and beyond their own control, so that one of the trustees, who was a solicitor, was allowed to act for himself and the others, and to receive the full costs, it not appearing that they had been increased through his conduct. But this decision is open to comment. If the distinction be made between costs out of Court and costs in Court, because, as regards the latter, the conduct of the trustee is under the cognisance of the Court, and the costs are to be taxed, the rule would equally apply to the case of a single trustee defending himself (*i*). The exception, [though well established (*j*)], appears to be anomalous, and is not likely to be extended (*k*). [It applies

[(*a*) *Re Corsellis*, 34 Ch. D. (C.A.) 675.]

[(*b*) *Re Barber*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. (C.A.) 1; and see *Re Thorley*, (1891) 2 Ch. (C.A.) 613; *Re White*, (1898) 1 Ch. 297; 2 Ch. (C.A.) 217; and legacy duty is payable in respect of it, *Ibid.*]

[(*c*) *Re White*, *ubi sup.*]

(*d*) *Collins* v. *Carey*, 2 Beav. 128; *Lincoln* v. *Windsor*, 9 Hare, 158; [*Re Corsellis*, 34 Ch. D. (C.A.) 675].

(*e*) *Christophers* v. *White*, 10 Beav. 523; [*Re Corsellis*, 34 Ch. D. (C.A.) 675; *Re Doody*, (1893) 1 Ch. (C.A.) 129].

(*f*) *Burge* v. *Burton*, 2 Hare, 373.

(*g*) *Clark* v. *Carlon*, 7 Jur. N.S. 441; [and see *Re Doody*, *ubi sup.*; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218].

(*h*) 1 Mac. & G. 664; *S. C.* 1 Hall & Tw. 617; overruling *Bainbrigge* v. *Blair*, 8 Beav. 588.

(*i*) See *Broughton* v. *Broughton*, 2 Sm. & G. 422; 5 De G. M. & G. 160.

[(*j*) *Re Corsellis*, 34 Ch. D. (C.A.) 675; *Re Barber*, 34 Ch. D. 77; *Re Doody*, (1893) 1 Ch. (C.A.) 129; *Re Smith's Estate*, (1894) 1 I. R. 60.]

[(*k*) See *Re Doody*, *ubi sup.*, where the Court declined to extend the rule

not only to proceedings in a hostile action, but to friendly proceedings in chambers, *e.g.* an application for maintenance of an infant (*a*).] Where a single trustee defended himself by his partner, the professional profits were disallowed (*b*).

Trustee accidentally advantaged by failure of heirs of the *cestui que trust.*

18. [Prior to the Intestates Estates Act, 1884, a trustee might by possibility have derived] a benefit from the trust estate, not from any positive right in himself, but from the want of right in any other; as if lands were vested in A. and his heirs upon trust for B. and his heirs, and B. died intestate and without an heir, the equitable interest in this case could neither escheat to the lord (*c*), nor, if the trust were created by conveyance from B., whose *seisin* or *title* was *ex parte paternâ*, could the lands, upon failure of heirs in that line, descend to the heir of B. *ex parte maternâ* (*d*): but the trustee, no person remaining to sue a *subpœna*, retained, as the legal proprietor, the beneficial enjoyment (*e*). [But now where the death occurs since the 14th August 1884, the law of escheat applies in the same manner as if the equitable interest had been a legal estate in corporeal hereditaments (*f*).]

Onslow *v.* Wallis.

19. If an estate be held by A. upon trust for B., and B. dies without leaving an heir, but having devised the estate to C. and D. upon trusts which fail or do not exhaust the beneficial interests, A. cannot insist on retaining the estate upon offering to satisfy the charges, if any, but will be bound to convey the estate to C. and D. as the nominees in the will and so entitled as against A., the bare trustee, and the Court as between those parties will not enquire into the nature of the trust or how far it can be executed (*g*). [But it will be otherwise if C. and D. are themselves mere bare trustees to whom, if the legal estate had been in their testator, it would not have passed by his will (*h*).]

Purchaser dying without heir after payment of purchase-money, and before conveyance.

20. In *Burgess* v. *Wheate*, Sir Thomas Clarke, M.R., put the case of a purchaser paying the consideration money, and then

to the case of a solicitor mortgagee; as to which case, however, see now the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 3.]

[(*a*) *Re Corsellis*, 34 Ch. D. (C.A.) 675.]

(*b*) *Lyon* v. *Baker*, 3 De G & Sm. 622. And see *Manson* v. *Baillie*, 2 Macq. H. L. Ca. 80.

(*c*) *Burgess* v. *Wheate*, 1 Eden, 177. But as to a surplus dividend in the hands of trustees for creditors, see *Wild* v. *Banning*, 12 Jur. N.S. 464.

(*d*) See 1 Eden, 186, 216, 256.

(*e*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168; *Barrow* v. *Wadkin*, 24 Beav. 9; and see *Attorney-General* v. *Sands*, Hard. 496; Bary, 14; *Burgess* v. *Wheate*, 1 Eden, 212, 213, 253.

[(*f*) 47 & 48 Vict. c. 71, s. 4.]

(*g*) *Onslow* v. *Wallis*, 1 Mac. & G. 506; and see *Jones* v. *Goodchild*, 3 P. W. 33.

[(*h*) *Re Lashmar*, (1891) 1 Ch. 258.]

dying without an heir before the execution of the conveyance. Whether under such circumstances the vendor should keep both the estate and the money? The M.R. thought that the vendor would keep the estate, but that the purchaser's personal representative would have a lien upon it for the purchase-money (*a*).

Mortgagor dying without an heir.

21. In the same case the questions were asked, whether in the event of a mortgagor in fee dying intestate as to real estate and leaving no heir, the mortgagee should hold the estate absolutely? and whether, if the mortgagee demanded his debt of the personal representative, he should take to himself both the land and the debt? Sir Thomas Clarke thought that the mortgagee might hold the estate absolutely; but that if the mortgagee took his remedy against the personal representative, the Court would compel him to re-convey, not to the lord by escheat, but to the personal representative, and would consider the estate re-conveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors (*b*). Lord Mansfield said, "He could not state on any ground established what would be the determination in that case" (*c*). Lord Henley observed: "The lord has his tenant and services in the mortgagee, and he has no right for anything more. Perhaps it would not be difficult to answer what would be the justice of the case, but it is not to the business in hand" (*d*). In the opinion of Sir John Romilly, M.R., the mortgagee held absolutely, subject to the payment of the mortgagor's debts out of the equity of redemption (*e*). [But now, under the Intestates Estates Act, 1884, the law of escheat will apply to the equitable interest in the land, and the lord will take accordingly (*f*).]

Whether the author of the trust can assert a claim.

22. A question was put by Lord Mansfield in *Burgess* v. *Wheate*, but was neither answered at the time, nor received any notice from the bench afterwards, viz. whether the right to the estate might not, in particular cases, result to the *author* of the trust (*g*). As, if A. infeoffed B. and his heirs, in trust for C. and his heirs, and C. [before the 14th August, 1884, died] without heirs, could the equitable interest result in favour of A.? Such a case has never occurred, and there is no authority upon the

(*a*) 1 Eden, 211, *per* Sir T. Clarke.
(*b*) 1 Eden, 210.
(*c*) 1 Eden, 236.
(*d*) Id. 256; and see *Viscount Downe* v. *Morris*, 3 Hare, 394.
(*e*) *Beale* v. *Symonds*, 16 Beav. 406.
[(*f*) 47 & 48 Vict. c. 71, ss. 4, 7; and in cases of death on or after January 1st, 1898, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 1, vests the estate in the first instance in the personal representatives.]
(*g*) 1 Eden, 185. As in a gift of land in fee to a corporation, and the corporation is dissolved or ceases, Co. Lit. 13 b.

subject; but it seems anomalous that a trust can under any circumstances result when the whole beneficial interest has been once parted with.

Trustee cannot come into a Court of Equity for his own benefit.

23. As the trustee when he can claim in these cases advances not a positive, but merely a negative right, he has no ground for coming into a Court of Equity for the establishment of his right (*a*). Thus, where A. devised a copyhold estate to B. and his heirs in trust for C. and his heirs, and C. died without heirs, and then B. died, having entered upon the lands, and having applied the rents to the trust, but never having been admitted, and the heir of B. filed a bill against the lord for compelling him to grant him admission, Lord Loughborough said, "If a man has got the legal estate, the Court will not take it from him, except for some person who has a claim; but does it follow that the Court will *give* him the legal estate?" (*b*). [But a Court of law will grant a *mandamus* to the lord to admit the heir of the trustee (*c*), and prior to the Intestates Estates Act, 1884, the heir when admitted was entitled to hold the lands for his own benefit (*d*).]

If *cestui que trust* die without next of kin, the trust chattel goes to the Crown.

24. If a *cestui que trust* of *chattels*, whether *real or personal*, die intestate, without leaving any *next of kin*, the beneficial interest will not, in this case, remain with the trustee, but like all other *bona vacantia* will vest in the Crown by the prerogative (*e*); [and so in the case of chattels belonging, or of debts due to a corporation aggregate which has been dissolved (*f*); and where land was devised to one in fee with no gift over, and the testator having died without an heir, the land was sold under the Settled Land Acts, the proceeds of sale were held to be a money fund which, on the death of the tenant for life, vested in the Crown as *bona vacantia* (*g*)]. And the result will be the same where the *cestui que trust*, though not dying absolutely

(*a*) See 1 Eden, 212; and see *Onslow* v. *Wallis*, 1 Mac. & G. 506.

(*b*) *Williams* v. *Lord Lonsdale*, 3 Ves. 752, see 756, 757.

[(*c*) *Rex* v. *Coggan*, 6 East, 431.]

[(*d*) *Gallard* v. *Hawkins*, 27 Ch. D. 298. See now the Intestates Estates Act, 1884, (47 & 48 Vict. c. 71), s. 4.]

(*e*) If the intestate leave a widow and no next of kin the Crown takes a moiety of the personal estate; *Cave* v. *Roberts*, 8 Sim. 214. [By the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29), if the net value of the real and personal estates of every man who dies intestate after September 1st, 1890, leaving a widow but no issue, do not exceed 500*l.*, they belong to his widow absolutely. This Act does not apply to a partial intestacy; *Re Twigg*, (1892) 1 Ch. 579; but does apply where there is a complete failure by lapse of all the beneficial interests bequeathed, and the person named executor has predeceased the testator; *Re Cuffe*, (1908) 2 Ch. 500. The right of the wife may be excluded by an apt provision in a marriage settlement made before the Act; *Re Hogan*, (1901) 1 I. R. 168.]

[(*f*) *Re Higginson*, (1899) 1 Q. B. 325.]

[(*g*) *Re Bond*, (1901) 1 Ch. 15.]

intestate, has appointed an *executor*, who by the language of the will itself is excluded from any beneficial interest (*a*). But an executor not expressly made a trustee by the will, was, before the Executors Act, 1830, (*b*), entitled *primâ facie* to the surplus for his own benefit, and that statute, it is conceived, has converted him into a trustee for the *next of kin* only, and has not altered the old law, as between him and the *Crown*, in case there be no next of kin (*c*).

Trustee cannot set up title adverse to *cestui que trust*.

25. A trustee is, under no circumstances, allowed to set up a title *adverse* to his *cestui que trust* (*d*). But though he may not claim against his own *cestui que trust*, yet he is not bound to deliver over the property to his *cestui que trust* if he cannot safely do so by reason of notice of title in another which is paramount to the trust (*e*).

Moral rights.

26. Trustees would not be justified in doing any act at variance with their trust. If, for instance, they honestly believed that property accepted by them in trust for one belonged of right to another, they would not be justified in communicating to such other that he could successfully claim the estate. Trustees have the custody of the property, but do not keep the conscience of their *cestui que trust*.

Impeachable settlements.

27. It sometimes happens that circumstances raise a *suspicion*, but without any *constat*, that the trust deed is impeachable, as if the trust be created by a father, tenant for life, and a son claiming in remainder under an appointment in exercise of a special power, and there are grounds for surmising that the appointment was collusive, but, nevertheless, the trustee must assume the validity of the trust until it is actually impeached (*f*).

(*a*) *Middleton* v. *Spicer*, 1 B. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8; *Russell* v. *Clowes*, 2 Coll. 648; *Powell* v. *Merrett*, 1 Sm. & G. 381; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Read* v. *Stedman*, 26 Beav. 495; [*Dillon* v. *Reilly*, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789; and see *Re Gosman*, 15 Ch. D. 67]. The foregoing were all cases of failure of next of kin of the author of the trust, but the principle of the decisions applies equally.

(*b*) 11 G. 4 & 1 W. 4 c. 40.

(*c*) See *ante*, p. 63. [So now decided; *Re Knowles*, 49 L. J. N.S. Ch. 625; *Re Bacon's Will*, 31 Ch. D. 460.]

(*d*) See *Attorney-General* v. *Munro*, 2 De G. & Sm. 163; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Ex parte Andrews*, 2 Rose, 412; *Kennedy* v. *Daly*, 1 Sch. & Lef. 381; *Shields* v. *Atkins*, 3 Atk. 560; *Pomfret* v. *Windsor*, 2 Ves. 476; *Conry* v. *Caulfield*, 2 B. & B. 272; *Langley* v. *Fisher*, 9 Beav. 90; *Reece* v. *Trye*, 1 De G. & Sm. 279; *Newsome* v. *Flowers*, 30 Beav. 461; *Frith* v. *Cartland*, 2 H. & M. 417; *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 537; *Neligan* v. *Roche*, 7 Ir. R. Eq. 332.

(*e*) *Neale* v. *Davies*, 5 De G. M. & G. 258.

(*f*) *Beddoes* v. *Pugh*, 26 Beav. 407.

CHAPTER XIV

THE DUTIES OF TRUSTEES OF CHATTELS PERSONAL

We next advance to the *duties* of trustees, and as trusts of chattels personal are of the most frequent occurrence, we shall first advert to trustees of property of this description. We may consider this branch of our subject under six heads:—1. The reduction of the chattel into the possession of the trustee. 2. The safe custody of it. 3. The rules of the Court as to conversion. 4. The proper investment of the trust fund. 5. The liability of trustees to payment of interest in cases of improper detainer; and, 6. The distribution of the trust fund.

SECTION I

OF REDUCTION INTO POSSESSION

Of reduction into possession.

1. The first duty of trustees is to place the trust property in a state of security. Thus if the trust fund be an equitable interest of which the legal estate cannot at present be transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise he who created the trust might incumber the interest he has settled in favour of a purchaser without notice, who by first giving notice to the legal holder might gain a priority (*a*).

Chose en action.

2. If the trust fund be a *chose en action*, as a *debt*, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk (*b*). A marriage settlement often contains

(*a*) See *Jacob* v. *Lucas*, 1 Beav. 436.

(*b*) *Caffrey* v. *Darby*, 6 Ves. 488; *Platel* v. *Craddock*, C. P. Cooper's Cases, 1837-8, 481; *Jones* v. *Higgins*, 2 L. R. Eq. 538; *Ex parte Ogle*, 8 L. R. Ch. App. 711; *M'Gachen* v. *Dew*, 15 Beav. 84; *Wiles* v. *Gresham*, 2 Drew. 258; *Waring* v *Waring*, 3 Ir. Ch. Rep. 335; *Tebbs* v. *Carpenter*, 1 Mad. 298; *Grove* v. *Price*, 26 Beav.

a covenant by one of the parties for payment of a certain sum to the trustees within a limited period, and if the Statute of Limitations be allowed to run so that the claim is barred, the trustees are answerable (*a*); and *a fortiori* the trustees will be responsible if they execute the settlement and sign a receipt for the money, but do not actually receive it (*b*).

Prepayment.

Though trustees may be answerable for delaying *after* the proper time to get in a *chose en action*, there can be no objection to their receiving it *before* the time, if the person liable be willing to pay it (*c*). [And trustees of a reversionary *chose en action* may concur with the person entitled to the prior interest in calling for an immediate transfer to themselves of the *chose en action* (*d*).]

Executors.

3. There is no inflexible rule as to the time within which *executors* are bound to get in the assets (*e*); but in every case the particular circumstances must govern, and the Court allows the executors a large discretion (*f*). Thus if a testator died possessed of live stock which cannot be kept but at a great expense, the executors ought to sell forthwith (*g*). So executors would not be justified in continuing the testator's housekeeping expenses for an unreasonable time, but when they have acquainted themselves with the facts, should discharge the servants and break up the establishment; and an interval of two months was in one case, but under rather special circumstances, held to be justifiable (*h*). A testator died possessed of Crystal Palace shares, and it was contended that the executors were to be responsible for the value at the end of two months, but the Court held that they had a discretion whether to sell or not until the end of twelve months (*i*).

Buxton *v.* Buxton.

Where a great part of the assets was outstanding on *Mexican bonds* and the executors sold in the course of the *second year* from the testator's decease, Lord Cottenham held that, if the executors were bound *at once* to convert the assets without

103; [*Re Brogden*, 38 Ch. D. 546; *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 171;] and see *Rowley* v. *Adams*, 2 H. L. Cas. 725; *Macken* v. *Hogan*, 14 Ir. Ch. R. 220.

(*a*) *Stone* v. *Stone*, 5 L. R. Ch. App. 74.

(*b*) *Westmoreland* v. *Holland*, 23 L. T. N.S. 797; 19 W. R. 302; affirmed W.N. 1871, p. 124.

(*c*) *Mills* v. *Osborne*, 7 Sim. 30; *Maskelyne* v. *Russell*, W.N. 1869, p. 184.

[(*d*) *Anson* v. *Potter*, 13 Ch. D. 141.]

[(*e*) See *Hiddingh* v. *Denyssen*, 12 App. Cas. 624; *Re Chapman*, (1896) 2 Ch. (C.A.) 763, 782.]

(*f*) *Hughes* v. *Empson*, 22 Beav. 183, *per* M.R.

(*g*) Ib.

(*h*) *Field* v. *Peckett* (No. 2), 29 Beav. 576.

(*i*) *Hughes* v. *Empson*, 22 Beav. 181.

considering how far it was for the interest of the persons beneficially entitled, there would of necessity be always an immediate sale, and often at a great sacrifice of property; that executors were entitled to exercise a *reasonable discretion* according to the circumstances of the particular case. The will had directed the trustees to convert "with all convenient speed," but this, observed his Lordship, was the ordinary duty implied in the office of every executor (*a*). [So where a testator bequeathed his personal estate to his executors upon trust to divide the same equally among four persons, all of whom were of age, and the estate comprised foreign railway bonds which the executors retained beyond the end of the first year from the testator's death, it was held by the Court of Appeal, affirming the decision of V. C. Hall, that as the executors acted with a view to what they thought beneficial to everybody interested, and in the exercise of their discretion thought it more prudent to wait, they ought not to suffer because they had committed an error of judgment, and L. J. James observed: "It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it was proved by the result, would have been the best course" (*b*).] But in *Grayburn* v. *Clarkson*, where the testator died possessed of shares in the Leeds Banking Company which involved a liability without limit, and the shares remained unsold for many years, L. J. Wood said that there was no fixed rule that conversion *must* take place by the end of one year, but that such was the *primâ facie* rule, and that executors who did not convert by that time, must show some reason why they did not (*c*); and the Court directed an enquiry whether any loss had accrued by the neglect to sell by the end of one year from the death of the testator, and declared the executor responsible for any such loss (*d*). And again in *Sculthorpe* v. *Tipper* (*e*), where a testator died possessed of shares in an unlimited Banking Company, and directed his executors to realise his personal estate "immediately after his decease, or *so soon thereafter as his trustees might see fit so to do*," the trustees acting, as they believed, for the best

(*a*) *Buxton* v. *Buxton*, 1 M. & Cr. 80.

[(*b*) *Marsden* v. *Kent*, 5 Ch. D. (C.A.) 598; *Re Chapman*, (1896) 2 Ch. (C.A.) 763.]

(*c*) *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 606.

(*d*) *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 605; [*Dunning* v. *Earl of Gainsborough*, 54 L. J. N.S. Ch. 991;] and see *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232.

(*e*) 13 L. R. Eq. 232.

interests of the parties, neglected for *two years and a quarter* to sell the shares, and they were made liable for the consequences, the Vice-Chancellor observing that although a discretion was vested in the trustees, they were bound to exercise it within a reasonable time, that is within a year. This has been considered a somewhat harsh decision. Had the testator simply directed the executors to realise immediately after his decease, they would still have had the year, and the Vice-Chancellor therefore gave no effect to the words of the power, "or so soon thereafter as they might see fit." The question should rather have been, Was the discretion vested in them *bonâ fide* exercised? In another case, where the trustees had an absolute discretion to sell and convert the testator's shares in a banking company, "*at such time or times as they might think proper*," they were held not to be liable for retaining the testator's shares beyond a year from his decease, but were made liable for other new shares in the bank which they had purchased themselves (*a*).

[Absolute discretion.]

[And where an absolute discretion is given to executors to postpone the sale and conversion of the estate, they are not bound by the ordinary rule to convert the property within a year, even although it consists of shares in companies with unlimited liability, and in the absence of *mala fides* they will not be responsible for losses arising to the estate from the non-conversion (*b*); nor will the Court interfere with the exercise of such a discretion by trustees who are acting *bonâ fide* (*c*). Where the trustees cannot agree as to the retention, the absolute trust for conversion must prevail, and the securities be sold accordingly (*d*).

[Investment becoming unauthorised after testator's decease.]

Where shares belonging to a testator are altered in amount after his death and become liable to calls, so as no longer to be an authorised investment according to the terms of the will, the trustees should convert them with reasonable speed (*e*). And where trustees are empowered to invest a trust fund by depositing it with a particular firm, they cannot lend to a firm differently constituted, whether consisting of more or fewer individuals (*f*), and it is their duty, upon a change of partners in the firm, to call in money so invested (*g*).

(*a*) *Edwards* v. *Edmunds*, 34 L. T. N.S. 522; [*Re Johnson*, W. N. 1886, p. 72].

[(*b*) *Re Norrington*, 13 Ch. D. (C.A.) 654.]

[(*c*) *Re Blake*, 29 Ch. D. (C.A.) 913.]

[(*d*) *Re Hilton*, (1909) 2 Ch. 548.]

[(*e*) *Re Morris*, 54 L. J. Ch. 388.]

[(*f*) *Smith* v. *Patrick*, (1901) A.C. (H.L.) 282.]

[(*g*) *Re Tucker*, (1894) 1 Ch. 724, *per* Romer, J.; *S. C.* (1894) 3 Ch. (C.A.) 429.]

But it is now enacted that "a trustee shall not be liable for breach of trust *by reason only* of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law" (*a*). [Trustee Act, 1894.]

4. Where it is for the benefit of infants to retain investments which are not authorised by the terms of the trust, the Court has a discretion to allow such retainer. The Court, however, will not exercise this discretion unless special circumstances are shown to exist, and the mere fact that the unauthorised securities are such as are authorised by sect. 21 of the Settled Land Act, 1882, and that a loss of income would be caused by a conversion, will not induce the Court to allow the securities to be retained (*b*). [Retaining investments for infants *in specie*.

5. Trustees, empowered to retain any part of the estate in its present "form" of investment, were held to be justified in retaining shares in a new company, given in exchange for shares in an old company, the Court being of opinion that in effect the new company was the old company in a new "form," and that the trustees became entitled to the shares because, by virtue of the Companies Act, 1862, the one company replaced the other (*c*); but where the trust comprised shares in a financial company, which had the control of and owned shares in two railway companies, and subsequently the greater part of the capital in the financial company was cancelled, and shares in the railway companies substituted for it, it was held that the last mentioned shares were a substantially different investment from the shares in the financial company, and that the trustees, by the terms of the trust instrument, were not at liberty to "retain" them (*d*).] [Retention of present form of investment.]

6. An executor is not to allow the assets of the testator to remain outstanding upon *personal* security (*e*), though the debt was a loan by the testator himself on what he considered an eligible investment (*f*). And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings (*g*). Personal Personal security.

[(*a*) 57 Vict. c. 10, s. 4, 18th June 1894. The section is not retrospective; *Re Chapman*, (1896) 1 Ch. 323, *per* Kekewich, J.]

[(*b*) *Fox* v. *Dolby*, W. N. 1883, p. 29.]

[(*c*) *Re Smith*, (1902) 2 Ch. 667.]

[(*d*) *Re Anson's Settlement*, (1907) 2 Ch. 424.]

(*e*) *Lowson* v. *Copeland*, 2 B. C. C. 156; *Caney* v. *Bond*, 6 Beav. 486; *Bailey* v. *Gould*, 4 Y. & C. 221; and see *Attorney-General* v. *Higham*, 2 Y. & C. C. C. 634. Where the *chose en action* is recoverable only in equity, a *cestui que trust* may take active steps for getting it in; and as to the effect of laches by the *cestui que trust* in this respect, see *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *Horton* v. *Brocklehurst* (No. 2), 29 Beav. 511.

(*f*) *Powell* v. *Evans*, 5 Ves. 839; *Bullock* v. *Wheatley*, 1 Coll. 130; and see *Tebbs* v. *Carpenter*, 1 Mad. 298; *Clough* v. *Bond*, 3 M. & Cr. 496.

(*g*) *Lowson* v. *Copeland*, 2 B. C. C. 156.

security changes from day to day, by reason of the personal responsibility of the debtor giving the security; and, as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who omits to get in the money within a reasonable time becomes himself the security (*a*). An executor will be equally liable if he knows that a *co-executor* is a debtor to the testator's estate, and does not take the same active steps for recovery of the amount from the co-executor, as it would have been his duty to take against a stranger. And it does not vary the case that the testator himself was in the habit of leaving money in the hands of that co-executor, and treating him as a private banker (*b*). Nor will an executor be excused for not calling in money on personal security by a clause in the will, that the executors are to call in "*securities not approved by them*"; for such a direction is construed as referable to securities upon which a testator's property may allowably be invested, and not as authorising an investment which the Court will not sanction (*c*). If a settlement contain a clause that the trustees are to get in the money "whenever they shall think fit and expedient so to do," they will be liable, if they refrain from enforcing payment out of tenderness to the tenant for life without a due regard to the interests of *all* the *cestuis que trust* (*d*). [And, generally, it is the duty of trustees to press for payment of the trust funds to them, and if they are not paid within a reasonable time, to enforce payment by legal proceedings, and they are especially bound to act promptly where payment is deferred by the terms of the trust to a specified time (*e*); but where there are no funds available, trustees are not bound to institute proceedings at their own expense (*f*).] If it appears, or there is reasonable ground for believing, that had legal steps been taken they would have produced no useful result, the executor or trustee is not liable (*g*); [but where a trustee seeks to

(*a*) *Bailey* v. *Gould*, 4 Y. & C. 226, *per* Baron Alderson; [and see *Re Tucker*, (1894) 1 Ch. 724, 734].

(*b*) *Styles* v. *Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; *Candler* v. *Tillett*, 22 Beav. 257.

(*c*) *Styles* v. *Guy*, 1 Mac. & G. 422; and see *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165.

(*d*) *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194.

[(*e*) *Re Brogden*, 38 Ch. D. (C.A.) 546, 568; *Re Hurst*, 63 L. T. N.S. 665; and as to the effect of s. 21 of the Trustee Act, 1893, replacing s. 37 of the Conveyancing Act, 1881, see *Re Owens*, 47 L. T. N.S. 61, 64.]

[(*f*) *Tudball* v. *Medlicott*, 59 L. T. N.S. 370; 36 W. R. 886.]

(*g*) *Clack* v. *Holland*, 19 Beav. 262; *Hobday* v. *Peters* (No. 3), 28 Beav. 603; *Alexander* v. *Alexander*, 12 Ir. Ch. Rep. 1; *Maitland* v. *Bateman*, 16 Sim. 233, note; *Walker* v. *Symonds*, 3 Sw. 71; [*Re Roberts*, 76 L. T. N.S. 479].

excuse himself on this ground, the burden of showing that if he had taken proceedings no good would have resulted from them lies upon him (*a*)].

Case of trust fund outstanding on mortgage.

7. Money outstanding upon good *mortgage* security an executor is not called upon to realise, until it is wanted in the course of administration (*b*). "For what," said Lord Thurlow, "is the executor to do? Must the money lie dead in his hands, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own peril" (*c*). But the trustee should ascertain that there is no reason to suspect the goodness of the security (*d*); and if it be not adequate, it is the duty of the trustee to insist on payment, though by the terms of the settlement every investment or change of investment is to be with the *consent* of the tenant for life who refuses, for nothing will justify conduct that puts the trust fund in danger (*e*).

How money to be received by trustees.

8. When the property is reduced into possession by actual payment, [the circumstances of the case are often such as render it impracticable or highly inconvenient for both trustees to be present at the payment of the money (*f*), and join in signing the receipt. Where a solicitor is employed, this difficulty has now been obviated by the provision in the Trustee Act, 1893 (*g*), that a trustee may appoint a solicitor to be his agent, to receive and give a discharge for any money under the trust by permitting the solicitor to have the custody of, and to produce a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881 (*h*). Where the transaction is carried out without the intervention of a solicitor, it is possible that the money may be *paid* for the time to one trustee without responsibility on the part of the other (*i*), but in every case

[(*a*) *Re Brogden*, 38 Ch. D. (C.A.) 546, 568; *Re Hurst*, 63 L. T. N.S. 665; *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 171.]

(*b*) *Orr* v. *Newton*, 2 Cox, 274; [*Re Chapman*, (1896) 2 Ch. (C.A.) 763, 787]; and see *Howe* v. *Earl of Dartmouth*, 7 Ves. 150.

(*c*) *Orr* v. *Newton*, 2 Cox, 276.

(*d*) See *Ames* v. *Parkinson*, 7 Beav. 384; [*Re Chapman*, (1896) 2 Ch. (C.A.) 763, 787].

(*e*) *Harrison* v. *Thexton*, 4 Jur. N.S. 550.

[(*f*) If money be laid down on a table in the presence of all the trustees, that is a payment to all of them, and if one of them be commissioned by the others to take it to the bank, that is an act subsequent to the receipt of the money with which the person paying the money is not concerned; *per* Kay, J., *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, 599.]

[(*g*) 56 & 57 Vict. c. 53, s. 17, replacing, as from December 24th, 1888, s. 2 of the Trustee Act, 1888. As to these provisions, *vide post*, Chap. XVIII. s. 2.]

[(*h*) 44 & 45 Vict. c. 41.]

[(*i*) In *Re Flower and the Metropolitan Board of Works*, 27 Ch. D. 592, where the question was as to the payment of purchase-money to

the safer course, where practicable, is that the money should not be handed to either of the trustees personally, but should, in the first instance, be paid into some bank of credit to their joint account].

Receipts of trustees.

9. If money be payable to A., who is simply a trustee for B., it would clearly be a breach of trust to pay it to the trustee against the wishes of the *cestui que trust* (*a*); and, on the other hand, if the nature of the trust be such that the person who has the money ready in his hands could not reasonably be expected to see to the application, he may pay safely to the trustees (*b*). Some cases in Ireland have gone further, and taken a distinction between moneys which are *pure personalty* and moneys payable on *sales or mortgages* (*c*); but the distinction, until adopted by the English Courts, cannot be relied upon.

Statutory power to give receipts; 22 & 23 Vict. c. 35.

10. By the Law of Property Amendment Act, 1859, it was declared that where "*purchase* or *mortgage* money *shall be* payable to a person upon any express or implied trust," and the payment is made *bonâ fide*, the receipt of the trustee "*shall* effectually discharge the person paying the same, unless the contrary *shall be* expressly declared by the instrument creating the trust" (*d*). It seems the better opinion that the clause applies only to trusts created since the Act, viz. 13*th August* 1859, for how can a person expressly declare that an Act shall not apply when the Act itself does not exist? By a more recent Act (*e*), the receipts of trustees for any money generally payable to them under any trust or

23 & 24 Vict. c. 145.

trustees who were selling under a power of sale, Kay, J., expressed the opinion that it would be a breach of trust on the part of one trustee to allow his co-trustee to *receive* the trust money. But the early authorities on the general point were not specially considered, and it is conceived that the rule which was previously established (see *ante*, p. 296, and the cases there cited, note (*b*)) that a trustee joining in a receipt merely for the sake of conformity is not responsible for money not actually received by him, still remains in force. It must, however, be borne in mind that the rule last mentioned was founded on *necessity*, and that as at the present day, through increased means of communication and locomotion and the facilities of passing money through banks, trustees can in most cases at very slight expense avoid the risk of putting the trust-money, even for a moment, in the power of ONE of themselves, the cases in which they can escape liability on the plea of having signed merely for the sake of conformity are more restricted than formerly, and the plea is one which can only be relied upon under exceptional circumstances. As to the power of the trustee under the Public Trustee Act, 1906, to make payments to his co-trustee, see *post*, Chap. XXIII.]

(*a*) *Pritchard* v. *Langher*, 2 Vern. 197.

(*b*) *Glynn* v. *Locke*, 3 Dru. & War. 11.

(*c*) See *Fernie* v. *Maguire*, 6 Ir. Eq. Rep. 137; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342.

(*d*) 22 & 23 Vict. c. 35, s. 23.

(*e*) 23 & 24 Vict. c. 145, ss. 29, 34; and see s. 12. [The Act was repealed by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 71.]

power created by a deed, will, or other instrument executed after 28*th August*, 1860, were made sufficient discharges (*a*), [and now by the Trustee Act, 1893, the receipt in writing of any trustee for any money, securities or other personal property or effects payable, transferable, or deliverable to him under any trust or power, whether the trust be created before or after the commencement of the Act, is made a sufficient discharge (*b*)].

[Trustee Act, 1893.]

11. Where the holder of the money knows that the trustee intends to commit a breach of trust, it would not be safe to pay to the trustee, whether he has by these Acts or otherwise a power of signing receipts or not. But the fact of such a knowledge must be brought home to the person paying, so as to make him *particeps criminis*, a privy to the fraud (*c*).

Receipt of a trustee who is known to intend a breach of trust.

SECTION II

OF THE SAFE CUSTODY OF TRUST PROPERTY

1. Lord Northington once observed: "No man can require or with reason expect that a trustee should manage another's property with the same care and discretion that he would his own" (*d*); but the maxim has never failed, as often as mentioned, to elicit strong marks of disapprobation, [and it is now established on the highest authority that the law requires of a trustee the same degree of diligence and care in the execution of his office that a man of ordinary prudence would exercise in the management of his own affairs (*e*)].

Trustee must take same care of the trust property as of his own.

2. A trustee in an old case had kept in his house 40*l.* of trust money, and 200*l.* belonging to himself, and was robbed of both by his servant, and was held not to be responsible (*f*). An

Robbery of the trust property.

(*a*) As to the doctrine of receipts generally, see *post*, Chap. XVIII. s. 2.

[(*b*) 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36.]

(*c*) See *Fernie* v. *Maguire*, 6 Ir. Eq. Rep. 137; [*Hone* v. *Abercrombie*, 46 J. P. 487].

(*d*) *Harden* v. *Parsons*, 1 Eden, 148.

[(*e*) *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733; and see *Knox* v. *MacKinnon*, 13 App. Cas. 753; *Rae* v. *Meek*, 14 App. Cas. 558, 569;] *Morley* v. *Morley*, 2 Ch. Cas. 2, *per* Lord Nottingham; *Budge* v. *Gummow*, 7 L. R. Ch. App. 720, *per* V. C. Bacon; *Jones* v. *Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Massey* v. *Banner*, 1 J. & W. 247, *per* Lord Eldon; *Attorney-General* v. *Dixie*, 13 Ves. 534, *per eundem*; [*Re Speight*, 22 Ch. D. (C.A.) 739, *per* Jessel, M.R.; *S. C.* in D. P. (nom. *Speight* v. *Gaunt*) 9 App. Cas. 19, *per* Lord Blackburn; and as to the application of the principle to cases of investment, *vide post*, sect. 4].

(*f*) *Morley* v. *Morley*, *ubi sup.*; and see *Jones* v. *Lewis*, 2 Ves. 241; *Ex parte Belchier*, Amb. 220; *Ex parte Griffin*, 2 Gl. & J. 114; [*Jobson* v. *Palmer*, (1893) 1 Ch. 71]. But see *Sutton* v. *Wilders*, 12 L. R. Eq. 377.

administratrix had left goods with her solicitor to be delivered to the party entitled. The articles were stolen; and the Court said it was the same as if they had been in the custody of the administratrix, and it was too hard to charge her with the loss (*a*). Lord Romilly, however, made a distinction between a loss arising from a *criminal act* done by a *stranger*, and a *criminal act* done by an *agent* appointed by the trustee himself, and held that in the latter case, but aggravated by circumstances of carelessness, and where both parties were innocent, the trustee was liable (*b*).

Chattels passing by delivery.

3. Where there are several trustees, as they cannot all have the custody of the property, if the subject of the trust be articles which pass by delivery, as plate, they should be deposited with the bankers of the trustees (*c*). As to stocks transferred by delivery and payable to bearer, as Spanish bonds, Vice-Chancellor Wood observed, that "no doubt the bonds might be kept at the bankers in a box with *three locks*, opened by *three different keys*, one to be kept by each of the three trustees; but as the interest was payable upon *coupons* twice a year, so that the box must be opened as often for that purpose, he thought that ordinary prudence did not require such a course to be adopted, more particularly as it would be the bankers' duty to see that the *coupons* only were taken out of the box, and that neither the box nor the securities were removed"; and so it was decided (*d*). [Where trustees are expressly authorised to retain or invest in securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment of the receipt of them by the bankers (*e*).

Where Russian Railway bonds which passed by delivery were purchased by two trustees, and each of the trustees took possession of a moiety of the bonds, but one of the trustees disposed of the moiety held by him and applied the proceeds for his own purposes, it was held that the other trustee was liable for the misapplication, as it was the duty of the trustees, where the bonds were transferable by delivery, to take care that no improper disposition could be made of them (*f*).

(*a*) *Jones* v. *Lewis*, 2 Ves. 240.

(*b*) *Bostock* v. *Floyer*, 1 L. R. Eq. 28; 35 Beav. 603; [and see *Re Brier*, 26 Ch. D. (C.A.) 238; *Jobson* v. *Palmer*, (1893) 1 Ch. 71; *Shepherd* v. *Harris*, (1905) 2 Ch. 310].

(*c*) *Mendes* v. *Guedalla*, 2 J. & H. 259; [and see *Field* v. *Field*, (1894) 1 Ch. 425].

(*d*) *Mendes* v. *Guedalla*, 2 J. & H. 259; *Consterdine* v. *Consterdine*, 31 Beav. 331; and see *Matthews* v. *Brise*, 6 Beav. 239.

[(*e*) *Re De Pothonier*, (1900) 2 Ch. 529.]

[(*f*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.]

In general it is the duty of trustees to keep their muniments of title as well as their securities under their own control. Title-deeds, however, rest on a different footing from securities, inasmuch as it is often necessary, as for example on the occasion of the realisation of an estate, that the deeds should be in the custody of the solicitor to the trustees. While, therefore, securities such as certificates or bonds payable to bearer, ought not to be left under the control of a solicitor or any other agent, no such absolute rule can be laid down in the case of title-deeds. If, from the nature of the trust, reference to the deeds is rarely required, it is right that they should be locked up in a bank or safe deposit, the trustees keeping the keys; but where the trust property was in course of development as a building estate, it was held, under the circumstances, that the trustees were justified in leaving the deeds in the custody of their solicitors (*a*). In the absence, however, of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee, and placed at a bank in a box accessible only to the trustees jointly (*b*).] [Title-deeds.]

4. An executor has been held *not* to be answerable for having omitted to secure the safety of *leasehold* premises by *insuring* them against fire (*c*). Insurance.

[By the Trustee Act, 1893 (*d*), sect. 18 (*e*), it is enacted that a trustee (*f*) may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof, or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income. The section applies to trusts created either before or after the commencement of the Act, but nothing in the section is to authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument

[(*a*) *Field* v. *Field*, (1894) 1 Ch. 425.]

[(*b*) *Re Sisson's Settlement*, (1903) 1 Ch. 262. As to custody of securities and documents under the Public Trustee Act, 1906, see *post* Chap. XXIII.]

(*c*) *Bailey* v. *Gould*, 4 Y. & C. 221; and see *Ex parte Andrews*, 2 Rose, 410; *Dobson* v. *Land*, 8 Hare, 216; *Fry* v. *Fry*, 27 Beav. 146.

[(*d*) 56 & 57 Vict. c. 53.]

[(*e*) Replacing s. 7 of the Trustee Act, 1888, 51 & 52 Vict. c. 59.]

[(*f*) As defined by s. 50 of the Act, including a trustee whose trust arises by construction or implication of law.]

creating the trust; and the section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so. Chattels settled so as to devolve as heirlooms are "insurable property" within the meaning of the section, and the trustees of the settlement have power to insure such chattels against loss by fire, and to pay the premiums out of income of capital moneys in their hands (*a*).]

Trustee should place trust money in a responsible bank, but not to his own credit.

5. If the subject of the trust be *money*, it may be deposited for *temporary* purposes in some responsible banking-house (*b*), but in such a manner that the *cestuis que trust* may follow the fund into the hands of the bankers (*c*), and it is no objection that the bank allows interest on the deposits (*d*). [But the trustees must not allow the money to remain on deposit longer than the circumstances of the trust require; and where a mortgage was paid off, and the money was placed on deposit at a bank as an interim investment, until a permanent investment could be found, and remained on deposit for fourteen months, when the bank failed, the trustees were held liable for the loss (*e*). And] if the trustee pay the money to his *own credit* and not to the separate account of the trust estate (*f*), or if he allow the drafts of another person to be honoured, who draws upon the account and misapplies the money (*g*), the trustee will be personally liable for the consequences.

Trustee must not put the trust fund out of his own control.

6. And a trustee must not lodge the money in such a manner as to *put it out of his own control*, though it be not under the control of another. White, a receiver appointed by the Court, in order to induce Adams and Burlton to become his sureties, entered into an arrangement with them, that the rents, as received, should be deposited in a bank in the joint names of the

[(*a*) *Re Earl of Egmont's Trusts*, (1908) 1 Ch. 821.]

(*b*) *Routh* v. *Howell*, 3 Ves. 565; *Jones* v. *Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Adams* v. *Claxton*, 6 Ves. 226; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Attorney-General* v. *Randall*, 21 Vin. Ab. 534, *per* Lord Talbot; *Massey* v. *Banner*, 1 Jac. & W. 248, *per* Lord Eldon; *Horsley* v. *Chaloner*, 2 Ves. 85, *per* Sir J. Strange; *France* v. *Woods*, Taml. 172; *Lord Dorchester* v. *Earl of Effingham*, Id. 279; *Wilks* v. *Groom*, 3 Drew. 584; *Johnson* v. *Newton*, 11 Hare, 160; *Swinfen* v. *Swinfen* (No. 5), 29 Beav. 211.

(*c*) *Ex parte Kingston*, 6 L. R. Ch. App. 632.

(*d*) *Re Marcon's Estate*, W. N. 1871, p. 148; 40 L. J. N.S. Ch. 537.

[(*e*) *Cann* v. *Cann*, 33 W. R. 40; 51 L. T. N.S. 770.]

(*f*) *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Mad. 73; *Macdonnell* v. *Harding*, 7 Sim. 178; *Matthews* v. *Brise*, 6 Beav. 239; *Massey* v. *Banner*, 1 J. & W. 241. See observations of L. J. K. Bruce and L. J. Turner on this case in *Pennell* v. *Deffell*, 4 De G. M. & G. pp. 386, 392.

(*g*) *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411; *Evans* v. *Bear*, 10 L. R. Ch. App. 76; and see *Hardy* v. *Metropolitan Land and Finance Company*, 7 L. R. Ch. App. 427; reversing *S. C.* 12 L. R. Eq. 386.

sureties, and that all drafts should be in the *handwriting* of Anderson, who was Adams' partner, and should be signed by White. An account was opened upon this footing, and the bank failed, and a considerable loss was incurred. Sir J. Leach held that the receiver and his sureties were not to be answerable (*a*); but his Honour's decision was reversed on appeal by the Lord Chancellor (*b*); and this reversal was afterwards affirmed on the final appeal by the House of Lords (*c*). [So, by the Trustee Act, 1893 (*d*), although in specified cases a trustee is empowered to appoint a solicitor to be his agent to *receive* money, yet if he permits the money to remain under the control of the solicitor longer than is reasonably necessary to enable the solicitor to pay the money to him, his liability is expressly retained.]

Whether executors may place money in bank payable to either of the co-executors.

7. In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the *joint* account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor *singly*. "It is the custom of bankers," said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors" (*e*). However, his Lordship admitted that "if there were any fraud or collusion, wilful default or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered" (*f*). But even with this qualification the doctrine is so contrary to the principle of other cases that no trustee or executor could be advised to rely upon it in practice (*g*).

Trustee responsible for bank if he ought not to have placed the money there.

8. The trustee will also be answerable for the failure of the bank, if he deposited the money there for safe custody, when it was his clear duty to have invested it in the funds for improvement (*h*), or if he left it there when he ought to have paid it to new

(*a*) *Salway* v. *Salway*, 4 Russ. 60.
(*b*) 2 R. & M. 215.
(*c*) Id. 220. See the argument of Lord Brougham stated from MS. in 3rd Edition, p. 335. [The case in D. P. is reported *sub nom. White* v. *Baugh*, 3 Cl. & F. 44; 2 Bli. N.S., 181.]
[(*d*) 56 & 57 Vict. c. 53, s. 17.]
(*e*) *Kilbee* v. *Sneyd*, 2 Moll. 186, see 200, 213.
(*f*) *Kilbee* v. *Sneyd*, 2 Moll. 203, 213.
(*g*) See *Clough* v. *Dixon*, 8 Sim. 594; 3 M. & Cr. 490; *Gibbins* v. *Taylor*, 22 Beav. 344; *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411.
(*h*) *Moyle* v. *Moyle*, 2 R. & M. 710; Sir W. P. Wood in *Johnson* v. *Newton*, 11 Hare, 169, called it a very strong case, and hard upon the executors.

trustees duly appointed (*a*), or into Court (*b*); or if, when the purposes of the trust do not require a balance to be kept in hand, he lend a sum to the bank at interest upon no other security than their notes, for this in effect cannot be distinguished from an ordinary loan on personal security, which the Court never sanctions (*c*). And if the trustees ought not, under the circumstances, to have left *so large* a balance in the hands of the bankers, they will be liable for the excess beyond the proper balance (*d*). But trustees will not be liable for having left moneys in the hands of a respectable bank during the first year from the testator's death, when there are no special directions in the will for investment, and the estate has not been wound up (*e*). But they will be liable, if, during the first year they draw out of one bank money which ought, by the will, to be invested in Government stocks, and deposit it in another bank at interest, for this is an irregular investment and not a deposit; and a direction in the will that the trustees should not be liable for any *banker* was held not to be material (*f*).

Mixing the trust property with private property.

9. The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own (*g*).

SECTION III

OF CONVERSION

General principle.

1. Express trusts for conversion must, of course, be strictly pursued according to the directions (*h*), and where the trustees have a discretionary *power* to convert or not, or at such time as

(*a*) *Lunham* v. *Blundell*, 4 Jur. N.S. 3.

(*b*) *Wilkinson* v. *Bewick*, 4 Jur. N.S. 1010.

(*c*) *Darke* v. *Martyn*, 1 Beav. 525.

(*d*) *Astbury* v. *Beasley*, 17 W. R. 638.

(*e*) *Johnson* v. *Newton*, 11 Hare, 160; *Swinfen* v. *Swinfen* (No. 5), 29 Beav. 211.

(*f*) *Rehden* v. *Wesley*, 29 Beav. 213.

(*g*) *Lupton* v. *White*, 15 Ves. 432; and *Panton* v. *Panton*, cited Ib. 440; *Chedworth* v. *Edwards*, 8 Ves. 46; *White* v. *Lincoln*, 8 Ves. 363; *Fellows* v. *Mitchell*, 1 P. W. 83; *Gray* v. *Haig*, 20 Beav. 219; *Duke of Leeds* v. *Amherst*, 20 Beav. 239; *Mason* v. *Morley* (No. 1), 34 Beav. 471, and *S. C.* (No. 2), Ib. 475; *Cook* v. *Addison*, 7 L. R. Eq. 466; [*Re Oatway*, (1903) 2 Ch. 356. Where a trustee mortgaged trust property along with his own property, and an account was directed of his receipts in respect of the trust property, he was treated as having raised the money rateably out of the properties according to their respective values: *Rochefoucauld* v. *Boustead*, No. 2, (1898) 1 Ch. 550].

(*h*) See *Craven* v. *Craddock*, 20 L. T. N.S. 638.

they may think fit, the Court cannot interfere with the exercise of the power (*a*). But besides express trusts of this kind, there is frequently imposed upon trustees a duty to convert, not directed in terms, but arising out of the nature of the property, and the relation in which the *cestuis que trust* stand to each other.

Implied conversion in cases of bequests of wasting property to persons in succession.

2. As a general rule, if a testator give his personal estate (*b*), or the residue of his personal estate (*c*), or the interest of his property (*d*), in trust for or directly to (*e*) several persons in succession, and the subject of the bequest is of a wasting nature, as leaseholds, long annuities, &c., the Court implies the intention that such perishable estate should assume a permanent character, and so become capable of succession. The Court accordingly, in these cases, has directed a conversion into Consols (*f*), and trustees and executors are bound to observe the same rule in their administration of property out of Court, and if they fail to do so, will be liable as for a breach of trust (*g*).

Intention to give right of enjoyment *in specie* may be collected from the bequest.

3. But an intention that the property should be enjoyed *in specie* may appear from the form of the bequest, or be collected from the terms in which it is expressed. Thus if there be a *specific bequest* of leaseholds or of stock the specific legatee will take the rents or dividends (*h*). And a power of varying the securities expressly given to the executors will not prejudice the right of the specific legatee, for the testator is held to have given the executors the authority, not with the intention of varying the relative rights of the legatees, but merely with the view of adding security to the property (*i*).

(*a*) *In re Sewell's Trusts*, 11 L. R. Eq. 80; [*Re Pitcairn*, (1896) 2 Ch. 199]. See *ante*, p. 320.

(*b*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137.

(*c*) *Cranch* v. *Cranch*, cited *Howe* v. *Earl of Dartmouth*, 7 Ves. 141, note; *Powell* v. *Cleaver*, cited Ib. 142; *Lichfield* v. *Baker*, 2 Beav. 481; *Crawley* v. *Crawley*, 7 Sim. 427; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441; *Re Shaw's Trust*, 12 L. R. Eq. 124; [*Re Smith's Estate*, 48 L. J. Ch. 205; *Re Whitehead*, (1894) 1 Ch. 678].

(*d*) *Fearns* v. *Young*, 9 Ves. 549; *Benn* v. *Dixon*, 10 Sim. 636. See *Oakes* v. *Strachey*, 13 Sim. 414.

(*e*) *House* v. *Way*, 12 Jur. 959.

[(*f*) *I.e.* formerly 3 per cent. Bank Annuities, and now $2\frac{1}{2}$ per cent. Consolidated Stock under 51 Vict. c. 2, see *post*, s. 4.]

(*g*) *Bate* v. *Hooper*, 5 De G. M. & G. 338. [As to the power of trustees to invest otherwise than in 3 per cent. Bank Annuities, and as to the conversion of the old Government Annuities into stock of lower denomination, see *post*, s. 4, of this chapter.]

(*h*) *Vincent* v. *Newcombe*, Younge, 599; *Lord* v. *Godfrey*, 4 Mad. 455; [and *ex converso* a specific legatee must bear the expense of preservation as from the death of the testator: *Re Pearce*, (1909) 1 Ch. 819]. But it is not necessary that the bequest should technically be specific in order to entitle the tenant for life to enjoy the income *in specie;* see *Pickering* v. *Pickering*, 4 M. & Cr. 299; *Hubbard* v. *Young*, 10 Beav. 205; *Harris* v. *Poyner*, 1 Drew. 181. The case of *Mills* v. *Mills*, 7 Sim. 501, is contrary to the other authorities, and is not law.

(*i*) *Lord* v. *Godfrey*, 4 Mad. 455;

Use of word "*rents.*"

4. Again, if after a mention of leaseholds, there is a general direction to pay *rents* to the tenant for life, this is held sufficient to prevent the application of the general rule (*a*), [but the use of the word *rents* in connection with a gift comprising freeholds and leaseholds will not have the same effect, as the word may be perfectly well satisfied by being attributed to the freeholds (*b*), and the addition of a power to annuitants to distrain will make no difference, as such power is susceptible of a like interpretation (*c*)]. A mere mention of "dividends" is certainly not sufficient to authorise the non-conversion of terminable annuities (*d*). But a bequest of the testator's public funds or government annuities (*e*), or of the "interest, dividends, or income of all moneys or stock, and of all other property yielding income at the testator's death," has been held to be specific (*f*).

Conversion directed at a later period.

5. And if a testator negative a sale at the time of his death by authorising or directing a conversion at a subsequent period (*g*); or if he use any other expressions which assume the leaseholds or stock to be unconverted when by the general rule it would be converted, the doctrine of conversion is excluded (*h*).

and see *Morgan* v. *Morgan*, 14 Beav. 721; *Re Llewellyn's Trust*, 29 Beav. 171; [and see *Re Bland*, (1899) 2 Ch. 336. If leaseholds, which a tenant for life is entitled to enjoy *in specie*, be taken by a company under the provisions of the Lands Clauses Consolidation Act, or sold under the Settled Estates Act, or by the Court in the absence of a trust or power of sale, the purchase money should be converted into an annuity having the same duration as the lease, which should be paid to the person who would for the time being have received the rents of the leaseholds; *Askew* v. *Woodhead*, 14 Ch. D. (C.A.) 27; *Re Walsh's Trusts*, 7 L. R. Ir. 554; *Re Lingard*, (1908) W. N. 107. As to the application of the purchase-money in the case of sales under the Settled Land Act, 1882, of leasehold or reversionary interests, see s. 34 of the Act].

(*a*) *Blann* v. *Bell*, 2 De G. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Re Elmore's Trusts*, 6 Jur. N.S. 1325; and see *Thursby* v. *Thursby*, 19 L. R. Eq. 395.

[(*b*) *Re Game*, (1897) 1 Ch. 881, *per* Stirling, J., following *Harris* v. *Poyner*, 1 Drew. 174, and *Craig* v. *Wheeler*, 29 L. J. N.S. Ch. 374; and not following *Crowe* v. *Crisford*, 17 Beav. 507; *Wearing* v. *Wearing*, 23 Beav. 99, and *Vachell* v. *Roberts*, 32 Beav. 140.]

[(*c*) *Re Game*, *ubi sup.*]

(*d*) *Blann* v. *Bell*, 2 De G. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90; and see *Sutherland* v. *Cooke*, 1 Coll. 503; *Neville* v. *Fortescue*, 16 Sim. 333; *Pidgeon* v. *Spencer*, 16 L. T. N.S. 83.

(*e*) *Wilday* v. *Sandys*, 7 L. R. Eq. 455.

(*f*) *Boys* v. *Boys*, 28 Beav. 436.

(*g*) *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Bowden* v. *Bowden*, 17 Sim. 65; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Alcock* v. *Sloper*, 2 M. & K. 699; [*Simpson* v. *Lester*, 4 Jur. N.S. 1269; 33 L. T. 6; *Gray* v. *Siggers*, 15 Ch. D. 74; *Re Leonard*, 29 W. R. 234; 43 L. T. N.S. 664; *Re Pitcairn*, (1896) 2 Ch. 199;] *Hind* v. *Selby*, 22 Beav. 373; *Skirving* v. *Williams*, 24 Beav. 275; *Harvey* v. *Harvey*, 5 Beav. 134; *Hinves* v. *Hinves*, 3 Hare, 609; *Rowe* v. *Rowe*, 29 Beav. 276.

(*h*) *Collins* v. *Collins*, 2 M. & K. 703; see observations on this case in *Vaughan* v. *Buck*, 1 Ph. 78; *Lichfield* v. *Baker*, 13 Beav. 451; *Harris* v. *Poyner*, 1 Drew. 180; and contrast with the last case *Chambers* v. *Chambers*, 15 Sim. 190; [and see *Re Thomas*, (1891) 3 Ch. 482].

Rule does not assume *intention of a sale.*

6. The rule of the Court under which perishable property is converted does not proceed upon the assumption that the testator in fact intended his property *to be sold*, but is founded upon the circumstance that the testator intended the perishable property to be enjoyed by different persons in succession, which is accomplished by means of a sale (*a*). The Court presumes that intention unless a contrary intention appear on the face of the will, and the only difficulty is, what will constitute a sufficient indication of a contrary intention, the more recent decisions allowing smaller indications to prevail than were formerly deemed necessary (*b*).

Rule as to conversion where property is not wasting, but of a class not authorised by the Court.

7. The object of the rule, under which a direction to convert wasting property is implied, being to secure a fair adjustment of the rights of the tenant for life and those coming after him, it follows that where a residue which, without any express trust for conversion, is bequeathed to persons in succession, consists of property which, though not wasting, is of a class producing a high rate of interest in proportion to its money value, and liable consequently to additional risk, such as railway shares, shares of insurance or other companies, foreign bonds, or stocks, &c., the persons entitled in expectancy have a right to call for the conversion of such property into Consols (*c*). [But where trustees are expressly empowered to retain existing securities, the mere fact that some of the securities retained are of a hazardous nature will not disentitle the tenant for life to the receipt of the income in specie (*d*), so long as the trustees think fit to retain them (*e*), and for this purpose it matters not whether the investments are wasting or permanent (*f*).]

Case of debts.

8. Even where the general estate or residue is directed to be enjoyed *specifically*, the tenant for life is not entitled to enjoy in specie what is not an investment, but a mere debt (*g*); and a special power for the executors and trustees "to *continue* invested

(*a*) *Cafe* v. *Bent*, 5 Hare, 35.

(*b*) *Craig* v. *Wheeler*, 29 L. J. N.S. Ch. 374; *Morgan* v. *Morgan*, 14 Beav. 82; [*Re Pitcairn*, (1896) 2 Ch. 199; See *Macdonald* v. *Irvine*, 8 Ch. D. (C.A.) 101, 124; *Re Game*, (1897) 1 Ch. 881; *Lyons* v. *Harris*, (1907) 1 I. R. 32].

(*c*) *Thornton* v. *Ellis*, 15 Beav. 193; *Blann* v. *Bell*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Wightwick* v. *Lord*, 6 H. L. Cas. 217. But the Court will not allow a mortgage to be called in, without an enquiry whether it is for the benefit of all parties to do so; *per* Lord Eldon, in *Howe* v. *Dartmouth*, 7 Ves. 150.

[(*d*) *Re Sheldon*, 39 Ch. D. 50, distinguishing *Porter* v. *Baddeley*, 5 Ch. D. 542; and see *Re Thomas*, (1891) 3 Ch. 482.]

[(*e*) *Re Bates*, (1907) 1 Ch. 22; *Re Wilson*, (1907) 1 Ch. 394 (distinguishing *Re Chaytor*, (1905) 1 Ch. 233, where there was an express trust for conversion).]

[(*f*) *Re Nicholson*, (1909) 2 Ch. 111.]

(*g*) *Holgate* v. *Jennings*, 24 Beav. 630, *per* M.R.; but it may be doubted whether the general doctrine laid down was rightly applied.

any of the testator's *government securities*," will not justify the trustees in continuing *long annuities* (*a*).

Direction for investment of personal estate and accumulations of income in land.

9. If a testator direct that his personal estate shall be converted and laid out in a purchase of lands, to be settled upon A. for life, with remainders over, and that *the interest of the personal estate shall be accumulated and laid out in a purchase of lands* to be settled to the same uses, the Court, to prevent the hardship that would fall upon the tenants for life, if the purchases were deferred for a long period, either from unavoidable circumstances, or from the dilatoriness of the trustees, interprets the intention in such cases to be that the accumulation should be confined to one year from the testator's death. At the expiration of that period, the Court presumes the trustees to be in a condition to invest the personal estate, and gives the tenant for life the interest from that time (*b*). And, conversely, if a testator devise his real estate to be sold and the produce thereof, and also the *rents and profits of the said estate in the meantime, to be laid out in Bank Annuities or other securities*, upon trust for A. for life, with remainders over, the accumulation of the rents is not extended beyond one year from the testator's death, but the tenant for life is entitled to them from that period (*c*).

Devise of real estate upon trust to sell and invest proceeds and rents until sale.

Produce during first year from testator's death.

10. From the language used by Lord Eldon, in the case of *Sitwell* v. *Bernard* (*d*), (in which the rule that the accumulation, where expressly directed, extends only to one year from the testator's death, was first established,) an impression prevailed that in no case was the tenant for life entitled to the income during the first year of the fund or land directed to be converted, and both Sir John Leach (*e*), and Sir Thomas Plumer (*f*), sanctioned this doctrine by their authority. However, Lord Eldon had no intention of laying down any such rule (*g*), and it has since been settled that where there is no express direction to accumulate, the tenant for life has an interest in the first year's income (*h*), but an interest varying according to the circumstances of the case, as will appear from the following distinctions.

(*a*) *Tickner* v. *Old*, 18 L. R. Eq. 422.

(*b*) *Sitwell* v. *Bernard*, 6 Ves. 520; *Entwistle* v. *Markland*, *Stuart* v. *Bruere*, cited Ib. 528, 529; *Griffith* v. *Morrison*, cited 1 J. & W. 311; *Tucker* v. *Boswell*, 5 Beav. 607; *Kilvington* v. *Gray*, 2 S. & S. 396; *Parry* v. *Warrington*, 6 Mac. 155; *Stair* v. *Macgill*, 1 Bligh, N.S. 662.

(*c*) *Noel* v. *Lord Henley*, 7 Price, 251; *Vickers* v. *Scott*, 3 M. & K. 500; and see *Vigor* v. *Harwood*, 12 Sim. 172; *Greisley* v. *Earl of Chesterfield*, 13 Beav. 288; *Beanland* v. *Halliwell*, 1 C. P. Cooper, *t.* Cottenham, 169, note (*a*).

(*d*) 6 Ves. 520.

(*e*) *Stott* v. *Hollingworth*, 3 Mad. 161.

(*f*) *Taylor* v. *Hibbert*, 1 J. & W. 308.

(*g*) See *Angerstein* v. *Martin*, T. & R. 238; *Hewitt* v. *Morris*, Ib. 244.

(*h*) *Macpherson* v. *Macpherson*, 16 Jur. 847.

(*a*.) The tenant for life of a residue is not entitled to the income accruing during the delay allowed for the *payment of legacies* on so much of the testator's property as is subsequently applied in paying them (*a*). Executors, as between themselves and the persons interested in the residue, are at liberty to have recourse to any funds they please for payment of debts and legacies, but in adjusting the accounts between the tenant for life and remainderman, they must be taken to have paid the debts and legacies not out of capital only or out of income only, but with *such portion of the capital, as together with the income of that portion for one year from the testator's death, was sufficient for the purpose* (*b*). As to *contingent legacies* which may or may not become payable, the tenant for life is, from a rule of convenience, entitled to the income of the fund as part of the residue, until the contingency arises (*c*); [but the rule will not be extended to the interim income of vested legacies payable *in futuro* (*d*)]. Income of property applied in paying legacies.

(*β*.) If a testator desire that his personal estate shall be laid out and invested either in Government or real securities, in trust for A. for life, with remainders over (*e*), or in a purchase of lands with a direction express (*f*) or implied (*g*) for the investment Where funds are in the state they ought to be.

(*a*) *Holgate* v. *Jennings*, 24 Beav. 623; *Crawley* v. *Crawley*, 7 Sim. 427; *Cranley* v. *Dixon*, 23 Beav. 512; *Fletcher* v. *Stevenson*, 3 Hare, 371; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; [*Re Whitehead*, (1894) 1 Ch. 678]. As to the principle to be applied where the debt is compromised, see *Maclaren* v. *Stainton*, 4 L. R. Eq. 448.

(*b*) *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; *Lambert* v. *Lambert*, 16 L. R. Eq. 320; *Marshall* v. *Crowther*, 2 Ch. D. 199. [The principle of *Allhusen* v. *Whittell* (*sup.*) does not apply where the gift is not to a tenant for life, but to one absolutely, with an executory gift over; *Re Hanbury*, (1909) W. N. 157.]

(*c*) *Allhusen* v. *Whittell*, 4 L. R. Eq. 305. [Where a fund was directed to be settled, and income, undisposed of in the event of an interest in remainder not becoming vested, fell into the residue of the testator's estate, the income was held to pass as such to the tenant for life of the residue; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; and where a testator had covenanted for payment of an annuity which his personal estate was insufficient to provide for, it was held, as between tenant for life and remainderman of real estate, that the tenant for life paying the annuity would be entitled in respect of each payment to a charge upon the corpus, but must keep down the interest on the amount so charged; *Re Harrison*, 43 Ch. D. 55; and where residue, which was earning 3 per cent. interest, was subject to a like annuity, each future instalment of the annuity as it accrued was to be apportioned between capital and income, by calculating, what sum, with 3 per cent. simple interest to the day of payment, would have met the particular instalment, and that sum was attributable to capital and the balance to income: *Re Perkins*, (1907) 2 Ch. 596; and see *Re Thompson*, (1908) W N. 195, where in a similar case the trustees were further directed to recoup income from corpus as to instalments already paid.]

[(*d*) *Re Whitehead*, (1894) 1 Ch. 678.]

(*e*) *Hewitt* v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295.

(*f*) *Angerstein* v. *Martin*, T. & R. 232.

(*g*) *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737.

thereof in the meantime in Government or real securities, and that the lands to be purchased shall be in trust for A. for life, with remainders over, the income of the *Government and real securities* of which the testator was possessed at the time of his death (these being the very investments contemplated by his will), belongs *from the time of the death* to the tenant for life.

Where the proper investment is made before the end of the year.

(γ.) If, during the first year, the *conversion* directed by the testator is *actually made*, the tenant for life is also entitled to the produce of the property, in its converted form, from the time of the conversion, as if land be directed to be sold, and the produce invested in Government or real securities (*a*), or money be directed to be laid out on land (*b*), the tenant for life is entitled to the dividends or interest in the first case, from the time of the sale and investment, and to the rents in the latter case from the time of the purchase, though made in the course of the first year.

Where the funds are not at the testator's death in the state they ought to be.

(δ.) Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life is, before the conversion, entitled, as the Court has now decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year, or subsequently; as if personal estate be directed to be laid out in Government or real securities, and part of the personal estate consists of bonds, bank stock, &c. (not being Government or real securities), the tenant for life has been held entitled to the dividends *from the death of the testator on so much Consols as such part of the personal estate, not being Government or real securities, would have purchased at the expiration of one year from the testator's death* (*c*).

(*a*) *La Terriere* v. *Bulmer*, 2 Sim. 18; *Gibson* v. *Bott*, 7 Ves. 89.

(*b*) See *Angerstein* v. *Martin*, T. & R. 240.

(*c*) *Dimes* v. *Scott*, 4 Russ. 195. In *Douglas* v. *Congreve*, 1 Keen, 410, the M.R. gave the tenant for life the actual interest of the personal estate making interest from the death of the testator until the end of one year; and in *Robinson* v. *Robinson*, 1 De G. M. & G. 247, the tenant for life was allowed 4 per cent. from the expiration of one year; but in the cases of *Taylor* v. *Clark*, 1 Hare, 161; *Morgan* v. *Morgan*, 14 Beav. 72; *Holgate* v. *Jennings*, 24 Beav. 623; *Brown* v. *Gellatly*, 2 L. R. Ch. App. 752; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; *Re Llewellyn's Trust*, 29 Beav. 171; *Hume* v. *Richardson*, 4 De G. F. & J. 29, the authority of *Dimes* v. *Scott* was followed; but in the last case (*Hume* v. *Richardson*), the Court gave the tenant for life the income of so much 3 per cent. Consolidated Bank annuities as would have been purchased had the conversion been made at the *testator's death*, and not at the *expiration of one year from the testator's death*. In *Allhusen* v. *Whittell*, 4 L. R. Eq. 295, V. C. Wood considered the true principle to be, to ascertain what part of the testator's estate (including the income of

(*e*.) Where the non-conversion is attended with any risk to the property, as in the case of bonds, &c., the *remainderman*, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce (*a*); but suppose *land* to have yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainderman call back the extra rent received by the tenant for life, or, as the remainderman gets all that was ever intended for him, viz. the undepreciated property, may the tenant for life keep the full rent? If not, then, conversely, if the land yield no annual fruit, or less than the purchase-money would yield, the tenant for life should have a claim against the remainderman (*b*). But if the tenant for life be also a *trustee* for sale, and neglect to sell, he cannot be allowed to put into his own pocket the higher annual produce which has arisen from his own laches, for no trustee can derive a profit from the exercise of his own office (*c*). [Where land was held upon immediate trust for sale, and investment of proceeds and payment of the income to a tenant for life, but there was no power to postpone sale nor any trust of rents until sale, and the sale was, without impropriety, delayed, the tenant for life was held entitled to the interim rents (*d*).]

Case of *ultra* income, but without risk.

[Where no power to postpone sale nor trust of *interim* rents.]

(ξ.) In *Gibson* v. *Bott* (*e*), leaseholds from a defect of title *could*

Gibson *v.* Bott.

such part during the first year from the testator's death) was required for the payment of funeral and testamentary expenses, debts, and legacies, and to give the tenant for life the income of the residue from the testator's death, any part not in a proper state of investment to be taken as invested in Consols at the death of the testator. [Where, upon the construction of the will, the tenant for life was held not to be entitled to the whole income of unauthorised investments retained under a power in the will, the investments were to be valued as at the end of a year from the testator's death, and interest at 4 per cent. was to be allowed to the tenant for life for the time past, and at 3 per cent. *in futuro*: *Re Lynch Blosse*, W. N. (1899) 27; and this has recently been followed, and it has been held that, in applying the principle of *Brown* v. *Gellatly* (*sup.*), interest must at the present day be calculated at the rate of 3 per cent.: *Re Woods*, (1904) 2 Ch. 4.]

(*a*) *Dimes* v. *Scott*, 4 Russ. 195. But see *Stroud* v. *Gwyer*, 28 Beav. 130, which M. R. distinguished from *Dimes* v. *Scott*, on the ground that in the latter the irregular investment existed at the death of the testator, but in *Stroud* v. *Gwyer*, the irregular investment had been made by the trustees. This appears to be a somewhat thin distinction, [and has been doubted in *Re Hill*, 50 L. J. N.S. Ch. 551; 45 L. T. N.S. 126. Where the consent of the tenant for life to change of investment is required, the Court will not readily order a conversion against his will, even though the investment is in bank shares involving personal liability; *Parke* v. *Thackray*, 28 W. R. 21; *Re Mullet*, W. N. 1885, p. 130].

(*b*) See *Yates* v. *Yates*, 28 Beav. 637.

(*c*) See *Wightwick* v. *Lord*, 6 H. L. Cas. 217.

[(*d*) *Hope* v. *D'Hedouville*, (1893) 2 Ch. 361; and see *Re Searle*, (1900) 2 Ch. 829; *Re Earl of Darnley*, (1907) 1 Ch. 159.]

(*e*) 7 Ves. 89,

not be sold, and the Court gave the tenant for life interest at 4 per cent. from the death of the testator on the value. It does not appear from the report at *what time* the value was to be taken, but according to recent cases it should have been ascertained at the expiration of one year from the testator's death (*a*).

Capital coming in by instalments.

(*η.*) Where the testator's estate comprised funds not immediately convertible but *receivable by instalments* such as the testator's share in a partnership assessed at a certain sum and payable by instalments, carrying interest at 5 per cent., the tenant for life was allowed 4 per cent. from the *death of the testator* on the value taken at the *expiration of one year* from the testator's death (*b*). [Where trustees having power to postpone conversion granted a mining lease for twenty-one years under powers in the will, and postponed the conversion for more than twenty-one years, a tenant for life of a settled share of residue was held entitled, after the twenty-one years, to receive out of the rents and royalties such an annual sum as in the opinion of the Court would be a fair equivalent for the annual income that would have resulted if the estate had been converted (*c*).]

Discretion expressly given by the testator.

(*θ.*) If it appear from the terms of the will that the testator intended to give his trustees a *discretion* as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule (*d*); [and such a direction extends to property which is not producing income, such as a reversion, as well as to wasting property (*e*)]. But if the power be so expressed as to negative the intention of varying by its exercise the rights of the parties, the general rule will prevail (*f*).

[Trade profits.]

[11. If the trust estate is improperly employed in trade, and large profits accrue, the tenant for life is only entitled to interest at 4 per cent. on the amount of capital so employed, and the rest

(*a*) See *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737; *Sutherland* v. *Cooke*, 1 Coll. 503.

(*b*) *Re Llewellyn's Trust*, 29 Beav. 171; *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; *Brown* v. *Gellatly*, 2 L. R. Ch. App. 751.

[(*c*) *Wentworth* v. *Wentworth*, (1900) A. C. (P.C.) 163, (it being considered that it would not be expedient to hamper the Court below by laying down any fixed rule as to rate of interest), and see *Re Oliver*, (1908) 2 Ch. 74.]

(*d*) *Mackie* v. *Mackie*, 5 Hare, 70; *Wrey* v. *Smith*, 14 Sim. 202; *Sparling* v. *Parker*, 9 Beav. 524; *Johnstone* v. *Moore*, 4 Jur. N.S. 356; 27 L. J. Ch. 453; *Re Sewell's Trust*, 11 L. R. Eq. 80; [*Re Chancellor*, 26 Ch. D. (C.A.) 42; *Re Thomas*, (1891) 3 Ch. 482; *Re Crowther*, (1895) 2 Ch. 56; *Re Pitcairn*, (1896) 2 Ch. 199;] and see *Murray* v. *Glasse*, 17 Jur. 816.

[(*e*) *Rowlls* v. *Bebb*, (1900) 2 Ch. (C.A.) 107.]

(*f*) *Brown* v. *Gellatly*, 2 L. R. Ch. App. 751; [*Porter* v. *Baddeley*, 5 Ch. D. 542].

of the profits must be added to the capital; but if the income is allowed to remain in the business, and thereby conduces to subsequent accretions of profits, it would seem that the tenant for life is entitled to so much of these accretions as is attributable to his share of the income remaining in the business, and if necessary an enquiry will be directed to ascertain the amount (*a*).]

Reversionary interest converted in favour of tenant for life.

12. The principle upon which the Court implies in favour of those in remainder a direction to convert wasting property (namely, that both tenant for life and remainderman were intended to share in the enjoyment of it), demands equally in favour of the *tenant for life* a conversion of *future* or *reversionary* interests (*b*). Hence if a testator entitled to a reversion expectant on lives direct a conversion and investment of his personal estate, with a discretion to the trustees as to the time, and the trustees decline to sell until in event the reversion falls into possession, here, had the reversion been sold at the end of one year from the testator's death, the tenant for life would have received the interest of the purchase-money, and the fund therefore, when it falls into possession, represents the capital with the interim interest; and the Court, under these circumstances [formerly gave] the tenant for life out of the capital the difference between the money [actually] received and the value of the reversion, estimated at one year from the testator's death, of the sum in question on the assumption of its being payable on the day, when, as afterwards happened, it actually fell into possession (*c*). [But this principle of computation was afterwards modified, and the method now adopted is to ascertain the sum which, put out at interest at a certain rate per annum on the day of the testator's death, and accumulating at compound interest at that rate, with yearly rests would, together with such interest and accumulations, after deducting income tax, amount on the day when the reversion falls in or is realised to the sum actually received; and the sum so ascertained has been treated as representing the corpus, and the difference between that sum and the sum actually received, the income (*d*). The rate of interest taken was formerly 4 per cent., but recently, in view of the

[Rule in *Re Earl of Chesterfield's Trusts.*]

[(*a*) *Re Hill*, 50 L. J. N.S. Ch. 551; 45 L. T. N.S. 126.]

(*b*) *Howe* v. *Lord Dartmouth*, 7 Ves. 148.

(*c*) *Wilkinson* v. *Duncan*, 23 Beav. 469; [*Wright* v. *Lambert*, 6 Ch. D. 649].

[(*d*) *Beavan* v. *Beavan*, 24 Ch. D. 649, n.; *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Wright* v. *Lambert*, 6 Ch. D. 649; *Re Hobson*, 55 L. J. N.S. Ch. 442; 53 L. T. N.S. 627; 34 W. R. 70; *Re Flower, Matheson* v. *Goodwyn*, 62 L. T. N.S. 217, reversed on appeal on the construction of the will, W. N. (1890), p. 152.]

diminished rate of interest which is now obtainable on high-class investments, it has been held that the proper rate of interest to be adopted in this method of computation is now 3, and not 4 per cent. (*a*). The method applies equally to any outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in, as for instance a mortgage debt with arrears of interest (*b*), or arrears of an annuity with interest, or moneys payable on a life policy (*c*), or stock in a gas company at a premium (*d*), or a reversionary interest which has been retained unconverted, although such interest happens to be expectant upon the decease of the tenant for life of residue (*e*), or the profit or loss of a business carried on pending realisation of the estate (*f*).

[Annuities payable under covenant by testator.]

Where a testator covenants to pay annuities, and then by will settles his estate, the successive instalments of the annuities must be borne by income and capital in proportion to the actual values of the life estate and reversion at the testator's death (*g*).

[Principle applied to legacies.]

13. Where a reversionary interest, which was available for the payment of pecuniary legacies, was retained unsold for many years for the benefit of the estate, it was held, when the reversion fell in, that the legatees were entitled to interest on their legacies from the expiration of one year from the testator's death (*h*).

[Limitations to application of general rule.]

14. The rule of apportionment in *Howe* v. *Earl of Dartmouth* (*i*), has no application to the case of a settlement by deed, and therefore, under a covenant in such a deed for settlement of after acquired property, a reversionary interest which becomes subject

[(*a*) *Rowlls* v. *Bebb*, (1900) 2 Ch. (C.A.) 107 ; *Re Goodenough*, (1895) 2 Ch. 537 ; *Re Duke of Cleveland*, (1895) 2 Ch. 542. As to rate of interest generally, see *post*, sect. 5, of this Chapter.]

[(*b*) *Re Broadwood's Settlements*, (1908) 1 Ch. 115, where, the interest on a mortgage which was settled on two successive tenants for life (since deceased) and a remainderman being in arrear, all sums received in respect of the mortgage were treated as payments on account of arrears of interest, and apportioned according to the amounts owing to the tenants for life and remainderman respectively for arrears of interest at the date when each sum was received.]

[(*c*) *Beavan* v. *Beavan ; Re Earl of Chesterfield's Trusts ; Re Hobson ; ubi sup.*]

[(*d*) *Re Eaton*, W. N. 1894, p. 95.]

[(*e*) *Rowlls* v. *Bebb*, (1900) 2 Ch. (C.A.) 107.]

[(*f*) *Re Hengler*, (1893) 1 Ch. 586.]

[(*g*) *Re Dawson*, (1906) 2 Ch. 211, following *Yates* v. *Yates*, 28 Beav. 637, and not following *Re Bacon*, 62 L. J. Ch. 445 ; but see *Re Henry*, (1907) 1 Ch. 30, where Kekewich, J., preferred *Re Bacon* to *Yates* v. *Yates*, and held that where payments of an uncertain amount becoming due from the estate had been by compromise commuted for a fixed sum, the proper course was for the trustees to raise that sum out of the estate.]

[(*h*) *Re Blachford*, 27 Ch. D. 676. As to the mode of apportionment between tenant for life and remainderman where a mortgage security proves insufficient, see *post*, Chap. XXXI. s. 3.]

[(*i*) 7 Ves. 137 ; *ante*, p. 333.]

to the covenant, is not apportionable when it falls into possession (*a*); nor does the rule apply where a will contains a discretionary power to postpone conversion with a direction that until conversion the annual produce of outstanding personal estate shall be deemed annual income (*b*); and the reason of the rule is not generally applicable to an absolute gift subject to an executory limitation (*c*), nor to securities which though hazardous are not of a wasting character, *ex gr.* shares in a colliery company which the trustees were empowered to retain (*d*). It may be questioned whether the rule has ever been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession (*e*).]

SECTION IV

OF INVESTMENT

[In dealing with this subject it will be convenient to consider I., the powers of investment possessed by trustees, *First*, independently of express provision; *Secondly*, under the provisions of a trust instrument; and *Thirdly*, under statute; and II., matters arising in the exercise of those powers.

I. The powers of investment possessed by trustees; *First*, independently of express provision.]

Of investment of trust money.

1. Where trust money (*f*) cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by the *investment* of it on some proper security.

Trustee may not invest on personal security.

2. It was the opinion of Lord Northington that a trustee might be justified in lending on personal credit. "The lending money on a note," he said, "is not a breach of trust, without other circumstances *crassæ negligentiæ*" (*g*). But the case from which this *dictum* is taken has been called by Lord Eldon, from

[(*a*) *Re Van Straubenzee*, (1901) 2 Ch. 779.]

[(*b*) *Rowlls* v. *Bebb*, (1900) 2 Ch. (C.A.) 107.]

[(*c*) *Re Bland*, (1899) 2 Ch. 336.]

[(*d*) *Re Bates*, (1907) 1 Ch. 22, *sup.* p. 335.]

[(*e*) *Re Van Straubenzee*, (1901) 2 Ch. 779, 782.]

[(*f*) The expression "trust money," it may be observed, comprises (1) money passing into the hands of the trustees at the inception of the trust; (2) money belonging to the trust which is outstanding at its inception, and is subsequently received by the trustees; and (3) money received by the trustees as the proceeds of the conversion of trust property.]

(*g*) *Harden* v. *Parsons*, 1 Eden, 148.

the extraordinary doctrines contained in it, "a curious document in the history of trusts" (*a*); and certainly it is now indisputably settled that the trustee *cannot* lend on personal security (*b*). Lord Hardwicke said, "a promissory note is *evidence* of a debt, but no *security* for it" (*c*); and Baron Hotham observed, that "lending on personal credit for the purpose of gaining a larger interest was a species of *gaming*" (*d*); and Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it ought to be *rung in the ears* of every one who acted in the character of trustee" (*e*). And it will not alter the case that the money is lent on the *joint* security of *several* obligors (*f*), or to a person to whom the testator himself had been in the habit of advancing money on personal security (*g*).

Investment on stock of private company.

3. A trustee may not invest the trust fund in the *stock of any private company*, as South Sea *stock*, &c., for the capital depends upon the management of the governors and directors, and is subject to losses. The South Sea Company, for instance, might trade away their whole capital, provided they kept within the terms of their charter (*h*). Nor until the Law of Property Amendment Act, 1859, (*i*) could a trustee invest in Bank stock (*j*). "Bank stock," said Lord Eldon, "is as safe, I trust and believe, as any Government security, but it is not Government security, and therefore this Court does not lay out or leave property in Bank stock; and what this Court will decree, it expects from trustees and executors" (*k*). But a trustee or

(*a*) *Walker* v. *Symonds*, 3 Sw. 92.

(*b*) *Adye* v. *Feuilleteau*, 1 Cox, 24; *Vigrass* v. *Binfield*, 3 Mad. 62; *Darke* v. *Martyn*, 1 Beav. 525; *Holmes* v. *Dring*, 2 Cox, 1; *Terry* v. *Terry*, Pr. Ch. 273; *Ryder* v. *Bickerton*, cited *Harden* v. *Parsons*, 1 Eden, 149, note (*a*), and more fully *Walker* v. *Symonds*, 3 Sw. 80, note (*a*); *Walker* v. *Symonds*, 3 Sw. 63; *Anon. case*, Lofft. 492; *Keble* v. *Thompson*, 3 B. C. C. 112; *Wilkes* v. *Steward*, G. Coop. 6; *Clough* v. *Bond*, 3 M. & Cr. 496, *per Cur.*; and see *Pocock* v. *Reddington*, 5 Ves. 799; *Collis* v. *Collis*, 2 Sim. 365; *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 477; *Watts* v. *Girdlestone*, 6 Beav. 188; *Ex parte Geaves*, 8 De G. M. & G. 291.

(*c*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 80, note (*a*).

(*d*) *Adye* v. *Feuilleteau*, 1 Cox, 25.

(*e*) *Holmes* v. *Dring*, 2 Cox, 1.

(*f*) Ib.

(*g*) *Styles* v. *Guy*, 1 Mac. & G. 423.

(*h*) *Trafford* v. *Boehm*, 3 Atk. 440; see 444; *Mills* v. *Mills*, 7 Sim. 501; *Adie* v. *Fennilitteau*, cited *Hancom* v. *Allen*, 2 Dick. 499, note; *Emelie* v. *Emelie*, 7 B. P. C. 259. The reporter speaks in the last case of South Sea *Annuities;* but no doubt the investment had been made in South Sea *stock*. In *Trafford* v. *Boehm* the investment had been in South Sea *stock*, but the reporter cites the case by a similar mistake as one of investment in South Sea *Annuities*. For the difference between the two, see *Trafford* v. *Boehm*, 3 Atk. 444. *Adie* v. *Fennilitteau*, or more correctly, *Feuilleteau*, has been examined in the Registrar's Book, but the point does not appear.

(*i*) 22 & 23 Vict. c. 35, s. 32.

(*j*) *Hynes* v. *Redington*, 1 Jones & Lat. 589; 7 Ir. Eq. Rep. 405.

(*k*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 150.

executor who by *mistake* invested in Bank stock instead of Bank Annuities, was not liable for the actual loss in sterling value, but only for the excess of the loss beyond that which would have resulted if the investment had been made in Bank Annuities (*a*).

Where no express power, trustees might invest in Consols.

4. In the absence of express powers created by the settlement and irrespective of powers conferred by statute, trustees, executors, or administrators have always been held justified in investing in one of the *Government* or *Bank Annuities;* for here, as the directors have no concern with the principal, but merely superintend the payment of the dividends and interest till such time as the Government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholder (*b*). It should be observed that all *public* annuities are not necessarily *Government* annuities (*c*); and of the Government or Bank annuities, the one which the Court thought proper to adopt was the *Three per Cent. Consolidated Bank Annuities* (*d*), the fund which at the time when the rule of the Court was established was considered from its low rate of interest the least likely to be determined by redemption (*e*). If a trustee, who had money in hand which he ought to have rendered productive, invested it on this security, he was held to have done his duty, and not to be answerable for any subsequent depreciation (*f*).

Investment on other stock ordered under particular circumstances.

5. The Court, however, under *special* circumstances invested in other Government Stock than Consols. Thus, a testator gave his residuary estate to executors upon trust to pay the annual produce to A. for life in equal portions at *Lady-day* and *Michaelmas-day,* and after his decease in trust for other purposes. A motion was made that the executors might invest a sum in their hands in the Three per Cent. Consolidated Bank Annuities, but it was objected that the dividends of this stock were payable in January and July; whereas, if the money were laid out in the *Three per Cent. Reduced Annuities,* the dividends would be payable at the time directed by the testator; and Sir John Leach made the order accordingly (*g*).

(*a*) *Hynes* v. *Redington*, 7 Ir. Eq. Rep. 405; 1 Jones & Lat. 589; see *post*, Chap. XXXI. s. 3.

(*b*) *Trafford* v. *Boehm*, 3 Atk. 444, *per* Lord Hardwicke.

(*c*) *Sampayo* v. *Gould*, 12 Sim. 435.

[(*d*) Now converted under 51 Vict. c. 2; see *post*, p. 360.]

(*e*) See *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, 151.

(*f*) *Ex parte Champion*, cited *Franklin* v. *Frith*, 3 B. C. C. 434; *Powell* v. *Evans*, 5 Ves. 841, and *Howe* v. *Earl of Dartmouth*, 7 Ves. 150; *Knight* v. *Earl of Plymouth*, 1 Dick. 126, *per* Lord Hardwicke; *Peat* v. *Crane*, cited *Hancom* v. *Allen*, 2 Dick. 499, note; *Clough* v. *Bond*, 3 M. & Cr. 496, *per* Lord Cottenham; *Holland* v. *Hughes*, 16 Ves. 114, *per* Sir W. Grant; *Moyle* v. *Moyle*, 2 R. & M. 716, *per* Lord Brougham; and see *Jackson* v. *Jackson*, 1 Atk. 513.

(*g*) *Caldecott* v. *Caldecott*, 4 Mad. 189.

Whether trustees might invest on any other Government security.

6. In the report of *Hancom* v. *Allen* (*a*) it is said, "The trust money had been laid out by the trustees in *funds* which sunk in their value, without any *mala fides;* but the same not being laid out in *the fund* in which the Court directs trust money to be laid out, the trustees were ordered to account for the principal and pay it into the Bank, and then that it should be laid out in *Bank Three per Cent. Annuities.*" It might be inferred from this statement, that, if a trustee before the recent Acts had invested in any other Government security than the Three per Cent. Consols, the Court would have held him accountable for any loss by a fall of the stock; but such a doctrine would have been extremely severe against trustees (*b*), and the case, as extracted from the Registrar's book, is no authority for any such proposition. Thomas Phillips, a trustee of 1500*l.*, instead of investing the money in a purchase of land, and in the meantime on some sufficient security, as required by the trust, had advanced it to his brother, John Phillips, a banker, without taking any other precaution than accepting a simple acknowledgment of the loan. John Phillips continued to pay interest upon the money for some time, but eventually became insolvent, and the fund was lost. The Court, under these circumstances, called upon the trustee to make good the amount. The decision was reversed in the House of Lords, probably on the ground of the plaintiff's acquiescence (*c*).

Investments on mortgage.

7. With respect to investments upon *mortgage* Lord Harcourt said: "The case of an executor's laying out money without the indemnity of a decree, if it were on a *real security and one that there was no ground at the time to suspect*, had not been settled: but it was his opinion that the executor, under such circumstances, was not liable to account for the loss" (*d*). And Lord Hardwicke (*e*) and Lord Alvanley (*f*) appear likewise to have held that a trustee or executor would be justified in laying out the trust fund upon well-secured *real estates.* But Lord Thurlow, upon application made to him to lay out on mortgage money belonging to a lunatic, observed, that "in *latter* times the Court had considered it as improper to invest any part of a lunatic's estate upon *private* security" (*g*). And Sir John

(*a*) 2 Dick. 498.
(*b*) See *Angell* v. *Dawson*, 3 Y. & C. 316; *Ex parte Projected Railway*, 11 Jur. 160; *Matthews* v. *Brise*, 6 Beav. 239; *Baud* v. *Fardell*, 7 De G. M. & G. 628.
(*c*) *Allen* v. *Hancorn*, 7 B. P. C. 375.
(*d*) *Brown* v. *Litton*, 1 P. W. 141, and see *Lyse* v. *Kingdom*, 1 Coll. 188.
(*e*) *Knight* v. *Earl of Plymouth*, 1 Dick. 126.
(*f*) *Pocock* v. *Reddington*, 5 Ves. 800.
(*g*) *Ex parte Cathorpe*, 1 Cox, 182; *Ex parte Ellice*, Jac. 234.

Leach refused a similar application with reference to the money of infants, at the same time expressing his surprise that any precedent could have been produced to the contrary (*a*). Where there was no power of investing on mortgage, and the trustees intending to invest on government securities, afterwards, *at the instance of the tenant for life*, and to procure a higher rate of interest, invested on mortgages which proved deficient, they were held to be liable for the difference to the *cestui que trust* in remainder. The ground of the decision, however, was, that the trustees had consulted the benefit of the tenant for life at the expense of the remainderman, and the Court gave no opinion upon the dry question, whether trustees without a power could safely invest on mortgage, but did not encourage the idea that they could (*b*). Trustees, until the Acts to be presently mentioned, were certainly not justified in lending upon *mortgage*, when by the terms of their instrument of trust they were expressly directed to invest in the *funds* (*c*).

Secondly. Of powers of investment under the provisions of a trust instrument.

Trustee, if expressly empowered, may lend on personal security.

1. A trustee may lend even on *personal* security, where he is *expressly empowered* to do so by the instrument creating the trust (*d*). But no such authority is communicated by a direction to place out the money at interest *at the trustee's discretion* (*e*), or *on such good security as the trustee can procure, and may think safe* (*f*). And if joint trustees be empowered to lend on personal security, they *may not lend to one of themselves*, for the settlor must be taken to rely upon the united vigilance of *all* the trustees with respect to the solvency of the *borrower* (*g*); and trustees having a power, with the *consent of the tenant for life*, to lend on personal security, [are not, it seems, necessarily precluded from lending on personal security to the tenant for

(*a*) *Norbury* v. *Norbury*, 4 Mad. 191; and see *Widdowson* v. *Duck*, 2 Mer. 494; *Ex parte Ellice*, Jacob, 234; *Ex parte Fust*, 1 C. P. Cooper, T. Cott. 157, note (e); *Ex parte Franklyn*, 1 De G. & Sm. 531; *Barry* v. *Marriott*, 2 De G. & Sm. 491; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hog. 309.

(*b*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104.

(*c*) *Pride* v. *Fooks*, 2 Beav. 430; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331.

(*d*) See *Forbes* v. *Ross*, 2 B. C. C. 430; *S. C.* 2 Cox. 113; *Paddon* v. *Richardson*, 7 De G. M. & G. 563.

(*e*) See *Pocock* v. *Reddington*, 5 Ves. 794; *Potts* v. *Britton*, 11 L. R. Eq. 433; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*f*) *Wilkes* v. *Steward*, G. Coop. 6; *Styles* v. *Guy*, 1 Mac. & G. 422; *Attorney-General* v. *Higham*, 2 Y. & C. C. C. 634; and see *Mills* v. *Osborne*, 7 Sim. 30; *Westover* v. *Chapman*, 1 Coll. 177.

(*g*) —— v. *Walker*, 5 Russ. 7; and see *Stickney* v. *Sewell*, 1 M. & Cr. 14; *Westover* v. *Chapman*, 1 Coll. 177.

life himself (*a*), but ought not to do so if he is a man to whom such an advance cannot be prudently made (*b*)]. And when the Court has assumed the administration of the estate by the institution of a suit, it has declined to direct an investment on personal security, though there was a *power* to lay out on either personal or Government security, but has ordered all future investments to be made on Government security (*c*).

A power to lend on personal security may mean on the security of personal property, or the security of the personal undertaking of the borrower, and where the trustees had the last-mentioned power and lent upon a note of hand, the Court allowed the loan, but directed a bond to be taken (*d*).

Where empowered to lend on personal security, trustee may not *accommodate* a person.

2. Where the trustees of a sum of money for A. for life, remainder for her children, were authorised by the settlement to lend the trust fund upon real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in *trade* whom A. had married, and the money was lost, they were made responsible for the amount. Sir William Grant said: "The authority did not extend to an *accommodation:* it was evident the trustees had, upon the marriage, been induced to *accommodate* the husband with the sum, which they had no power to do" (*e*). And in another case, where a trustee was even *required* at the request of the wife to advance money to the husband upon his bond, and the husband took the benefit of the Insolvent Act, and the wife requested the trustee to advance 80*l.* to the husband upon his bond, and the trustee refusing, the wife filed her bill to have the trustee removed, the Court said, "that so total a change had taken place in the circumstances and position of the husband, that the clause in question became no longer applicable to him and ceased to have any effect, and the trustee had done his duty when he refused to lend the money" (*f*).

Tenant for life not to be favoured.

3. No applications from *cestuis que trust* to their trustees are so frequent as for a more productive investment for the benefit

[(*a*) *Re Laing's Settlement*, (1899) 1 Ch. 593.]

[(*b*) *Keays* v. *Lane*, 3 I. R. Eq. 1. But a tenant for life whose consent is necessary to the exercise of a power of sale by trustees, may purchase from the trustees. See *post*, Chap. XVIII. s. 3.]

(*c*) *Holmes* v. *Moore*, 2 Moll. 328.

(*d*) *Pickard* v. *Anderson*, 13 L. R. Eq. 608.

(*e*) *Langston* v. *Ollivant*, G. Coop. 33. In this case, as the person to whom the money was lent was a *trader*, it has been inferred that under a power to lend on personal security the truste cannot lend to a *trader*, but the Court has never yet gone to that extent.

(*f*) *Boss* v. *Godsall*, 1 Y. & C. C. C. 617; and see *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172. Compare cases, at p. 377, note (*d*), *post*.

of the tenant for life. In these cases the trustees must remember that any special power which the settlement may give them was not created for the purpose of favouring one party more than another, but for the benefit of *all*, and that if they lend themselves improperly to the views of the tenant for life, at the expense of the remaindermen, they will be held personally responsible (*a*); and where trustees have the ordinary power of varying securities *with the consent of the tenant for life*, the trustees must consider the intention to be that as the control is given to the tenant for life for *his* protection, so the trustees have a particular discretion reposed in them for the protection of the *remaindermen* (*b*). And on the other hand, where every change of investment is to be with the *consent* of the tenant for life, and he withholds his consent though the fund is in danger, the trustee can proceed in equity and compel a change of investment against the wishes of the tenant for life (*c*). [And the Court has refused to hear counsel for trustees in support of an application by the tenant for life whose interest was opposed to those of the remaindermen (*d*).]

Trustees bound to protect the remaindermen.

4. All the conditions annexed to the power must be strictly observed, as if the authority be to lend to the husband *with the consent of the wife*, the trustees cannot make the advance on their own discretion, and take the consent of the wife at a subsequent period (*e*). And if the consent of two trustees be required, the consent of one of them does not operate as the consent of both (*f*). And where the consent of a married woman was necessary to authorise an investment with the sanction of the Court, a *petition* by the husband and wife praying for such investment was no consent by the wife, for the petition was regarded as that of the husband only (*g*), nor will a married woman be deemed to have consented to an investment by joining

Consent.

(*a*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; and see *Stuart* v. *Stuart*, 3 Beav. 430; *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145; *Vickery* v. *Evans*, 3 N. R. 286; [*Re Dick*, (1891) 1 Ch. (C.A.) 423, 431; *S. C.* in H. L. (1892) A. C. 112, *nom. Hume* v. *Lopes*; *Mara* v. *Browne*, (1895) 2 Ch. 83, *per* North, J.]

(*b*) See *Harrison* v. *Thexton*, 4 Jur. N.S. 550.

(*c*) *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172.

[(*d*) *Re Hotchkin's Settled Estates*, 35 Ch. D. 41 (North, J.).]

(*e*) *Bateman* v. *Davis*, 3 Mad. 98.

(*f*) *Greenham* v. *Gibbeson*, 10 Bing. 363.

(*g*) *Norris* v. *Wright*, 14 Beav. 291, see 303. [But now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and Rules of the Supreme Court, Order 16, Rule 16, a married woman petitions without a next friend, and a petition by husband and wife is not necessarily regarded as the petition of the husband only; and such a petition would, it is conceived, if presented under the wife's instructions, operate as a consent by her.]

in a deed of appointment of new trustees, in which such an investment is recited or noticed, for the deed is executed *alio intuitu* (*a*). Where the consent of two trustees is not required to be by *deed*, one may consent by deed and the other by parol (*b*). Where the nature and object of the power and the circumstances of the case point to a *previous* or *contemporaneous* consent, then such previous or contemporaneous consent is necessary, although not *expressly* required by the terms of the power (*c*). If, for instance, a consent be required for the substitution of one estate for another, the consent must precede or at all events accompany the execution of the power, for the question must be determined by the relative values of the two estates, at the time of substitution (*d*). [And a consent by a wife to the exercise by the trustees of a power to lend the trust money to her husband cannot be given *prospectively* (*e*).] But if an investment has been made without the required consent, a *cestui que trust* cannot complain of it, who, being *sui juris* at the time, acquiesced in and adopted the investment (*f*).

[Alteration of range of investments.]

[The donee of a power of appointment, making a partial appointment only, and allowing the bulk of the property to devolve as in default of appointment under the trust instrument, cannot alter the range of investments authorised thereby (*g*).]

Investment in trade.

5. A power to "invest at the *discretion* of the trustees," will not authorise an investment on the securities of the *United States*, or of the railway companies in that country (*h*); and a power "to place out at *interest*, or other way of *improvement*," will not authorise an investment of the money in any trading concern (*i*); or in fact any investment but a Government or real or other unobjectionable security (*j*). It has been held that a direction not to "invest" but to "employ" the money, savours of a trading concern (*k*); but the distinction appears too thin to be relied upon with safety. [A power to trustees for a brewery company to invest in any securities authorised by law for

(*a*) *Wiles* v. *Gresham*, 2 Drew. 258, see 267; [and in order to show consent, it is necessary that there should be knowledge of the nature of the proposed investment; *Re Massingberd's Settlement*, 63 L. T. N.S. 296, 299 (C.A.)].

(*b*) *Offen* v. *Harman*, 1 De G. F. & J. 253.

(*c*) *Greenham* v. *Gibbeson*, 10 Bing. 374, *per* Tindal, C.J.

(*d*) *Greenham* v. *Gibbeson*, 10 Bing. 363.

[(*e*) *Child* v. *Child*, 20 Beav. 50.]

(*f*) *Stevens* v. *Robertson*, 37 L. J. N.S. Ch. 499; 18 L. T. N.S. 427; 16 W. R. 724.

[(*g*) *Re Falconer's Trusts*, (1908) 1 Ch. 410.]

(*h*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*i*) *Cock* v. *Goodfellow*, 10 Mod. 489.

(*j*) *Dickonson* v. *Player*, C. P. Cooper's cases, 1837-8, 178.

(*k*) *S. C.*

investment of trust funds was held to extend to an investment on mortgage of a licensed house belonging to the company (*a*).]

Loan by way of annuity.

6. Upon a marriage the wife's portion was settled upon the intended husband and wife for their respective lives, with remainder to the issue, and a power was given to the trustees to "call in and lay out the money at greater interest if they could." The trustees sold out stock to the amount of 400*l.*, and laid it out in the purchase of an *annuity* for one life, and *insured* the life, and Lord Manners said the purchase of the annuity was not a proper disposition of a trust fund settled as this was (*b*).

Loans upon shares of companies.

7. A power to invest "upon *security* of the funds of any company incorporated by Act of Parliament," will not authorise an investment in "Great Northern Preference *shares*," which are not a security upon the property of the company, but a participation in the partnership (*c*). [A power to invest in the shares or securities of a "company incorporated *by* Act of Parliament," will not authorise an investment in securities of a company which is only incorporated by registration under the Companies Acts (*d*); but such a power was held to extend to shares in the London Assurance, a company constituted under a charter deriving its force from a preceding Act of Parliament (*e*). A power to invest in the securities of any "railway or other public company" includes securities of companies under the Companies Acts, as such companies are incorporated under the authority of a public statute, the instruments forming their constitution are accessible to the public, and their shares are transferable to the public (*f*); but a power to invest in "any of the public funds, or in Government or real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public companies," is confined to public companies in the United Kingdom, so that the trustees are not at liberty to retain shares in an American steamship company, which have been substituted, under an amalgamation scheme, for shares in an English steamship company (*g*).

[Company incorporated by Act of Parliament.]

[Public company.]

[(*a*) *Re Bentley's Yorkshire Breweries*, (1909) 2 Ch. 609.]

(*b*) *Fitzgerald* v. *Pringle*, 2 Moll. 534.

(*c*) *Harris* v. *Harris*, No. 1, 29 Beav. 107; [and see *Murphy* v. *Doyle*, 29 L. R. Ir. 333, and *Re Rayner*, (1904) 1 Ch. (C.A.) 176, where the word "securities," having regard to the context, was held to mean "investments," and to include stocks and shares in railway and other companies, and it was questioned how far the word at the present day has acquired an extended meaning in legal documents. This was followed in *Re Gent and Eason's Contract*, (1905) 1 Ch. 386; and see *Re Tapp and London Dock Company*, (1905) W. N. 85, 92, where ground rents were held to be "securities" for the purposes of the particular instrument].

[(*d*) *Re Smith; Davidson* v. *Myrtle*, (1896) 2 Ch. 590.]

[(*e*) *Elve* v. *Boyton*, (1891) 1 Ch. (C.A.) 501.]

[(*f*) *Re Sharp*, 45 Ch. D. (C.A.) 286; and see *Re Lysaght*, (1898) 1 Ch. (C.A.) 115, 122.]

[(*g*) *Re Castlehow*, (1903) 1 Ch. 352.]

But where the power was to invest in the stocks, funds or securities of "any corporation or company, municipal, commercial or otherwise" or in Indian annuities, or in any trustee securities authorised by English law, the trustees had power to invest in the stocks, funds or securities of companies, incorporated, and unincorporated, formed or registered within the United Kingdom, but carrying on business abroad, and also of companies formed or registered outside the United Kingdom (*a*); and the expression "companies in the United Kingdom," will extend to companies registered in this country but carrying on operations abroad (*b*).]

Debentures.

8. A power to lend on the *debentures* (*c*) of a public company would not, it is conceived, authorise an investment on debenture *stock;* for the settlor, in allowing debentures, relied on the liability of the company to pay the capital; but in debenture stock the dividend only can be recovered, and there are no means of realising the capital but by transfer, and the value in the market may have greatly sunk. Debenture bonds are a temporary loan, but debenture stock is perpetual. However, [by the Debenture Stock Act, 1871 (*d*), which is now incorporated in the Trustee Act, 1893 (*e*)], where power is given to trustees to invest in the mortgages or bonds of a railway or other company, such power, unless the contrary is expressed in the instrument, is deemed to include a power to invest in the *debenture stock* of a railway or other company.

Terminable securities.

9. And where a fund is settled upon trust for one for life with remainders over, a power to "invest upon Government, real, or personal security, or in such stocks, funds, or shares, as the trustees in their *absolute discretion may think fit*," will not authorise a purchase of ordinary consolidated stock, or of preference or guaranteed stock of a *terminable character* (*f*).

Direction to retain investments.

10. If a testator direct his "personal estate invested in Government or *other securities in bonds or shares*, of whatever nature or kind, to be held in the same or the like investments," the executors are justified in retaining in specie Victoria bonds, Brazilian and Russian bonds, and English and Indian Railway

[(*a*) *Re Stanley*, (1906) 1 Ch. 131.]

[(*b*) *Re Hilton*, (1909) 2 Ch. 548.]

[(*c*) It has been held that any document which either creates a debt or acknowledges it is a "debenture"; *Edmonds* v. *Blaina Furnaces Company*, 36 Ch. D. 215; *Levy* v. *Abercorris Slate Company*, 37 Ch. D. 260.]

[(*d*) 34 Vict. c. 27, June 29, 1871.]

[(*e*) 56 & 57 Vict. c. 53, s. 5, sub-s. 2, see *post*, p. 369.]

(*f*) *Stewart* v. *Sanderson*, 10 L. R. Eq. 26.

stock, and East India stock (*a*). [If shares in a banking company are given to trustees "upon trust to permit them to remain in their then state of investment," but the company is reconstituted, and the shares which were originally fully paid up with unlimited liability are converted into shares of limited liability, but with a margin of uncalled capital, the authority to retain the shares is exhausted, as they have ceased to be in the same state of investment (*b*). Where a will contains an express trust for conversion, and unauthorised securities are retained under a power conferred on the trustees, the tenant for life is (in the absence of special direction) only entitled to interest at 3 per cent. on the value of such securities at the testator's death, whether of a wasting character or not, and any surplus dividends must be invested (*c*).] [Effect of trust for conversion.]

11. If a trust fund be given to *three* trustees, with power to sell out and invest in the shares of a company, the trustees may not sell out and invest in the shares of a company which requires the shares to be held by a *single person*. But if shares in such a company be specifically bequeathed to three trustees, they are justified from the nature of the case in taking the shares in the name of *one* of themselves (*d*). Shares which must stand in one name only.

12. Where moneys paid into Court were directed by an Act to be invested in "Three per Cent. Consols, or Three per Cent. Reduced, or *any Government securities*," the Court refused to allow an investment on Exchequer bills, as not within the meaning of the Act (*e*); but where a trustee had engaged to lend a sum upon mortgage, which was authorised by the powers of the will, and instead of leaving the money idle at his bankers, laid it out in Exchequer bills as a temporary investment, and productive of interest with little fluctuation of value during the interval while the mortgage was in preparation, the Court held that such a dealing with the funds was justifiable (*f*); and it has since Exchequer bills.

(*a*) *Arnould* v. *Grinstead*, W. N. 1872, p. 216; 21 W. R. 155.

[(*b*) *Re Morris*, 54 L. J. Ch. 388; 33 W. R. 445; 52 L. T. N.S. 462; and see *Re Smith*, (1902) 2 Ch. 667, *ante*, p. 323.]

[(*c*) *Re Chaytor*, (1905) 1 Ch. 233 (not following *Bulkeley* v. *Stephens*, 3 N. R. 105). For cases in which there was no trust for conversion, see *Re Wilson* and other cases cited, *ante* p. 335 note (*e*).]

(*d*) *Consterdine* v. *Consterdine*, 31 Beav. 330; and see *Mendes* v. *Guedella*, 2 J. & H. 259; [*Lewis* v. *Nobbs*, 8 Ch. D. 591; *Re Roth*, 74 L. T. N.S. 50; W. N. 1896, p. 16].

(*e*) *Ex parte Chaplin*, 3 Y. & C. 397.

(*f*) *Matthews* v. *Brise*, 6 Beav. 239. But the trustee having left the Exchequer bills in the hands of the broker for more than a year, and without being earmarked, and the broker having disposed of the Exchequer bills for his own purposes, and become bankrupt, the trustee was, on *that ground*, made responsible for the value of the bills at the date of the bankruptcy, with 4 per cent. interest.

been ruled that Exchequer bills do fall within the description of Government securities (*a*); and [as will be seen hereafter, they are now expressly authorised as trust investments by statute (*b*)].

Foreign securities.

13. Stock of the United States, and even the bonds and debentures of the particular states, come under the description of "*foreign funds*," but not so the bonds or debentures of municipal towns or railway companies abroad (*c*). [And where a power was given to trustees to invest "upon any of the stocks or funds of the Government of the United States of America or of the Government of France, or *any other Foreign Government*," it was held that investments in New York and Ohio stocks and Georgia bonds were authorised by the power (*d*).] And where trustees were empowered to "continue or change securities from time to time, *as to the majority should seem meet*," and they proposed to call in certain securities and invest in American Government and American railway securities, the Court in an administration suit would not allow the trustees to exercise their discretion in this way, though great part of the testator's own estate was left by him thus invested (*e*). [But where a testator gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities, and the will contained a proviso authorising the trustees, as often as they should think it expedient so to do, to sell out, transfer or otherwise vary the trust moneys, funds, and securities, and to invest the same in or on *any other funds or securities whatsoever*, it was held that the trustees were acting within their powers in selling out New Three per Cent. Annuities, and investing the proceeds in Russian Railway bonds and Egyptian bonds (*f*).

[Indian railways]

14. The Court has even in an administration action sanctioned the conversion of Bank Annuities into East India Railway stock annuity B., and into Scinde, Punjaub and Delhi Railway 5*l.* per cent. guaranteed stock, where the will authorised an investment in the guaranteed stock of any Railway Company in India, notwithstanding that the Scinde, Punjaub, and Delhi Railway was,

(*a*) *Ex parte South Eastern Railway Company*, 9 Jur. 650.

[(*b*) For information as to the nature of Exchequer bills, see Vaizey on Investments, 89, 90; and Marrack's Statutory Trust Investment Guide, ed. 1896, pp. 6, 7. In the *Encyclopædia Britannica*, vol. xxviii. p. 347, it is stated that Exchequer bills "became extinct in 1897, and are not likely to be revived."]

(*c*) *Ellis* v. *Eden*, 23 Beav. 543; *Re Langdale's Settlement Trusts*, 10 L. R. Eq. 39.

[(*d*) *Cadett* v. *Earle*, 5 Ch. D. 710.]

(*e*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

[(*f*) *Lewis* v. *Nobbs*, 8 Ch. D. 591; and see *Blount* v. *O'Connor*, 17 L. R. Ir. 620; *Re Roth*, 74 L. T. N.S. 50.]

like most of the Indian Railways, held only on a lease under Government (*a*).

15. However large the power of investment may be, it is the duty of the trustees to exercise their discretion as to the choice of investment, and they should, before investing in the shares of a company, have regard to its constitution and its rights against its shareholders (*b*). But if their discretion be exercised *bonâ fide*, the mere fact that the shares are not fully paid up will not make the investment an improper one (*c*); and where trustees were authorised to invest in such securities as they "thought fit," an investment, honestly made, in debentures to bearer issued by a limited company by way of floating security, was held not to be a breach of trust (*d*).] [Shares in companies.]

16. Where a testator directed all his property, except ready money or moneys in the *funds*, to be converted, and the proceeds to be invested in Three per Cent. Consols or *other Government securities in England*, it was held that Greek *bonds*, though guaranteed by this country, were not comprehended in the words "*funds*," and that they ought to be converted, though the Court disavowed any intention of saying that bonds of that description might not, in other cases, be deemed Government securities (*e*). Greek bonds.

17. A power to invest on "the bonds, debentures, or other securities, or the stocks or funds of any *colony or foreign country*," will not authorise an investment upon the Preference Bonds of a *foreign railway company*, though a sinking fund for paying off the capital expended, and the payment of the interest in the meantime, are guaranteed by the foreign government (*f*). [Where trustees are empowered to invest "in such mode or modes of investment as they in their uncontrolled discretion shall think proper," they cannot be made personally liable for investments made *bonâ fide* in the purchase of bonds of a foreign government, bonds of a colonial railway company, or shares of a bank on which there is a further liability; but if an action is pending for the administration of the estate, the Court will not allow such investments to be retained; but has under such a power authorised an investment in the inscribed stocks Colony or foreign country.

[(*a*) *Re Mansel*, 30 W. R. 133; 45 L. T. N.S. 741. See 42 & 43 Vict. c. ccvi., s. 37.]

[(*b*) *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. D. (C.A.) 302.]

[(*c*) *Re Johnson*, W. N. 1886, p. 71.]

[(*d*) *Re Smith*, (1896) 1 Ch. 71.]

(*e*) *Burnie* v. *Getting*, 2 Coll. 324.

(*f*) *Re Langdale's Settlement Trusts*, 10 L. R. Eq. 39. As to investments by the Court on foreign securities, as Italian, see *Re Brackenbury's Trusts*, 31 L. T. N.S. 79; 22 W. R. 682.

of the Governments of New Zealand, Victoria, and New South Wales (*a*).]

East India stock.

18. Government or Parliamentary stocks or funds are such as are managed by Parliament, or paid out of the revenues of the British Government, or at least guaranteed by it, and therefore *East India stock*, under the charter of the East India Company, as possessing none of these requisites, was never a *Government* stock (*b*).

Thirdly. Of powers of investment under statutory provisions.

[Statutory powers anterior to Trustee Act, 1893.]

[1. The statutory powers of investment of trustees are now mainly to be found in the Trustee Act, 1893, but it is convenient here to refer shortly to the previous legislation.]

22 & 23 Vict. c. 35. East India Stock.

2. By the Law of Property Amendment Act, 1859 (commonly known as Lord St Leonards' Act), 22 & 23 Vict. c. 35, sect. 32 (*c*), trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, were authorised to invest trust funds in the stock of the Bank of England or Ireland, or on East India stock; but the Act was held not to apply where a particular fund was settled specifically and there was no power of varying securities (*d*).

Real securities.

3. [By the same enactment it was] further provided that when a trustee, executor, or administrator, should not "by some instrument creating his trust be expressly forbidden to invest any trust fund on *real securities in any part of the United Kingdom*," he should be at liberty to make such investment, provided it were in other respects reasonable and proper. Under this enactment, therefore, trustees might lend on real security in *England* or *Wales*, or *Ireland*, but not in the *Isle of Man*, and as the Act by the last section was not to extend to *Scotland*, and as the Scotch real property law is quite different from the English, trustees could not be advised to lend money on real security in Scotland (*e*).

Scotland.

23 & 24 Vict. c. 38.

4. By the Law of Property Amendment Act, 1860, sect. 11 (*f*),

[(*a*) *Re Brown*, 29 Ch. D. 889.]

(*b*) *Brown* v. *Brown*, 4 K. & J. 704; [and India 3½ per cent. stock, being only charged on the revenues of India, is not within a power to invest on securities guaranteed by authority of Parliament; *Re National Permanent Building Society*, W. N. (1890) 117].

[(*c*) Repealed by the Trust Investment Act, 1889, see *post*, p. 361.]

(*d*) *Re Warde's Settlement*, 2 J. & H. 191; but see *contra*, *Waite* v. *Littlewood*, 41 L. J. N.S. Ch. 636, in which case, however, the case before V. C. Wood was not cited. [By the Amendment Act, 23 & 24 Vict. c. 38, s. 12, s. 32 of Lord St Leonards' Act was made retrospective. As to the meaning of the words East India Stock as used in this Act, and to the application of the section, see the ninth edition of this work, pp. 330, 331.]

(*e*) See *Re Miles's Will*, 5 Jur. N.S. 1236.

[(*f*) Repealed by the Trust Investment Act, 1889, see *post*, p. 361.]

and the general order of February, 1861, subsequently mentioned, trustees having power to invest on Government or Parliamentary securities were expressly authorised to invest not only in Consols, but also in Three per Cent. Reduced Annuities and New Three per Cent. Annuities, and might also invest on real securities in *England* or *Wales;* and such investments might be made by corporations and trustees holding moneys in trust for any public or charitable purpose notwithstanding the statutes of mortmain (*a*).

Investments by the Court.

5. Previously to these Acts the Court had, even where an express power existed to lend on real security, refused to exercise it by sanctioning a loan on mortgage, on the ground that in ninety-nine cases out of a hundred the expense of the mortgage more than counterbalanced the increase of income (*b*). But the rule was afterwards relaxed (*c*).

23 & 24 Vict. c. 38.

6. By sect. 10 of 23 & 24 Vict. c. 38, the Court of Chancery was empowered to issue general orders from time to time as to the investment of cash subject to its jurisdiction, either "in Three per Cent. Consolidated, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities" as the Court should think fit; and by sect. 11 (*d*), trustees, executors, or administrators, "having power to invest their trust funds upon Government securities, or upon parliamentary stocks, funds, or securities, or any of them," might invest "in any of the stocks, funds, or securities, in or upon which, by such general order," cash might be invested by the Court (*e*).

General Order as to investment of cash under control of Court.

7. A General Order, dated February 1, 1861, was issued under the powers of this Act, but was annulled by the Rules of the Supreme Court, 1883, its place being supplied, in a slightly modified form, by Order 22, Rules 17 and 18, as follows:—

R. 17. "Cash under the control of, or subject to the order of, the Court may be invested in *Bank stock, East India stock* (*f*),

(*a*) Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34).

(*b*) *Barry* v. *Marriott*, 2 De G. & Sm. 491; and see *Ex parte Franklyn*, 1 De G. & Sm. 531.

(*c*) See *Ungless* v. *Tuff*, 9 W. R. 729; 30 L. J. Ch. 784.

[(*d*) Repealed by the Trust Investment Act, 1889, see *post*, p. 361.]

(*e*) It is to be observed that in this section the power was a general one, without the exception contained in 22 & 23 Vict. c. 35, s. 32, and in the Trustee Act, 1893, to be hereafter referred to, and accordingly it was effectual notwithstanding an express direction in the instrument creating the trust that the investments should be confined to those enumerated therein; *In re Wedderburn's Trusts*, 9 Ch. D. 112, [but see *Ovey* v. *Ovey*, (1900) 2 Ch. 524].

(*f*) It was at one time considered that the East India Stock referred to in the Order of 1st February, 1861, was the old East India stock (*i.e.* the capital stock of the East India Company), as the new loan had not then

Exchequer bills, and 2*l.* 10*s. per cent. Annuities*, and upon *mortgage* of freehold and copyhold estates respectively in *England* and *Wales*, as well as in *Consolidated*, *Reduced*, and *New* 3*l.* per cent. Annuities."

R. 18. "Every application for the purpose of the conversion of any stocks, funds, or securities into any other stocks, funds, or securities authorised by the last preceding rule, shall be served upon the trustees thereof if any, and upon such other persons if any as the Court or Judge shall think fit" (*a*).

Powers in Acts of Parliament.

[8. There was great conflict of opinion as to whether] the powers conferred by the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), applied to moneys paid into Court under *Acts of Parliament* directing the moneys to be invested on securities other than those mentioned in the Act under consideration; [but the question was finally settled in favour of the application of the powers (*b*).

[Indian Railway annuities.]

9. By the East Indian Railway Company Purchase Act, 1879 (*c*), certain annuities were authorised to be created for the purpose of carrying out the terms which had been agreed upon between the Secretary of State for India and the Railway Company, and by sect. 37 any trustee having power under the instrument constituting his trust to invest the trust funds in the shares or stock of any Indian railway the interest on which is guaranteed by the Secretary of State, was empowered to invest such trust funds in the purchase of annuities of Class B. thereby authorised to be created (*d*). Under this section the

acquired the distinctive name of East India stock. But in a case in the Court of Appeal, the M.R. stated that it had always been held that new East India stock was within the *intention* of the General Order, and it was held that new 3*l.* 10*s.* per cent. East India stock created under the powers of 42 & 43 Vict. c. 60, was within the order; *Ex parte St John Baptist College, Oxford*, 22 Ch. D. (C.A.) 93. Under 36 Vict. c. 17, the old East India stock has been redeemed or commuted, and has ceased to exist, and the loans under the several East India Loan Acts are now known as East India stock.

[(*a*) This order was annulled and replaced by the Order of 14th November, 1888, stated *post*, p. 365.]

(*b*) [*Ex parte St John Baptist College, Oxford*, 22 Ch. D. (C.A.) 93; *Re Brown*, 59 L. J. Ch. 530; 63 L. T. N.S. 131; see] *Re Birmingham Bluecoat School*, 1 L. R. Eq. 632; *Re Wilkinson's Settled Estate*, 9 L. R. Eq. 343; *Re Cook's Settled Estate*, 12 L. R. Eq. 12; *Re Thorold's Settled Estate*, 14 L. R. Eq. 31; *Reading* v. *Hamilton*, W. N. 1872, p. 91; *Re Taddy's Settled Estates*, 16 L. R. Eq. 532; [*Re Fryer's Settlement*, 20 L. R. Eq. 468; *Re Foy's Trusts*, 23 W. R. 744; *Re Southwold Railway Company's Bill*, 1 Ch. D. 697; *Jackson* v. *Tyas*, 52 L. J. N.S. 830; *Secus*,] *Re Shaw's Settled Estates*, 14 L. R. Eq. 9; *Re Boyd's Settled Estates*, 21 W. R. 667; [*Re Vicar of St Mary, Wigton*, 18 Ch. D. 646; *Ex parte Rector of Kirksmeaton*, 20 Ch. D. 203].

[(*c*) 42 & 43 Vict. c. ccvi. See now the provisions of the Trustee Act, 1893, *post*, p. 363.]

[(*d*) And trustees having power to retain, but not to invest in East Indian

Court has, upon the application of a tenant for life, sanctioned the conversion into annuities of Class B. of Bank Annuities in Court (*a*).

10. Church trustees incorporated under the Compulsory Church Rate Abolition Act, 1868, are by that Act empowered to invest any funds in their hands in Government or real securities (*b*).] [Church trustees.]

11. Powers of investment are generally to be exercised with the consent of the tenant for life, and it was doubted whether the several Acts enlarging the power of trustees applied where such consent was required. It is conceived, however, that the effect of the Acts was to authorise trustees to invest on the extended securities, provided the investments were accompanied with all the conditions required for investment upon the securities specified in the settlement. Any other construction would have been a trap into which many trustees must have fallen. [And under the Trust Investment Act, 1889, now replaced by the Trustee Act, 1893, to be presently noticed, all difficulty on this head was removed. Consent.

12. Under sections 21 and 32 of the Settled Land Act, 1882 (*c*), all *moneys in Court* which are liable to be laid out in the purchase of land to be made subject to a settlement, may be invested "on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (*d*) authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares." [Settled Land Act.]

Under these sections moneys in Court which have arisen from the purchase under the Lands Clauses Consolidation Act, 1845, of land belonging absolutely to a charity, have been invested in railway debenture stock (*e*).

By sect. 33 of the Act of 1882, where under a settlement *money* is *in the hands of trustees*, and is liable to be laid out

Railway Company's stock might accept the B. annuities; *Re Chaplin*, 28 W. R. 132.]

[(*a*) *Re Mansel*, 30 W. R. 133; 45 L. T. N.S. 741.]

[(*b*) 31 & 32 Vict. c. 109, s. 9.]

[(*c*) 45 & 46 Vict. c. 38.]

[(*d*) Including, therefore, the investments specified in the Trustee Act, 1893, unless expressly excluded by the settlement.]

[(*e*) *Re Byron's Charity*, 23 Ch. D. 171; and see *Ex parte Vicar of Castle Bytham*, (1895) 1 Ch. 348; *Ex parte Jesus College, Cambridge*, W. N. 1884, p. 37; *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.]

in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option of the tenant for life (*a*), invest the same as capital money arising under the Act.

[Investment not permitted by terms of will.]

13. Where under a will money was bequeathed to trustees in trust to lay it out in the purchase of real estate, to be settled in strict settlement, with a direction that until the purchase "the legacy should be invested in Government or real securities, but not in any other mode of investment," it was held that the trustees, on the direction of the tenant for life, might invest the legacy in debenture stock (*b*), for this was only doing directly what the tenant for life could have done circuitously under the powers of the Act, by reselling the estate when purchased, and directing the investment of the money in the manner proposed. And in another case where the will contained no clause authorising an interim investment, the Court sanctioned the postponement of the purchase of real estate in Ireland until such a purchase could be prudently effected, and allowed an interim investment under sect. 21 (*c*). Money held upon trust for investment in the purchase of a particular piece of land was held to be "money liable to be laid out in the purchase of land" within the section (*d*).

[Conversion of Government annuities.]

14. By the National Debt (Conversion) Act, 1888 (*e*), provision was made for the conversion and exchange of Three per Cent. Consolidated Bank Annuities, Three per Cent. Reduced Bank Annuities, and New Three per Cent. Annuities into a new Government stock of a lower denomination to be called Two and Three-quarters per Cent. Consolidated Stock until the 5th of April, 1903, and thereafter Two and a Half per Cent. Consolidated Stock (*f*), and trustees having power to invest in the old stocks were empowered to invest in the new stock

[(*a*) The tenant for life is not subject to the control of the trustees in his selection of investments: *Re Lord Coleridge's Settlement*, (1895) 2 Ch. 704; and see *Re Gee*, 64 L. J. Ch. 606; W. N. 1895, p. 90; but he is in the position of a trustee with a discretionary power of investment, and if the trustees reasonably think that a proposed investment is undesirable, they are justified in bringing the matter before the Court: *Re Hunt's Settled Estates*, (1905) 2 Ch. 418; and see, as to the duty of trustees under the Settled Land Acts in the matter, *Re Hotham*, (1902) 2 Ch. (C.A.) 575, *post*, Chap. XXII.; and as to their right to select their own broker, *Re Cleveland's Settled Estates*, (1902) 2 Ch. 350, *post*, Chap. XXII.]

[(*b*) *Re Mackenzie's Trusts*, 23 Ch. D. 750; and see *Re Tennant*, 40 Ch. D. 594; *Re Mundy's Settled Estates*, (1891) 1 Ch. (C.A.), 399.]

[(*c*) *Re Maberley*, 33 Ch. D. 455; and see *post*, Chap. XXII.]

[(*d*) *Re Hill*, (1896) 1 Ch. 962.]

[(*e*) 51 Vict. c. 2.]

[(*f*) Sect. 2, sub-s. 4.]

in lieu thereof (*a*). The dividends on the new stock were made payable *quarterly*, at the rate of $2\frac{3}{4}$ per cent. until the 5th of April, 1903, and at the rate of $2\frac{1}{2}$ per cent. after that date (*b*); and the stock is not to be redeemable until the 5th of April, 1923, after which date it will be redeemable at par in such manner as Parliament shall direct (*c*). Special provision is made for the protection of trustees of stock appropriated to provide annuities (*d*), and it is enacted (*e*) that when any stock converted or exchanged by virtue of the Act into new stock, is held by a trustee, such trustee shall be at liberty to sell the same, and to invest the proceeds in any of the securities for the time being authorised for the investment of cash under the control of the High Court (*f*), notwithstanding anything to the contrary contained in the instrument creating the trust. [Reinvestment.]

The conversion of the New Three per Cent. Annuities was effected on the 29th of March, 1888, and all holders of that stock who had not by that date dissented from the conversion received in lieu thereof an equal nominal amount of the new stock. The redemption of the Consolidated Three per Cent. Annuities and the Reduced Three per Cent. Annuities was effected on the 6th of July, 1889, and all holders of such stock on that day were paid off.

By sect. 10 of the same Act it is provided that in the registers of new stock the Bank shall allow any holder or joint holders to have more than one account, provided that each account is distinguished either by a number or by such other designation as may be directed by the Bank, and that the Bank shall not be required to permit more than four accounts to be opened in the same name or names. This provision will be convenient for trustees holding several funds on distinct trusts, and will relieve them from the necessity of resorting to the device of varying the order of names in the account in the bank books (*g*). [Power to hold stock on different accounts.]

15. Extensive powers of investment were conferred on trustees by the Trust Investment Act, 1889 (*h*), by which the enactments, already referred to, of 22 & 23 Vict. c. 35, sect. 32 and 23 & 24 Vict. c. 38, sect. 11 were, without prejudice to [Trust Investment Act, 1889.]

[(*a*) Sect 19.]
[(*b*) Sect. 2, sub-ss. 1, 3.]
[(*c*) Sect. 2, sub-s. 2.]
[(*d*) Sect. 20.]
[(*e*) Sect. 27; see *Re Tuckett's Trusts*, 57 L. J. Ch. 760; 58 L. T. N.S. 719; 36 W. R. 542.]
[(*f*) See *post*, p. 364.]
[(*g*) See Vaizey on Investments, pp. 86, 87, where it is stated that in practice the Bank distinguishes the four permissible accounts by the letters A, B, C, and D, and has ceased to distinguish from each other accounts in the same names but in various orders.]
[(*h*) 52 & 53 Vict. c. 32.]

the validity of any act done thereunder, repealed. The Act was applicable as well to trusts created before as to trusts created after the passing of it (*a*). These important provisions have now been repealed and substantially re-enacted by the Trustee Act, 1893 (*b*), which provides by sect. 1 that a trustee may, unless expressly forbidden by the instrument (*c*) (if any), creating the trust (*d*), invest any trust funds in his hands, whether at the time in a state of investment or not (*e*), in manner following, that is to say:—

[Trustee Act, 1893.]

[Public Funds.] (a.) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom:

[Real Securities.] (b.) On real or heritable securities in Great Britain or Ireland (*f*):

[Bank Stock.] (c.) In the stock of the Bank of England or the Bank of Ireland:

[India Stock.] (d.) In India Three and a Half per Cent. stock, and India Three per Cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India:

[Securities guaranteed by Parliament.] (e.) In any securities the interest of which is or shall be guaranteed by Parliament (*g*):

[Metropolitan Board of Works or London County Council stock.] (f.) In Consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

[Railway securities.] (g.) In the Debenture, or Rent-charge, or Guaranteed (*h*), or Preference stock (*i*) of any railway company in Great Britain or Ireland, incorporated by special Act of Parliament (*j*), and having, during

[(*a*) See s. 6.]

[(*b*) 56 & 57 Vict. c. 53.]

[(*c*) By s. 50 the expression "instrument" includes an Act of Parliament. A direction to retain trust funds and invest them in a specified way is not an express prohibition within the section: *Re Burke*, (1908) 2 Ch. 248.]

[(*d*) As to the effect of these words see *post*, p. 367. As to investment under the Public Trustee Act, 1906, see *post*, Chap. XXIII.]

[(*e*) As to the effect of these words, which were not contained in the Act of 1889, see *post*, p. 367.]

[(*f*) As to investments on mortgage of land in Ireland under 4 & 5 Will. 4 c. 29 (which Act is repealed by the Act above stated), see *post*, p. 383. And as to investments on securities in Scotland, see *post*, p. 383. A mortgage of a licensed house is within a general power to invest on "securities" authorised by law: *Re Bentley's Yorkshire Breweries, Limited*, (1909) 2 Ch. 609.]

[(*g*) See Vaizey on Investments, 148; Marrack's Investment Guide, p. 15.]

[(*h*) The expression "guaranteed" is of doubtful meaning; see Marrack, 26.]

[(*i*) By s. 50 the expression "stock" includes fully paid up shares.]

[(*j*) As to the meaning of these words, see *ante*, p. 351. It may in

each of the ten years last past before the date of investment, paid a dividend at the rate of not less than three per centum per annum on its ordinary stock (*a*):

(h.) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity (*b*), or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company:

[Debenture stock of Indian railway.]

(i.) In the Debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India:

[Indian railway "B." annuities.]

(j.) In the B. Annuities of the Eastern Bengal, the East Indian, and the Scinde, Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the Revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway (*c*): Also in deferred annuities comprised in the register of holders of annuity, Class D, and annuities comprised in the register of annuitants, Class C, of the East Indian Railway Company:

[Indian railway guaranteed stock.]

(k.) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed (*d*):

[Water companies stock.]

(l.) In the Debenture, or Guaranteed, or Preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament, or by Royal Charter, and having during each of the ten years last past before the date of investment, paid a dividend of not less than five pounds per centum on its ordinary stock:

some cases be matter of difficulty to ascertain whether particular stocks are "preference" or "ordinary" within the meaning of this sub-section; see Marrack, 23.]

[(*a*) This requirement as to the *rate* of dividend is not contained in the rule of Court, *post*, p. 366.]

[(*b*) The expressions "leased in perpetuity," and "at a fixed rental" are of doubtful meaning; see Marrack, 27.]

[(*c*) On the purchase of these Indian railways by the Government, the B. Annuities, specially suitable for investment by trustees, were created. For details, see Marrack, 42. See also *Re Blue Ribbon Life Assurance*, 59 L. J. Ch. 276; 61 L. T. N.S. 660, where North, J., without deciding whether the Court would accept B. Annuities as a proper investment for funds under its control, sanctioned, under the Board of Trade Rules, the investment therein of a deposit paid in under the Life Assurance Companies Act, 1870, s. 3.]

[(*d*) For details as to these and the other stocks specified, see Marrack, 44 *et seq.*]

[Corporation or County Council stock.]

(m.) In nominal (*a*), or inscribed stock, issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council under the authority of any Act of Parliament, or Provisional Order (*b*):

[Water commissioners' stock.]

(n.) In nominal or inscribed stock, issued or to be issued, by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(o.) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the Order of the High Court:

And may also from time to time vary any such investment.

[Colonial Stock Act, 1900.]

16. By the Colonial Stock Act, 1900 (*c*), sect. 2, the securities in which a trustee may invest under the powers of the Trustee Act, 1893, are to include any Colonial Stock which is registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by this Act, and with respect to which there have been observed such conditions (if any) as the Treasury may by order notified in the *London Gazette* prescribe.

The restrictions mentioned in sect. 2, sub-sect. (2), of the Trustee Act, 1893, with respect to the stocks therein referred to are to apply to Colonial Stock. The Treasury are to keep a list of any Colonial Stocks in respect of which the provisions of this Act are for the time being complied with, and are to publish the list in the *London* and *Edinburgh Gazettes*, and in such other manner as may give the public full information on the subject (*d*).

[(*a*) As to the meaning of nominal stock, see *post*, p. 369, note (*d*).]

[(*b*) As to the Local Loans Act, 1875, see *post*, p. 369. As to the borough of Bournemouth being within the enactment in the text, see *Re Druitt*, (1903) 1 Ch. (C.A.) 446.]

[(*c*) 63 & 64 Vict. c. 62.]

[(*d*) Notices under this Act have from time to time been published in the *London Gazette* stating the Colonial Stocks in which trustees are authorised to invest. A table giving all those of which notice had been given up to date will be found in L. R. Current Index, 1905, p. clxiv. Subsequent additions to the list are specified in Current Indexes, 1905, p. lxvi; 1906, p. lxix; 1907, p. lxix.; and 1908, p. lxxiii.]

17. The Order of Court above referred to (*a*), which came into operation on the 26th of November, 1888, as amended, provides as follows:— [Order of Court as to investment of cash under its control.]

"Cash under the control of or subject to the Order of the Court may be invested in the following stocks, funds, or securities; namely—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th of April, 1903, Two and a Half per Cent. Consolidated Stock);

Consolidated Three Pounds per Cent. Annuities (*b*);

Reduced Three Pounds per Cent. Annuities (*b*);

Two and Three quarters per Cent. Annuities;

Two pounds Fifteen Shillings per Cent. Annuities;

Two Pounds Ten Shillings per Cent. Annuities;

Local Loans Stock under the National Debt and Local Loans Act, 1887;

Exchequer Bills;

Bank Stock;

India Three and a Half per Cent. Stock;

India Three per Cent. Stock;

India Two and a Half per Cent. Stock (*c*);

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment;

Stocks of Colonial Governments guaranteed by the Imperial Government; *or in respect of which the provisions of the Colonial Stock Act*, 1900 (*d*), *and of section* 2 (2) *of the Trustee Act*, 1893, *are for the time being complied with* (*e*);

Mortgage of freehold and copyhold estates respectively in England and Wales;

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.;

Three per Cent. Metropolitan Consolidated Stock;

Two and a Half per Cent. Metropolitan Consolidated Stock (*f*);

Four and a Half per Cent. London County Consolidated Stock (*f*);

Three per Cent. London County Consolidated Stock (*f*);

[(*a*) Rules of Supreme Court, 1883, Ord. XXII. r. 17. For a list of the colonial stocks which are authorised as investments under the Act, see Ellis on the Trustee Acts, 6th ed. pp. 30, 31.]

[(*b*) These have now been redeemed and have ceased to exist, 51 Vict. c. 2, *ante*, p. 360; 52 Vict. c. 4.]

[(*c*) Added by R. S. C. July, 1903.]

[(*d*) See *ante*, p. 364.]

[(*e*) These words were added by R. S. C July, 1903.]

[(*f*) Added by R. S. C. July, 1901.]

Inscribed Two and a Half per Cent. Debenture Stock issued by the Corporation of London and secured by a trust deed dated June 24th, 1897 (*a*);

Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares;

Debenture, preference, guaranteed, or rent-charge stocks of Railways in Great Britain or Ireland, guaranteed by railway companies owning railways in Great Britain or Ireland, which have for ten years next before the date of investment paid a dividend on ordinary stock or shares (*b*);

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, *or under the Isle of Man Loans Act*, 1880 (*c*), provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment (*d*).

[Persons by whom power exercisable. Definition of "trust" and "trustee."]

18. By the definition clause (*e*) of the Trustee Act, 1893, unless the context otherwise requires, the expression, "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person. In the Trust Investment Act, 1889 (*f*), the expression "trustee" was defined as including "an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee." For the purposes of sect. 1 of the Act of 1893, it does not appear that there is any material difference in effect between the two definitions.

[Trustees within the meaning of the Act.]

A corporation incorporated by a special Act, holding funds for charitable purposes and empowered to invest the same, were held to be trustees within the meaning of the Act of 1889 (*g*); but not so trustees holding moneys which belonged to a building society, and were to be dealt with only under the direction of the board of directors (*h*), nor yet the directors themselves (*i*).

[(*a*) Added by R. S. C. October, 1899.]

[(*b*) Added by R. S. C. January, 1904.]

[(*c*) These words were added by a rule of 10th Feb. 1897.]

[(*d*) As to the practice under the corresponding rule in Ireland, and the circumstances under which the Court will sanction investments in securities newly authorised, see *Roberts* v. *Morgan*, 23 L. R. Ir. 118; *Re Phelan*, Ib. 336; *Johnson* v. *O'Neil*, Ib. 430; *Re Nesbitt's Trusts*, 25 L. R. Ir. 430.]

[(*e*) Sect. 50.]

[(*f*) 52 & 53 Vict. c. 32, s. 9.]

[(*g*) *Re Manchester Royal Infirmary*, 43 Ch. D. 420.]

[(*h*) *Re National Permanent Mutual Building Society*, 43 Ch. D. 431.]

[(*i*) *S. C.*]

19. It is to be observed that the powers of investment conferred by section 1 of the Trustee Act, 1893, on a trustee are limited by the words "unless expressly forbidden by the instrument (if any) creating the trust" (*a*), and this restriction is of great importance. Investment clauses in settlements, after authorising the trustees to invest in specified modes of investment, often proceed with words of prohibition such as "but not in any other mode of investment," and where these or similar words are to be found in the trust instrument the statutory powers of investment are not available (*b*). Trustees must therefore carefully examine the terms of the trust instrument before proceeding to use the powers of the Act. [Express prohibition in instrument creating trust.]

20. It is further to be observed that the powers of the section extend to all trust funds "whether at the time in a state of investment or not." These words, which were not contained in the Trust Investment Act, 1889, in effect embody in the Act of 1893 the decision of the House of Lords in *Hume* v. *Lopes* (*c*), arrived at after much discussion, that according to the true construction of the Act of 1889, the powers of that Act were not limited to cash in the hands of trustees, but extended to all the trust investments, so that, whatever might be the nature of such investments, the power of varying investments conferred by the statute was available. [Statutory power of varying investments.]

21. It would be beyond the scope of this work to specify in detail the numerous investments which are authorised by the Act, and for such information the reader is referred to works specially devoted to that subject (*d*). It may, however, be well to point out that the list of authorised investments is necessarily subject to change from time to time, as, for instance, when a railway company which has paid a dividend on its ordinary shares ceases to do so (*e*). Trustees, therefore, when making an investment must be careful to ascertain, through their broker or otherwise, that the investment of their choice is at that time on the privileged list. [Range of statutory power is subject to variation.]

22. It is remarkable that, whereas by sub-sect. (g) of sect. 1 of the Act, as to railway stocks it is required that the railway company [Concurrent powers under sub-sections (g) and (o).]

[(*a*) Differing in this respect from the 23 & 24 Vict. c. 38, s. 10, already referred to; see p. 357.]

[(*b*) *Ovey* v. *Ovey*, (1900) 2 Ch. 524.]

[(*c*) (1892) A. C. 112, affirming and extending the decision of the Court of Appeal in *Re Dick*, (1891) 1 Ch. (C.A.) 423, overruling that of North, J., in *Re Manchester Royal Infirmary*, 43 Ch. D. 420.]

[(*d*) See Marrack's Statutory Trust Investment Guide, and Ellis on the Trustee Act, 1893.]

[(*e*) It is to be noted that there may be special provisions in the special Acts of Companies enabling investment by trustees. Such provisions, however, could not safely be relied upon in the absence of legal advice.]

should for ten years have paid a dividend of not less than three per cent., no similar requirement as to rate of dividend is contained in the Order of Court. The Legislature has thus by sub-sects. (g) and (o) conferred two concurrent powers, one of which is more extensive than the other. The reason for so doing is not apparent, but it must be borne in mind that the more comprehensive Order of the Court is liable to be amended at any time, should circumstances render any alteration desirable.

[Purchase of redeemable stocks.]

23. By sect. 2 of the Trustee Act, 1893 (*a*), it is provided that trustees may, under the powers of the Act, invest in any of the securities mentioned or referred to in sect. 1, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value, provided that a trustee may not under the powers of the Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m), which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate. It is further provided that a trustee may retain until redemption any redeemable stock, fund, or security, which may have been purchased in accordance with the powers of the Act. It is particularly to be noticed that the prohibition imposed by this section does not attach to any stocks except those referred to in the sub-sections mentioned, notwithstanding that many of them, including some of the greatest importance, *ex. gr.*, Consols, are redeemable. Trustees, however, should be careful not to exercise their powers of holding redeemable stocks in a way unduly detrimental to the reversioners (*b*).

[Discretion of the trustee.]

By sect. 3, every power conferred by the Act is to be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds.

[Application of preceding provisions.]

24. By sect. 4, the preceding sections are made applicable as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are to be in addition to the powers conferred by the instrument (if any) creating the trust.

[Section 5.]

25. Sect. 5 of the Act of 1893 contains a collection of miscellaneous clauses reproducing certain repealed enactments,

[(*a*) Replacing s. 4 of the Trust Investment Act, 1889.]

[(*b*) See Vaizey on Investments, p. 137.]

whereby powers of investment were conferred on trustees. It provides by the first sub-section that a trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest (a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent; and (b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864. The first clause of this sub-section is a reproduction of sect. 9 of the Trustee Act, 1888 (*a*), and the second is a reproduction of sect. 60 of the Improvement of Land Act, 1864 (*b*). [Mortgage of long term.] [Land improvement charge.]

By sub-sect. 2 of the same section, it is provided that a trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid. This provision is a reproduction of the Debenture Stock Act, 1871, already referred to (*c*). [Debenture stock.]

By sub-sect. 3 of the same section, a trustee having power to invest money in the debentures or debenture stock of any railway or other company, may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875. This provision is a reproduction of section 27 of the Local Loans Act, 1875 (*d*); it is impliedly confined to the enlargement of express powers of investment, and therefore does not enable a trustee, under the general statutory power, in sect. 1 (g), of investment in debenture stock, to invest in nominal debentures issued under the Local Loans Act, 1875 (*e*). A similar power is frequently given by local Acts to invest in corporation and county stocks issued thereunder, but a proviso is sometimes [Local Loans Stock.]

[(*a*) 51 & 52 Vict. c. 59.]

[(*b*) 27 & 28 Vict. c. 114, passed 29th July, 1864.]

[(*c*) 34 & 35 Vict. c. 27, see *ante*, p. 352.]

[(*d*) 38 & 39 Vict. c. 83. A debenture payable to a person named, his executors, administrators, and assigns, is in the Act referred to as a nominal debenture (s. 5), and debenture stock in respect of which a stock certificate has not been issued is referred to as nominal debenture stock (s. 6). *Semble*, that when the authority to invest in the Railway Debenture Stock arises under s. 21 of the Settled Land Act, 1882, the local authority must have paid a dividend for ten years before the investment on their debentures or stock is authorised; *Re Maberly*, 33 Ch. D. 455.]

[(*e*) *Re Tattersall*, (1906) 2 Ch. 399.]

added to prevent the investment in redeemable stock from being made at a price exceeding its redemption value.

[Securities of Government of Isle of Man.]

By sub-sect. 4 of the same section, a trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880. This provision is a reproduction of sect. 7 of the Isle of Man Stock Act, 1880 (*a*).

[Mortgage debentures.]

By sub-sect. 5 of the same section, a trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865. This provision is a reproduction of section 40 of the Mortgage Debenture Act, 1865 (*b*).

[Power to invest notwithstanding drainage charges.]

26. By sect. 6 of the Trustee Act, 1893 (*c*), it is enacted that a trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856 (*d*), or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge. This enactment is a reproduction of sect. 61 of the Improvement of Land Act, 1864 (*e*), and is designed to remove any objection which might be made to such an investment by a trustee, as being in the nature of a second incumbrance.

[Trustees not to convert inscribed stock into certificates to bearer.]

27. By sect. 7 of the Trustee Act, 1893 (*f*), it is provided that a trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer (*g*) issued under the authority of any of the following Acts, that is to say:—(1) The India Stock Certificate Act, 1863 (*h*); (2) the National Debt Act, 1870 (*i*); (3) the Local Loans Act, 1875 (*j*); (4) the Colonial

[(*a*) 43 & 44 Vict. c. 8.]
[(*b*) 28 & 29 Vict. c. 78.]
[(*c*) 56 & 57 Vict. c. 53.]
[(*d*) These are 9 & 10 Vict. c. 101 (see s. 37); 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.]
[(*e*) 27 & 28 Vict. c. 114.]
[(*f*) 56 & 57 Vict. c. 53.]
[(*g*) A similar prohibition was contained in the East India Unclaimed Stock Act, 1885 (48 & 49 Vict. c. 25), s. 23. As to the undesirability of securities to bearer as investments for trustees, see *ante*, p. 328.]
[(*h*) 26 & 27 Vict. c. 73.]
[(*i*) 33 & 34 Vict. c. 71.]
[(*j*) 38 & 39 Vict. c. 83.]

Stock Act, 1877 (*a*); but nothing in this section is to impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to enquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.]

II. Of matters arising in the exercise by trustees of their powers of investment.

Trustees, where there is power to vary, may sell out stock and invest on mortgage.

1. Trustees may be, and generally are, *expressly* empowered to invest on *real* as well as Government security, and where this was the case, and there was a power to vary securities (*b*), the trustees might safely sell out Three per Cent. Bank Annuities, and invest the proceeds on a mortgage; for, in such a case, although the tenant for life may obtain a higher rate of interest, yet no injury is done to the remainderman, as the capital is a constant quantity, and on the tenant for life's death, the remainderman himself will have the benefit. A notion is sometimes entertained that where the stock has become depreciated since the original purchase of it by the trustees, the trustees cannot sell out the stock and lend the money on mortgage without being answerable for the difference between the bought and sale price. But there is no ground for this apprehension, for if the trust authorise the purchase of stock at all, the trustees cannot be wrong in dealing with it at the market price of the day. No doubt if there were a sudden fall under peculiar circumstances, the trustees should not, without good reason, sell out at the very moment of casual depreciation, but if the power be *bonâ fide* exercised, the mere fact of a depreciation below the bought price cannot *per se* constitute a breach of duty.

Apportionment in respect of dividends upon a change of investment.

2. The trustees in changing the investment should have regard to the *tenant for life's interest* in the *income*. The stock, for instance, should be sold so as to make the time of accruer of the last dividend the starting-point as nearly as possible for the commencement of the interest on the mortgage. However, if the sale of the stock be made on an intermediate day between two dividends, although the price may be enhanced by the near approach of the dividend, it is not the practice to pay to the tenant for life the estimated amount of the current dividend out of the proceeds (*c*), although it was held in one case under *very*

[(*a*) 40 & 41 Vict. c. 59.]

[(*b*) As to the power to vary investments under the Trustee Act, 1893, s. 1, see *ante*, p. 367.]

(*c*) *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitebread*, 1 L. R. Eq. 266; and see *Re Ingram's Trust*, 11 W. R. 980; 8 L. T. N. S. 758; *Bostock* v. *Blakeney*, 2 B. C. C. 654.

special circumstances, that the tenant for life was entitled to an apportionment (*a*), [and in a recent case, where the sale took place not on a change of investment, but with a view to a final distribution, which, by the strict terms of the trust, would have been properly effected by means of a transfer of investments, the representatives of the deceased tenant for life were held similarly entitled (*b*).]

And so after a purchase of stock between two dividend days the tenant for life will be entitled to the whole dividend which is declared on the dividend day subsequent to the purchase (*c*).

Mortgage to replace stock and pay interim dividends.

3. Under the ordinary power of varying securities, a trustee would not be justified in lending a sum of stock upon a mortgage of real estate, conditioned for the replacement of the specific *stock* at a future day, and the payment of half-yearly sums equal to what would have been the *dividends* in the meantime. For the exercise of the power must be supposed to be beneficial to the parties interested, or some of them; whereas, in this case, it is difficult to point out what possible advantage can accrue, though the dividends be paid and the stock replaced. Nothing more is secured to the trust than would have been the effect of the original investment had it remained *in statu quo;* while a Government security is changed for the risk of a private security, and perhaps some expense incurred, and all this for no purpose. In short, such an arrangement would look like an accommodation to a friend, rather than as an investment in furtherance of the trust (*d*).

Mortgage to replace stock and pay interim interest.

4. The case is not so objectionable when the stock is to be replaced, and in the meantime *interest* exceeding the dividend is to be paid on the amount produced by the sale; for here, one of the persons whose interest is to be consulted, viz. the tenant for life, does receive a benefit *in præsenti*, and the remainderman, if he outlive the tenant for life and the mortgage continue so long, will derive the same advantage (*e*).

[Care to be observed in lending on mortgage.]

5. [The question, already adverted to (*f*), as to the degree of care and prudence which a trustee is called upon to exercise

(*a*) *Lord Londesborough* v. *Somerville*, 19 Beav. 295; and see *Bulkeley* v. *Stephens*, (3 N. R. 105; 10 L. T. N.S. 225).

[(*b*) *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241.]

[(*c*) *Re Clarke*, 18 Ch. D. 160.]

(*d*) Since the above remarks were written, judicial opinions have been expressed to this effect; *Pell* v. *De Winton*, 2 De G. & J. 18; *Whitney* v. *Smith*, 4 L. R. Ch. App. 519, 521; [and see also *Bromley* v. *Kelly*, 39 L. J. Ch. 274, cited in Set. on Decrees, 6th Ed., 2003].

[(*e*) Under 51 Vict. c. 2, s. 21 and preamble, and s. 2 (4), an agreement to transfer any of the old 3 per cent. Government stocks may be satisfied by a transfer of new ($2\frac{1}{2}$ per cent.) consols.]

[(*f*) See *ante*, p. 327.]

in the conduct of the trust is in no case of more prominent importance than when he is called upon to invest trust moneys on mortgage or other private securities. A clear and authoritative statement of the law upon this subject, as expounded in modern decisions, is to be found in the following words of Lord Watson:—

"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in the honest observance of those limitations, the general rule already stated will apply" (*a*).]

Attention to value and title in lending on mortgage.

6. When trustees propose to lend upon mortgage, their attention should be directed to two leading topics—the [value and] sufficiency of the [security], and the title of the borrower (*b*). Trustees who accept a security without making proper enquiries as to its nature and adequacy, though it may have been previously valued by a surveyor (*c*), or who rely upon a valuation made by a surveyor employed by the mortgagor, without having a survey made by a valuer employed by themselves, will be held personally liable for any deficiency of the security (*d*).

[(*a*) *Learoyd* v. *Whiteley*, 12 App. Cas. 727 at p. 733, quoted or referred to in *Rae* v. *Meek*, 14 App. Cas. 558, at pp. 569 and 570; *Re Salmon*, 42 Ch. D. 351, at p. 367; *Sheffield Society* v. *Aizlewood*, 44 Ch. D. 412, at p. 454. In applying this principle, it must, however, be borne in mind that "the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide:" *per* Lindley, L.J., *Re Whiteley*, 33 Ch. D. (C.A.) 347, 355. And see the observations of Lord Halsbury and Lord Watson in *S. C.* in D. P., *Learoyd* v. *Whiteley*, *ubi sup.*; and see *Bullock* v. *Bullock*, 56 L. J. Ch. 221; 55 L. T. N.S. 703.]

(*b*) See *Waring* v. *Waring*, 3 Ir. Ch. Rep. 336.

(*c*) *Bell* v. *Turner*, W. N. 1874, p. 113.

(*d*) *Ingle* v. *Partridge* (No. 2), 34 Beav. 411; and see *Hopgood* v. *Parkin*, 11 L. R. Eq. 74; *Budge* v. *Gummow*, 7 L. R. Ch. App. 719; *Bell* v. *Turner*,

[Value.]

7. [In reference to the question of value there are two matters of primary importance—the mode in which the value is to be ascertained, and the proportion of the ascertained value which the trustee is justified in lending. Both these matters are now regulated by sect. 8 of the Trustee Act, 1893 (*a*), an enactment whereby the Legislature has laid down for the guidance of trustees "certain rules which in some respects relaxed those previously existing, and are in themselves reasonable, and constitute a standard, with reference to which reasonable conduct is to be judged" (*b*). By this enactment, which applies to (*c*) "transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th of December, 1888" (*d*), it is provided as follows:—

[Trustee Act, 1893.]

"A trustee (*e*) lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property (*f*), whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report" (*g*).

[Report as to value.]

8. In order that the trustee should bring himself within the protection of this enactment, it is an essential condition that he should obtain such a report as to value as the statute indicates (*h*). The first requisite is that the trustee should have a reasonable belief that the person appointed is an able, practical surveyor or

W. N. 1874, p. 113; [*Smethurst* v. *Hastings*, 30 Ch. D. 490; *Re Olive*, 34 Ch. D. 70; *Walcott* v. *Lyons*, 54 L. T. N.S. 786; *Rae* v. *Meek*, 14 App. Cas. 558].

[(*a*) 56 & 57 Vict. c. 53, replacing s. 4 of the Trustee Act, 1888, 51 & 52 Vict. c. 59.]

[(*b*) *In re Stuart*, (1897) 2 Ch. 583, 592, *per* Stirling, J.]

[(*c*) S. 8, sub-s. 4.]

[(*d*) The date of the passing of the Trustee Act, 1888.]

[(*e*) As to the definition of "trustee" see *ante*, p. 366.]

[(*f*) *I.e.* in fact so instructed and employed, not merely believed by the trustee to be so; *Re Somerset*, (1894) 1 Ch. 231, 253, *per* Kekewich, J.; *Re Walker*, 59 L. J. Ch. 386, 391; 62 L. T. N.S. 449; 38 W. R. 766.]

[(*g*) 56 & 57 Vict. c. 53, s. 8, sub-s. 1.]

[(*h*) *Shaw* v. *Cates*, (1909) 1 Ch. 389.]

valuer. The choice of the surveyor is a matter upon which the trustee is bound to exercise his own judgment (*a*), and he cannot properly leave the nomination to his solicitor (*b*). But it is no longer necessary (*c*) that the surveyor should be possessed of special knowledge of the locality in which the property is situate, though of course in many cases the possession of such knowledge may be very material with regard to his ability (*d*). As to the mode of employment of the surveyor, the statute requires, as did in effect the pre-existing law, that he should be instructed and employed independently of any owner of the property, and every precaution should be taken to secure the services of an entirely independent person who can in no sense be regarded as instructed and employed on behalf of, or even recommended by (*e*), the mortgagor. And he should be paid by the trustee, although the charge is ultimately to be borne by the mortgagor, and the amount of the fee should not be subject to increase if the mortgage is carried out (*f*), as this might act as an inducement to the surveyor to make a report which would enable the transaction to go through (*g*). The report must not merely state the value of the property, but must be of such a character that the loan can properly be said to have been made "under the advice of the surveyor or valuer as expressed in such report." The surveyor should therefore state what amount may in his opinion safely be advanced upon the security of the particular property (*h*), and expressly advise that such amount should be advanced.

[Amount of loan.]

9. If the trustee, by compliance with the provisions of the recent enactment, has brought himself within its protection, the only requirement as to the amount of the loan is that it must not exceed *two-thirds* of the value of the property as appearing by the report, and as the section applies to loans upon "any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend," there is now established one uniform rule as to the amount of money proportionate to the value of the property which the trustee may safely advance. Formerly a distinction was made, and it was considered that while

[(*a*) See *Re Walker*, 59 L. J. Ch. 386, 391.]

[(*b*) See *Fry* v. *Tapson*, 28 Ch. D. 268.]

[(*c*) As formerly held, see *Fry* v. *Tapson*, *ubi sup.*; and *Budge* v. *Gummow*, L. R. 7 Ch. 717, 722.]

[(*d*) See *Budge* v. *Gummow*, *Fry* v. *Tapson*, *sup.*]

[(*e*) See *Hopgood* v. *Parkin*, 11 L. R. Eq. 74; *Re Somerset*, (1894) 1 Ch. 231; *Re Walker*, *sup.*; and see *Re Dive*, (1909) 1 Ch. 328, where the surveyor was the person who had recommended the security to the trustee's solicitor.]

[(*f*) *Smith* v. *Stoneham*, W. N. 1886, p. 178; *Re Dive*, (1909) 1 Ch. 328.]

[(*g*) *Marquis of Salisbury* v. *Keymer*, (1909) W. N. 31.]

[(*h*) *Re Walker*, 59 L. J. Ch. 386; 62 L. T. N.S. 449; 38 W. R. 766.]

Value of the security.

trustees] could not be advised to advance more than *two-thirds* of the actual value of the estate if it were *freehold land* (*a*), if the property consisted of *freehold houses*, they should not lend so much as two-thirds (*b*), but (say) one-half of the actual value (*c*). [It has often been said that the "two-thirds rule," as it has been called, is not a hard and fast rule, but] only a general one (*d*); and where trustees have lent on the security of property of less value, but acted honestly, they have been protected by the Court, and allowed their costs (*e*). [But the rule has certainly been regarded as one which ought not lightly to be departed from (*f*), and as it has now received the recognition of the Legislature, trustees will do well to adhere to it in every case.

Sufficiency of security.

10. It has been held that as to buildings used in *trade*,] and the value of which must depend on external and uncertain circumstances, trustees would not, in general, be justified in lending so much as one-half (*g*). [And where trustees having a power to invest on real securities, invested on the security of freehold property used as brick-works, to an amount which was excessive, having regard to the value of the property independently of its capability of being used for trade purposes, they were held responsible (*h*). So, too, it has been held that trustees should not lend on the security of unlet houses, especially if the mortgagor is a builder (*i*); and cottage property in a town, the value of which necessarily depends on changing circumstances (*j*), cannot

(*a*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; *Norris* v. *Wright*, 14 Beav. 307; *Macleod* v. *Annesley*, 16 Beav. 600; *Ingle* v. *Partridge* (No. 2), 34 Beav. 411; *Roddy* v. *Williams*, 3 Jones & Lat. 16, *per Cur.*

(*b*) *Stickney* v. *Sewell*, *Norris* v. *Wright*, *ubi sup.*; *Phillipson* v. *Gatty*, 7 Hare, 516; *Drosier* v. *Brereton*, 15 Beav. 221.

(*c*) *Stretton* v. *Ashmall*, 3 Drew. 12; *Macleod* v. *Annesley*, 16 Beav. 600; *Budge* v. *Gummow*, 7 L. R. Ch. App. 719; [*Hoey* v. *Green*, W. N. 1884, p. 236.]

[(*d*) *Stretton* v. *Ashmall*, 3 Drew. 12; *Re Godfrey*, 23 Ch. D. 483, 490; *Smethurst* v. *Hastings*, 30 Ch. D. 490.]

(*e*) *Jones* v. *Lewis*, 3 De G. & Sm. 471. Reversed on appeal, it is believed, by Lord Truro, on 26th Feb. 1852, but on what grounds not known. [*Re Godfrey*, 23 Ch. D. 483; *Re Olive*, 34 Ch. D. 70; *Re Pearson*, 51 L. T. N.S. 692.] And see *Vickery* v. *Evans*, 3 N. R. 286.

[(*f*) *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 734; 33 Ch. D. (C.A.) 347; and see *Knox* v. *Mackinnon*, 13 App. Cas. 723; *Re Olive*, 34 Ch. D. 70; *Rae* v. *Meek*, 14 App. Cas. 558; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337; *Re Somerset*, (1894) 1 Ch. 231.]

(*g*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; and see *Stretton* v. *Ashmall*, 3 Drew. 9; *Royds* v. *Royds*, 14 Beav. 54, cases of trade and manufacturing premises.

[(*h*) *Re Whiteley*, 32 Ch. D. 196; 33 Ch. D. (C.A.) 347; *S. C.* in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas. 727; *Re Pearson*, 51 L. T. N.S. 692.]

[(*i*) *Hoey* v. *Green*, W. N. 1884, p. 236; *Fry* v. *Tapson*, 28 Ch. D. 268; *Smethurst* v. *Hastings*, 30 Ch. D. 490; *Mara* v. *Browne*, (1895) 2 Ch. 69, 83, *per* North, J.]

[(*j*) *Re Salmon*, 42 Ch. D. (C.A.) 351, 368; *Re Olive*, 34 Ch. D. 74; *Re Hunt's Settled Estates*, (1905) 2 Ch. 418, where it was held that, even on the direction of the tenant for life under the Settled Land Acts, trustees were

be regarded as an eligible investment for trustees, though the mere fact that new buildings on the security of which trustees are lending are unfinished may not be material, if due security is taken for their completion (*a*). In reference to decisions of this kind, it must be borne in mind that by the recent statute the duty which the trustee is empowered to delegate is that of ascertaining the value of the property, but the statute will not protect him from liability for breach of trust on the ground that the security "is one of a class which is attended with hazard" (*b*), and, generally, it is conceived that in reference to the sufficiency of the security he is bound to exercise the same care and prudence as theretofore. Where the question is simply one of value, which, in the ordinary course of business, it is within the functions of a surveyor or valuer to determine, the protection afforded by the statute seems to be complete. But further than this it does not appear to extend, and a trustee, while, of course, eschewing altogether all investments of a speculative character, will be well advised if he obtains in every case from his surveyor and valuer a report as full and ample as may be, setting forth all particulars requisite in order to enable the trustee to judge not merely as to the present, the special, or the temporary value of the property, but as to its permanent value for all purposes (*c*).

11. With reference to the liability of a trustee who makes [Liability of trustee lending excessive sum.]

justified in declining to invest on security of badly built houses let to artisans on monthly tenancies.]

[(*a*) *Rae* v. *Meek*, 14 App. Cas. 558, 571, a Scotch case, *per* Lord Herschell.]

[(*b*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 354, *per* Stirling, J., referring to *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733.]

[(*c*) As to the form and contents of the report, see *Re Olive*, 34 Ch. D. 74; *Re Whiteley*, 33 Ch. D. (C.A.) 351; *S. C. nom. Learoyd* v. *Whiteley*, 12 App. Cas. 735.

The following are suggested as some of the most material points to be attended to by the trustee: 1. The instructions to the valuer should be in writing. 2. It should appear how the trustees became acquainted with the property. 3. The valuer should be informed that the loan is one of trust money; and (4) generally of all material circumstances known to the trustees or their adviser in reference to the property and neighbourhood. 5. The report should be in writing. 6. It should particularly describe the character of the property, and should not extend to any property other than that on which the loan is to be made (see *Re Walker*, 59 L. J. Ch. 386, 391; 62 L. T. N.S. 449; 38 W. R. 766). 7. All matters connected with the property tending to decrease its value in reference to repairs, outgoings, and the like, should be stated (*S. C.*). 8. The means of knowledge and capacity of the valuer should be clearly made to appear, especially his experience, if any, in the locality, and his information as to actual recent sales in the district. 9. The valuer should expressly state what amount may be safely advanced, and advise such advance being made (*Re Walker*, *sup.*); and if any supplementary letter is written by him he should therein repeat or confirm such advice. 10. The report should be expressed in plain business-like language, and not in inflated phraseology.]

an excessive advance upon a mortgage security, it is now enacted (*a*) that "where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects (*b*) for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest," and the section applies "to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December, 1888" (*c*). The section is not applicable where the trustees are charged with a breach of trust because the security was one of a "class attended with hazard" (*d*), and where the investment was on undivided shares of china-clay works, and otherwise undesirable, the Court declined to apply the provision of the section (*e*).

The application of this section is attended with some difficulty. The section seems, as was said in a recent case, to suppose that whenever a mortgage security is found to have been a proper investment in all other respects there is a possibility of determining what less sum than was actually advanced thereon might have been safely advanced (*f*). In the particular case, the propriety of the investment being impugned on the question of sufficiency of value, the learned judge felt himself able to discharge the burden thus imposed upon him, and to fix at a specified sum the utmost limit of the amount which ought to have been advanced. In applying the section the Court will be guided by the principles prevailing before the passing of the Act (*g*).

[Lien of *cestui que trust* on securities retained pending realisation.]

12. Where trust money has been invested on an insufficient security, and the trustee is ordered to replace the fund, but the existing securities are retained, at the instance of the trustee, to await a more favourable time for realising them, the *cestuis que trust* are entitled to an interim lien on the securities until the fund is replaced (*h*).

[Title.]

13. The duty of the trustee in considering the sufficiency of

[(*a*) Trustee Act, 1893, (56 & 57 Vict. c. 53) s. 9, replacing s. 5 of the Trustee Act, 1888.]

[(*b*) See *Re Walker*, *sup.*]

[(*c*) The date of the passing of the Trustee Act, 1888.]

[(*d*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 353, *per* Stirling, J., quoting language of Lord Watson in *Learoyd* v. *Whiteley*, 12 A. C. 727, 733.]

[(*e*) *Re Turner*, (1897) 1 Ch. 536.]

[(*f*) *Re Somerset*, (1894) 1 Ch. 231, 253, *per* Kekewich, J.]

[(*g*) *Shaw* v. *Cates*, (1909) 1 Ch. 389, where an investment of £4440 was treated as good for £3400.]

[(*h*) *Re Whiteley*, 33 Ch. D. (C.A.) 347; *S. C.* in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas. 727.]

the title to the mortgaged property is not distinguishable in principle from his duty in the case of a purchase (*a*). Mortgages of leaseholds, however, formerly rested on a different footing from purchases, by reason that the provisions of the Vendor and Purchaser Act, 1874 (*b*), and the Conveyancing and Law of Property Act, 1881 (*c*), were not applicable to mortgages. This is remedied by the Trustee Act, 1893, which provides (*d*) that a trustee lending money upon the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partly, with the production or investigation of the lessor's title.] It was held by Lord Romilly, M.R., that, as trustees are bound to employ competent persons as their solicitors, if through the ignorance or negligence of their solicitors, the trustees lend money upon a bad title, they are personally responsible to the *cestuis que trust.* But the decision was appealed against, and the case was compromised with the sanction of the Lords Justices on behalf of infants (*e*).

[Duty of solicitor to trustee.]

14. [The duty of a solicitor advising a trustee in reference to an investment of trust money is not so much himself to form or express an opinion on the value of the property offered as security (though the law does not prohibit him from doing so if he thinks fit), as to see that the trustee has before him proper materials for forming a judgment of his own. The solicitor ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor and not appearing by the valuations, which may affect the value of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters (*f*).]

Ground-rents.

15. A power of investment upon the security of freehold or copyhold hereditaments will authorise trustees to invest upon freehold ground-rents reserved out of houses, and upon the question of value it will be borne in mind that the value of the

[(*a*) As to which, see *post*, Chap. XIX.]

[(*b*) 37 & 38 Vict. c. 78, ss. 2, 3.]

[(*c*) 44 & 45 Vict. c. 41, ss. 3, 13. See *post*, Chap. XVIII. s. 1.]

[(*d*) 56 & 57 Vict. c. 53, s. 8, sub-s. 2, replacing s. 4, sub-s. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59).]

(*e*) *Hopgood* v. *Parkin*, 11 L. R. Eq. 74. The M.R. added, that if the mortgagor had wilfully and knowingly deceived the solicitor by assertion of what was false, or by the suppression of what was true, it might have altered the case and the liability of the trustees, Ib. 79; [and see *Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1, *sub. nom. Speight* v. *Gaunt.*]

[(*f*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337 at p. 360, *per* Stirling, J.; and see *Stokes* v. *Prance*, (1898) 1 Ch. 212, 224.]

houses is included, as, if the ground-rents be not paid, the landlord can enter (*a*). [The word "investment" in such a connection *may* extend to a purchase by way of investment. Thus where trustees were empowered to invest on government securities "or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder," it was competent for them to purchase leasehold ground-rents of the character indicated (*b*).]

["Investment" including purchase.]

Trustees may not lend on mortgage to one of themselves.

16. Trustees are precluded from lending on mortgage to one of themselves, as all must exercise an impartial judgment as to the sufficiency of the security (*c*).

Existing mortgages.

17. Where trustees and executors are empowered by will to lay out money upon *real securities*, they are authorised in *continuing* it upon existing mortgages (*d*); but the trustees should first satisfy themselves as to the sufficiency of the security.

[Power "to continue to hold" investments.]

18. [Where trustees are authorised to "continue to hold" special investments, the power must, *primâ facie*, be held to apply to such of the trusts as are continuous, and the trustees may appropriate to a special continuous trust any of the investments which the settlor has authorised to be held (*e*).]

Fowler *v.* Reynal.

19. If trustees have a power of lending to *three* on a mortgage of their joint interest in a particular property, they cannot lend to *two* of them. Neither can the trustees lend to the *three* without taking any security at the time, though after an interval of two years they succeed in obtaining the security. It is no excuse to say that the delay in taking the security did not occasion the loss. The answer is, that the terms of the power were not complied with (*f*).

Road bonds.

20. Road bonds, or mortgages of tolls and toll-houses are *real* securities, though they may not be eligible real securities (*g*); and where a testator, having road bonds, empowered his executor to *leave* any part of his assets on existing "real securities," it was held that they were not bound to call in the road bonds, but might exercise a discretion. The Court, however, gave no opinion whether the executor would have been justified in

(*a*) *Vickery* v. *Evans*, 3 N. R. 286.

[(*b*) *Re Mordan*, (1905) 1 Ch. (C.A.) 515.]

(*c*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; and see —— v. *Walker*, 5 Russ. 7; *Francis* v. *Francis*, 5 De G. M. & G. 108; *Crosskill* v. *Bower*, 32 Beav. 86; *Fletcher* v. *Green*, 33 Beav. 426.

(*d*) *Angerstein* v. *Martin*, T. & R. 239; *Ames* v. *Parkinson*, 7 Beav. 379; [and see *Re Chapman*, (1896) 2 Ch. (C.A.) 763].

[(*e*) *Fraser* v. *Murdoch*, 6 App. Cas. 855.]

(*f*) *Fowler* v. *Reynal*, 3 Mac. & G. 500; 2 De G. & Sm. 749.

[(*g*) See *Holgate* v. *Jennings*, 24 Beav. 623.]

lending trust money on road bonds as an original investment (*a*).

Railway mortgages.

21. It has since been determined, that a power to lend on *real securities* does not authorise a loan upon *railway* mortgages (*b*); and *a fortiori* a power to invest "upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments," does not authorise an investment on railway mortgages (*c*). And even a power to lend on "approved securities," though it will justify an investment on an ordinary mortgage, might not be held to extend to railway securities (*d*). And where trustees are empowered to lend "on such securities as they may approve," they are still bound to make enquiries, and exercise a sound discretion whether the securities are of sufficient value; and if in such a case the trustees lend on any irregular securities, the *onus* lies on the trustees to show the sufficiency of the security (*e*).

Loan upon a judgment.

22. Trustees, with power to lend on *real securities*, could not lend on *personal* security with a *judgment* entered up against the borrower, [even when] by the Judgments Act, 1838 (1 & 2 Vict. c. 110), judgments were a charge on all the lands of the debtor, in the same manner as if he had, by writing under his hand, agreed to charge the same (*f*).

Upon leaseholds for lives.

23. Trustees having power to lend on *mortgage*, ought not to invest on security of leaseholds for *lives*, for there can be no security without resorting to a policy of insurance, and then, *quatenus* the policy, they rely upon the funds and credit of a private company (*g*). In the case of leaseholds, the lessee generally does not know the lessor's title; and where this is the case, it is an additional reason why trustees cannot accept the security. This restriction, however, does not apply to leases for lives in Ireland renewable for ever (*h*).

(*a*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247; [*Cavendish* v. *Cavendish*, 24 Ch. D. 685].

(*b*) *Mant* v. *Leith*, 15 Beav. 525; *Harris* v. *Harris* (No. 1), 29 Beav. 107.

(*c*) *Mortimore* v. *Mortimore*, 4 De G. & J. 472.

(*d*) See *Re Simson's Trusts*, 1 J. & H. 89.

(*e*) *Stretton* v. *Ashmall*, 3 Drew. 9; and see *Zambaco* v. *Cassavetti*, 11 L. R. Eq. 439; [*New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. D. (C.A.) 302; but see *Re Smith*, (1896) 1 Ch. 71, *ante*, p. 355].

(*f*) *Johnson* v. *Lloyd*, 7 Ir. Eq. Rep. 252. Decided upon the corresponding enactment in the Irish Act, 3 & 4 Vict. c. 105. [And see *Rochfort* v. *Seaton*, (1896) 1 I. R. 18, where a power to invest on "real securities" was held not to authorise an investment on an assignment of a judgment which had not been docketed. As to judgments not charging lands until they have been actually delivered in execution, see the Judgments Act, 1864 (27 & 28 Vict. c. 112).]

(*g*) See *Lander* v. *Weston*, 3 Drew. 389; *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*h*) *Macleod* v. *Annesley*, 16 Beav. 600.

Upon leasehold for years.

24. Although where there is a power to lend on *mortgage* of real estates generally, there may be no objection on principle to an investment on *long terms of years* at a peppercorn rent, which beneficially are equal to freeholds, yet it was held that technically long terms of years did not answer the description of real securities (*a*). [But the law in this respect is now altered by the provision of the Trustee Act, 1893, already referred to (*b*).]

Mortgage for long term.

25. [Formerly, although] the mortgagor was seised *in fee*, a demise for a long term of years was often thought the more convenient form of mortgage, in order that the land and the money might devolve together upon the personal representative of the mortgagee, [but modern legislation has rendered such a device unnecessary, and it has consequently fallen into disuse].

Leaseholds with onerous covenants.

26. As to *leaseholds* of short duration, and incumbered with covenants and clauses of forfeiture, although no rule can be laid down that a trustee would not be justified under any circumstances in lending on such a security, yet he would at least be treading on very delicate ground, and the *onus* would lie heavily upon him to make out the perfect propriety of the investment (*c*). If the trustees be authorised and *required*, at the instance of the tenant for life, to invest the trust fund in a *purchase* of leaseholds, they have no option if the tenant for life insist upon his right (*d*).

Copyholds.

27. There can be no objection to *copyholds* as a real security, but the trustees should of course take care that they are of adequate value, and not rely on the mere covenant to surrender, but procure an actual surrender (*e*).

Mortgage of an undivided share or of a reversion.

28. There does not appear to be any *absolute* objection to a loan by trustees on the security of an *undivided share* or of a *reversion;* but they must not advance more than the proper proportion of the value of the undivided share, or of the reversion as such, that is, the *present value of the future interest*, and in

(*a*) *Townend* v. *Townend*, 1 Giff. 211; [*Re Chennel*, 8 Ch. D. (C.A.) 507; *Re Boyd's Settled Estates*, 14 Ch. D. 626; *Leigh* v. *Leigh*, 56 L. J. N.S. Ch. 125; 56 L. T. N.S. 634; 35 W. R. 121; but under the Conveyancing Acts, 44 & 45 Vict. c. 41, s. 65, and 45 & 46 Vict. c. 39, s. 11, a long term of years at a peppercorn rent may, in the cases provided by the Acts, be enlarged into a fee simple].

[(*b*) 56 & 57 Vict. c. 53, s. 5 (sub-s. 1), *ante*, p. 369, replacing s. 9 of the Trustee Act, 1888 (51 & 52 Vict. c. 59). When it is practicable for the mortgagors to enlarge the long term into a fee simple previous to the mortgage, this course should always be adopted.]

(*c*) See *Townend* v. *Townend*, 1 Giff. 201; *Wyatt* v. *Sharratt*, 3 Beav. 498; *Fuller* v. *Knight*, 6 Beav. 209; [*Re Chennell*, 8 Ch. D. (C.A.) 492].

(*d*) *Cadogan* v. *Earl of Essex*, 2 Drew. 227; *Beauclerk* v. *Ashburnham*, 8 Beav. 322; see *ante*, p. 348.

(*e*) See *Wyatt* v. *Sharratt*, 3 Beav. 498.

taking securities of this kind a full power of sale (*a*) would be an essential provision.

Lending on real security in Ireland.

29. Where trustees were expressly authorised to lend on real securities in England, Wales, or Great Britain, they were empowered by 4 & 5 Will. 4. c. 29, to lend on real securities in *Ireland*. But the second section enacted, that all loans in which any *minor*, *unborn child*, or *person of unsound mind* was interested, should be made by the direction of the Court of Chancery, to be obtained *in any cause*, or (*b*) *upon petition* in a summary way (*c*). And by the Law of Property Amendment Act, 1859, s. 32 (*d*), trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, might invest the trust fund on real securities in any part of the *United Kingdom*, and investments on real securities in Ireland might therefore be made; [but these enactments were repealed by the Trust Investment Act, 1889, already adverted to (*e*)].

Lord St Leonards' Act.

Securities in Scotland or Ireland.

30. Where trustees have a power of investing upon "real securities," it is conceived that real securities in *Scotland*, where the law is wholly different, would not fall within the description; and though the above-mentioned Act of 1859 allowed investments in real securities in any part of the United Kingdom, yet as by the 33rd section the Act was not to extend to Scotland, it was not considered safe for trustees to invest in Scotch securities, [and under the Trustee Act, 1893 (*f*), by which 22 & 23 Vict. c. 35 has now been replaced, and which also does not extend to Scotland, it would seem that such investments are no more advisable than they previously were.

Although the registration laws and the practice in Ireland in

[(*a*) The law now supplies a power of sale, see the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19. It must, however, be borne in mind that an investment on an undivided share involves a complication with the rights of other persons, and, in the case of small estates, the possibility that the costs of a partition action may exceed the margin of the security, and see *Re Turner*, (1897) 1 Ch. 536. In the case of a reversion there is no income available for payment of the interest, and the value of the mortgaged property is in many cases matter of speculation rather than of reasonable certainty.]

(*b*) *Ex parte French*, 7 Sim. 510.

[(*c*) As to this Act, see *Stuart* v. *Stuart*, 3 Beav. 430; *Re Kirkpatrick's Trusts*, 15 Jur. 941; *Ex parte French*, 7 Sim. 510; *Ex parte Pawlett*, Ph. 570; *Re Settlement of Allies and Ux.*, M. R. 24 Jan. 1857, in which the Court sanctioned a proviso that the mortgage money should not be called in for five years. As to how trustees, on the sale of any holding under the Purchase of Land (Ireland) Act, 1885, may invest the proceeds of sale, see Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33, s. 11).]

(*d*) 22 & 23 Vict. c. 35, s. 32, made retrospective by 23 & 24 Vict. c. 38, s. 12.

[(*e*) 52 & 53 Vict. c. 32; see *ante*, p. 361.]

[(*f*) 56 & 57 Vict. c. 53; see *ante*, p. 362.]

several respects render a puisne mortgage on land in Ireland a less undesirable security than a puisne mortgage on land in England, and although it has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not of itself and in the absence of other circumstances a breach of trust (*a*), yet such securities are undesirable investments for trustees, and in a recent case where, without the requisite consent of the tenant for life, India stock was sold out by trustees of a settlement, and the proceeds invested on a third sub-mortgage of land in Ireland, it was held, under the circumstances, that a breach of trust had been committed (*b*)].

Second mortgages.

31. Trustees cannot be advised to make advances upon a *second* mortgage (*c*), for they neither get the legal estate nor the title-deeds, and they may be placed under serious difficulties by the acts of the first mortgagee. If he bring an action for foreclosure, the trustees forfeit their interest unless they redeem, which they may have no means of doing out of their own estate, and they may experience a difficulty in procuring a person to take a transfer; and if the first mortgage contain a power of sale, the mortgagee may sell the property at a great disadvantage, and the trustees cannot prevent it, unless by redemption, which may not be practicable (*d*). In addition to which it is extremely difficult to guard satisfactorily against the possible event of the mortgagor obtaining an advance upon a third mortgage without disclosing the second, and should this occur the third mortgagee might as a purchaser for value without notice get in the first mortgage, and *tack* his original mortgage to it, and squeeze out the second mortgage; or the first mortgagee or his transferee might by *consolidation* of his mortgage with a mortgage of other property of the same mortgagor, oust the trustees of their security (*e*). [But by the Conveyancing and Law of Property Act, 1881 (*f*), sect. 17, in cases of mortgages made, or one of

[(*a*) See *Smithwick* v. *Smithwick*, 12 Ir. Ch. Rep. 181; *Crampton* v. *Walker*, 31 L. R. Ir. 437.]

[(*b*) *Chapman* v. *Browne*, (1902) 1 Ch. (C.A.) 785.]

[(*c*) See, however, *ante*, p. 370, as to investments on land subject to statutory rent-charges for drainage, &c.]

(*d*) See *Norris* v. *Wright*, 14 Beav. 308; *Robinson* v. *Robinson*, 16 Jur. 256; *Drosier* v. *Brereton*, 15 Beav. 226; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 337; *Lockhart* v. *Reilly*, 1 De G. & J. 464, 476.

(*e*) But a third mortgagee holding a security which had no existence at the date of the second mortgage, and taking with notice of that mortgage, cannot consolidate a first mortgage with his own third mortgage as against the second mortgagee; *Baker* v. *Gray*, 1 Ch. D. 491; [and see *Jennings* v. *Jordan*, 6 App. Cas. 698; *Harter* v. *Colman*, 19 Ch. D. 630; *Pledge* v. *White*, (1896) A. C. 187; *Re Salmon*, (1903) 1 K. B. 147; *Sharp* v. *Rickards*, (1909) 1 Ch. 109].

[(*f*) 44 & 45 Vict. c. 41.]

which is made, after the 31st December, 1881, and subject to any stipulation to the contrary, the right of consolidating separate mortgages of different properties is taken away.]

Equitable mortgages.

32. An investment upon a *deposit* of title-deeds has this advantage over a second mortgage, that it would be difficult for the mortgagor to deal with the property in the absence of the deeds. At the same time it is possible that by some accident or fraud, the legal estate might get into the hands of a purchaser for value without notice, and if so, the trustees would be ousted. Sir J. Romilly, M.R., observed: "I do not know that it has ever been determined, and I do not mean to express an opinion, that a trustee is ever justified in lending money on real securities, *when he does not get the legal estate*" (*a*). [And in a recent case Sir George Jessel, M.R., said that "it had never been decided that an investment upon equitable mortgage was unauthorised when there was a power to invest on real securities, because it had always been assumed to be the law of the Court without calling for a decision," and he acted upon that view (*b*). There seems to be no objection to trustees investing upon a sub-mortgage where they get the legal estate, and are put in a position to exercise the powers arising under the original mortgage deed (*c*).

Sub-mortgage.

Contributory mortgage.

33. It is a breach of trust for trustees empowered to invest "in their names" upon real security, to invest upon a contributory mortgage of freeholds (*d*), and in general it is apprehended that] trustees should not join with others in a mortgage, so as to *mix* up the trust fund with the rights of strangers. Still less could they take a joint mortgage in the name of a common trustee, for this would also be a delegation of their duty.

Mixing trust money in a mortgage.

Powers of sale.

34. Mortgagees at the present time almost invariably have powers of sale, [either expressed in the mortgage or arising under the recent Act (*e*),] but formerly it was otherwise, and trustees would no doubt be held justified in taking a transfer of an old mortgage not accompanied with a power of sale. Where, however, it is practicable, trustees should always insist on a power

(*a*) *Norris* v. *Wright*, 14 Beav. 308; and see cases cited *sup.*, p. 384, note (*d*).

[(*b*) *Swaffield* v. *Nelson*, W. N. 1876, p. 255.]

[(*c*) *Smethurst* v. *Hastings*, 30 Ch. D. 490.]

[(*d*) *Webb* v. *Jonas*, 39 Ch. D. 660; *Re Massingberd's Settlement*, 63 L. T. N.S. 296 (C.A.); and see *Re Walker*, 59 L. J. Ch. 386; 62 L. T. N.S. 449; 38 W. R. 766; *Stokes* v. *Prance*, (1898) 1 Ch. 212, 224; *Re Dive*, (1909) 1 Ch. 328.]

[(*e*) Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19, *et seq.*, a statutory power of sale arises under every mortgage by deed unless expressly excluded.]

of sale, though the omission might not amount to a breach of trust (*a*).

Caution in payment of the money.

35. When trustees lend on mortgage, they should be careful not to part with the money, except on delivery of the security; for they will be liable for all the consequences if they sell out stock, and allow their solicitor or agent to receive the money on his representation that the mortgage is ready, and it afterwards turns out that the proposed security was a pure invention, and that the money has been misapplied (*b*).

Clause not to call in the money.

36. A power of investment does not justify trustees in admitting a clause that the mortgage shall not be called in for a certain period, and if the interests of the *cestuis que trust* were thereby affected, the trustees would be personally responsible (*c*).

In loans of trust-money, the trust kept out of sight.

37. Where trust money is lent upon *mortgage*, it is desirable to keep the trust out of sight, in order that when the money is paid off, the trust deed may not become an essential link in the mortgagor's title. It is usual, therefore, to insert in the mortgage deed a declaration, that the money advanced belongs to the trustees (not described in that character, but by name) on a joint account, and that the receipt of the survivors or survivor, his executors or administrators, their or his assigns, shall be a sufficient discharge (*d*); a practice which, assuming the trust settlement to confer the power of executing the trusts and giving receipts on the survivors or survivor, his executors or administrators, their or his assigns, does not seem open to much objection, and has received the sanction of general usage. Any declaration of trust of the mortgage that may be requisite is executed by a separate deed. The trustees should, however, also execute the mortgage deed, as doubts have been entertained (though it is conceived without reason (*e*)) whether, if they omit to execute,

(*a*) See *Farrar* v. *Barraclough*, 2 Sm. & G. 231.

(*b*) *Rowland* v. *Witherden*, 2 Mac. & G. 568; *Hanbury* v. *Kirkland*, 3 Sim. 265; [*Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1;] and see *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; [*Robinson* v. *Harkin*, (1896) 2 Ch. 415].

(*c*) *Vickery* v. *Evans*, 33 Beav. 376; 3 N. R. 286; 33 L. J. Ch. 261. See *ante*, p. 383, note (*c*).

[(*d*) See now the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 61, which, subject to a contrary intention being expressed in the instrument, makes the receipt of the survivors or survivor, or of the personal representatives of the last survivor, a complete discharge in all cases where, in a mortgage or transfer made since the 31st December, 1881, the money advanced or owing is expressed to be advanced by or owing to more persons than one out of money or as money belonging to them on a joint account, or the mortgage or transfer is made to more persons than one jointly, and not in shares.]

(*e*) How can a person claim at the same time under and against a deed? If he claim under the mortgage at all, he must admit the declaration that the money was a joint advance. Besides,

the declaration will bind them. By this method, should the mortgage be called in or transferred before any change of trustees occurs, no inconvenience arises (*a*). Upon a change of trustees, however, the difficulty of framing a transfer of the mortgage to the new trustees so as not to disclose the trust is very great. Some conveyancers, indeed, treat the difficulty as insurmountable, and disclose the trust; others recite in the transfer an actual payment of the mortgage money by the new trustees to the old, a practice open to the objection that it involves a recital absolutely contrary to fact (*b*). Another and middle course, frequently adopted, is as follows:—A. and B. being appointed new trustees in the room of C. and D., the recitals omit to notice the appointment of A. and B. as new trustees, and merely state that A. and B. "have become entitled to the mortgage, and have required C. and D. to convey and assign to them." But this last method is by no means free from difficulty. The degree of inaccuracy of statement is perhaps no greater than that involved in the original joint account clause; but the absence of consideration creates embarrassment, and there seems room for contention by a future purchaser of the mortgaged estate that he has a right to know *how* A. and B. became entitled. Another mode is to recite that C. and D. are possessed of the mortgage moneys and security *in trust for A. and B.*, to whom the same belong on a joint account, and who are desirous of having the same vested in them; a method affording a greater prospect of success than those previously mentioned, and on the whole perhaps to be preferred. [This mode of effecting the transfer has recently been approved, and the Court expressed an opinion that purchasers were entitled to rely on such a recital as a protection against any trusts which might affect the property (*c*);

the presumption (unless and until the contrary is proved) would be, that the solicitor who prepared the deed had sufficient authority to insert the clause.

[(*a*) *Re Harman and Uxbridge, &c., Railway Company*, 24 Ch. D. 720, 726.]

(*b*) In a note to Jarman's Bythewood, Vol. VI. p. 381, it is stated that "some gentlemen introduce a declaration that the mortgagees *are trustees*, and have no beneficial interest, conceiving, and, it is apprehended, rightly, that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying the mortgage to enquire into the nature of the trust." This proposition, it is conceived, cannot safely be acted upon. [And see now 5th edit. of same work, Vol. III. p. 851, note (*f*); and *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340.] See on the doctrine of notice, *Jones* v. *Smith*, 1 Hare, 43; 1 Ph. 244; *Bridgman* v. *Gill*, 24 Beav. 306; *Jones* v. *Williams*, 24 Beav. 47; [*Re Alms Corn Charity*, (1901) 2 Ch. 750].

[(*c*) *Re Harman and Uxbridge, &c., Railway Co*, 24 Ch. D. 720, 726; and see *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263, 272; *Re West and Hardy's Contract*, (1904) 1 Ch. 145.]

but where it was inadvertently disclosed to purchasers that mortgage money was held on the trusts of a settlement of which the mortgagees were not the original trustees, the purchasers were entitled to require proof that the mortgagees were the duly appointed trustees of the settlement (*a*).]

Mortgage where the trust is disclosed.

38. Where trust money is secured upon a mortgage, and the trust appears upon the title, the mortgagor generally requires a [statutory acknowledgment of the right to] production of the settlement, for the purpose of satisfying a future purchaser that the estate has been discharged, and it is conceived that the trustee should give such [an acknowledgment.

[Friendly society.]

39. If the trustees of a friendly society lend the funds of the society on personal security not authorised by the Friendly Societies Act, 1875, the transaction is not an illegal contract upon which the trustees cannot sue, but amounts only to a breach of trust on the part of the trustees (*b*).]

Scale must be held evenly by trustees.

40. Where *successive estates* are limited, the scale in investments should of course be held evenly as between all parties, and the tenant for life should not be allowed, by an investment on a security less safe or less permanent than the usual one, and therefore yielding to the present holder an increased rate of interest, to advance himself at the expense of the remainderman (*c*).

Long Annuities, &c.

41. If a testator's estate consist of Long Annuities, or other fund either not a Government security or not of the most permanent character, the Court, as we have seen, as soon as its observation is attracted to the circumstance, has been accustomed to direct a conversion of such estate into Consols (*d*); and even Four per Cent. and Five per Cent. Bank Annuities, while that description of stock existed, were ordered to be similarly converted (*e*). It follows that trustees, who must be guided by the practice of the Court, would not be justified, in the absence of a special power, in investing trust moneys settled upon several persons successively upon any securities, which, by the rule of the Court referred to, would be liable to be converted into other securities. Even where the trustees were empowered by the

[(*a*) *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340. In the case of a purchase where the sale is by the Court, see *Re Whitham*, W.N. (1901) 86.]

[(*b*) *Re Coltman*, 19 Ch. D. (C.A.) 64.]

(*c*) See *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; [*Re Dick*, (1891) 1 Ch. (C.A.) 423, 431; *S. C.* in H. L. *Hume* v. *Lopes*, (1892) A. C. 112; *Re Somerset*, (1894) 1 Ch. (C.A.) 231, 247, *per* Kekewich, J.; *Mara* v. *Browne*, (1895) 2 Ch. 69, 83; *S. C.* (1896) 1 Ch. (C.A.) 199.]

(*d*) See pp. 333, 335, *sup.* [As to the extinction or conversion of the annuities here mentioned, see Vaizey on Investments, Chap XI.]

(*e*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 151, *per* Lord Eldon; *Powell* v. *Cleaver*, and other cases, cited Id. 142.

will to *continue* any of the testator's *Government Stocks*, it was held that they were not justified in continuing *Long Annuities* (*a*).

Navy Five per Cents.

42. However, where the trustees were directed by the will to invest on "*Government* or other *good* security," and part of the testator's estate consisted of Navy Five per Cents., and the tenant for life continued to receive the dividends for more than thirty years, the Court refused to hold the trustees liable for not having converted the Navy Five per Cents, into Three per Cent. Consols (*b*).

Selling out Consols.

43. Where the fund is already invested in *Consols*, it would be a clear breach of trust to sell out and invest the proceeds in an irregular fund, as, for instance, in *Long Annuities* (*c*).

Where trust funds are irregularly invested, the tenant for life and the trustees may be called upon to answer the difference.

44. Where a tenant for life has been wrongly in possession of the dividends of a stock producing an extraordinary income, he will be accountable to the remainderman for the excess of his receipts beyond the income which he would have received had the fund been properly invested (*d*). Upon the question whether, if the tenant for life be insolvent, the trustees should be decreed to make compensation to the suffering party, Lord Eldon said, he would not state what the Court would do in such a case, for it depended on many circumstances (*e*). In the case of *Dimes* v. *Scott* (*f*), where the executors were *expressly directed* to convert the testator's personal estate into money, and invest the proceeds in Government or real securities in trust for A. for life, remainder to B., and the executors for eleven years permitted A. to receive 10 per cent. interest upon an Indian loan, it was held they were chargeable with the difference between 10 per cent. interest which they had wrongfully paid, and the interest that would have resulted from a conversion into Three per Cent. Consols at the expiration of one year from the testator's decease. And in other later cases the Court, under similar circumstances, has apparently viewed the trustees as liable, and the tenant for life as liable over to the trustees, to the extent of his benefit (*g*).

(*a*) *Tickner* v. *Old*, 18 L. R. Eq. 422; [and see *Re Sheldon*, 39 Ch. D. 50; *Re Thomas*, (1891) 3 Ch. 482].

(*b*) *Baud* v. *Fardell*, 7 De G. M. & G. 628.

(*c*) *Kellaway* v. *Johnson*, 5 Beav. 519. [But as to varying investments, authorised by the Trustee Act, 1893, see *ante*, p. 367.]

(*d*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, see 150, 151; *Mills* v. *Mills*, 7 Sim. 501; and see *Pickering* v. *Pickering*, 4 M. & Cr. 289.

(*e*) See *Howe* v. *Earl of Dartmouth*, 7 Ves. 150; *Holland* v. *Hughes*, 16 Ves. 114.

(*f*) 4 Russ. 195; and see *Mehrtens* v. *Andrews*, 3 Beav. 72.

(*g*) *Hood* v. *Clapham*, 19 Beav. 90; *Bate* v. *Hooper*, 5 De G. M. & G. 338.

Of conversion of assets in India.

45. Where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the High Court, it is not the duty of the executor in India to transmit the assets to England to be invested in Consols, but he may invest the property in the securities of the Government of India, and the tenant for life will be entitled to the dividends or interest, whatever the amount. If the parties return to England, and so come under the jurisdiction of the Court, the fund may then be brought over at the instance of the remainderman, and the tenant for life must submit to the consequential reduction of his income (*a*).

Trust to invest in the funds and the money is retained.

46. If trustees be *expressly* bound by the terms of their trust to invest in the *public funds*, and instead of so doing they retain the money in their hands, the *cestuis que trust* may clearly elect to charge them with the amount of the money or with the amount of the stock which they might have purchased with the money (*b*).

Trustees ordered to invest in stock or on real securities, and neglecting to do either.

47. If trustees or executors be directed by the will to convert the testator's property and invest it in *Government or real securities*, it was long a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made with subsequent dividends, at the option of the *cestuis que trust* (*c*); or whether they should be charged with the amount of principal and interest only, without an option to the *cestuis que trust* of taking the stock and dividends (*d*). It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestuis que trust* have no option of taking the stock and

(*a*) *Holland* v. *Hughes*, 16 Ves. 111; *S. C.* 3 Mer. 685. [As to the investment in India under the Indian Trusts Act, 1882, of money which cannot be paid at once to beneficiaries, see Vaizey on Investments, p. 151.]

(*b*) *Shepherd* v. *Mould*s, 4 Hare, 504, *per* Sir J. Wigram; *Robinson* v. *Robinson*, 1 De G. M. & G. 256, *per Cur.*; *Byrchall* v. *Bradford*, 6 Mad. 13, 235. And it was said, that if a trust were of a permanent character, in which case the Court expected trustees to invest in Consols, though the settlement contained no express direction to that effect, trustees who improperly retained the funds in their hands might perhaps be held liable, at the option of the *cestuis que trust*, for the principal sum or the amount of stock which it would have purchased; *Robinson* v. *Robinson*, 1 De G. M. & G. 256, *per Cur.* [But since the Trust Investment Act, 1889, now replaced by the Trustee Act, 1893, cases of the kind last mentioned cannot occur, as trustees, in the absence of express directions in the trust instrument, have discretionary powers of investment.]

(*c*) *Hockley* v. *Bantock*, 1 Russ. 141; *Watts* v. *Girdlestone*, 6 Beav. 188; *Ames* v. *Parkinson*, 7 Beav. 379; *Ouseley* v. *Anstruther*, 10 Beav. 456.

(*d*) *Marsh* v. *Hunter*, 6 Mad. 295; *Gale* v. *Pitt*, M. R. 10th May, 1830; *Shepherd* v. *Mould*s, 4 Hare, 500; *Rees* v. *Williams*, 1 De G. & Sm. 319.

dividends. The principle upon which the Court proceeds is, that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestuis que trust* must have been entitled to in whatever mode that duty was performed; that the trustee might have discharged his duties without purchasing Three Per Cent. Bank Annuities; that the trustee is not to be deemed retrospectively to have exercised the discretion one way or the other, but is answerable only for the consequences of not having exercised the discretion; that to compel the trustee to purchase a sum of stock because the price has since risen, is to regulate the liability by an accidental subsequent occurrence, and not by the superiority of the stock over a mortgage at the time when the investment ought to have been made (*a*).

Trustees selling out stock improperly.

48. If the trust fund be *standing on a proper security*, and the trustee calls it in for no purpose connected with the trust, and therefore in dereliction of his duty, or for a purpose not authorised by the terms of the trust, he will be compellable, at the option of the *cestuis que trust*, *either* to replace the specific stock, or the stock into which, if not sold out, it would have been converted by Act of Parliament (*b*), with the intermediate dividends (*c*), *or* to account for the proceeds of the sale (*d*) with interest at 5 per cent. (*e*). And the breach of trust will not be cured by a subsequent reinvestment upon the trusts unless the reinvestment be the same *in specie* (*f*). But in a case where the trustee did not seek to make anything himself, but was honourably unfortunate in having yielded to the importunity of one of the *cestuis que trust*, it was held by Sir A. Hart, that, although the trustee was bound to replace the specific stock, the *cestuis que trust* should not have the option of taking the proceeds with interest (*g*). If the trustee become bankrupt, the *cestuis que trust*

(*a*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

(*b*) *Phillipson* v. *Gatty*, 7 Hare, 516; *Norris* v. *Wright*, 14 Beav. 304, 305; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; [*Re Massingberd*, 63 L. T. N.S. 296 (C.A.)].

(*c*) *Davenport* v. *Stafford*, 14 Beav. 335.

(*d*) *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Ex parte Shakeshaft*, 3 B. C. C. 197; *O'Brien* v. *O'Brien*, 1 Moll. 533, *per* Sir A. Hart; *Raphael* v. *Boehm*, 11 Ves. 108, *per* Lord Eldon; *Harrison* v. *Harrison*, 2 Atk. 121; *Bate* v. *Scales*, 12 Ves. 402; *Phillipson* v. *Gatty*, 7 Hare, 516; *Norris* v. *Wright*, 14 Beav. 305; *Rowland* v. *Witherden*, 2 Mac. & G. 568; *Wiglesworth* v. *Wiglesworth*, 16 Beav. 269.

(*e*) *Crackelt* v. *Bethune*, 1 J. & W. 587; *Mosley* v. *Ward*, 11 Ves. 581; *Pocock* v. *Reddington*, 5 Ves. 794; *Piety* v. *Stace*, 4 Ves. 620; *Jones* v. *Foxall*, 15 Beav. 392. [But as to rate of interest, see *post*, pp. 397, 398.]

(*f*) *Lander* v. *Weston*, 3 Drew. 309; [*Re Massingberd's Settlement*, 63 L. T. N.S. 296 (C.A.)].

(*g*) *O'Brien* v. *O'Brien*, 1 Moll. 533.

may at their option prove for the proceeds with interest, or for the price of the specific stock at the date of the bankruptcy with interim dividends (*a*). [And where the trustee has retired from the trust and transferred the security to new trustees, they are entitled to realise the security and hold the former trustee liable for the deficiency without giving him the option of replacing the money and taking the security (*b*).

[Where investment unauthorised.]

49. In the case of an investment which is not merely insufficient, but wholly unauthorised, it has been intimated that the *cestuis que trust* cannot require the trustee to replace the security which has been converted, without giving him an option or opportunity of taking to the improper investment (*c*).]

Neglect to invest property.

50. If trustees be under an obligation to invest in the funds, and they pay the money into a *bank* with a direction to lay it out in Bank Annuities, and the bankers neglect to do it, and the trustees make no inquiry for five months, and the bankers fail, the trustees are answerable for the money or the stock at the option of the *cestuis que trust* (*d*).

[Postponement of investment.]

51. [Where trustees are expressly directed to make a particular investment, which when the time for investment arrives has become a perilous one, they may, in the exercise of their discretion as prudent men, postpone the investment, but where such postponement is against the letter of the trust they should apply to the Court for its sanction to the proposed course (*e*).

[Change of investment sanctioned by Court.]

52. In a case of emergency, as for example, where the estate consists of a business, or of shares in a mercantile company, and a scheme of reconstruction is on foot which appears to be clearly advantageous, the Court may sanction the investment of trust moneys by the trustees in investments which are not authorised by the trust (*f*); but this is an extreme exercise of jurisdiction, and certainly the Court will not sanction an unauthorised change of investment which is proposed on the mere ground that it will be to the advantage of the beneficiaries (*g*).]

(*a*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Ex parte Gurner*, 1 Mont. Deac. & De G. 497.

[(*b*) *Re Salmon*, 42 Ch. D. (C.A.) 351.]

[(*c*) *Re Salmon*, 42 Ch. D. 351, 357; followed by Wright, J., in *Re Lake*, (1903) 1 K. B. 439, 443, where *cestuis que trust*, having adopted an improper investment were allowed, under the circumstances, to prove in the bankruptcy of the trustee not for the whole amount of the trust fund, but only for the damage the trust estate had sustained by reason of the investment, the measure of damage being the difference between the total sum invested and the assessed value of the amount receivable under the compromise.]

(*d*) *Challen* v. *Shippam*, 4 Hare, 555.

[(*e*) *Re Maberly*, 33 Ch. D. 455.]

[(*f*) *Re New*, (1901) 2 Ch. 534.]

[(*g*) *Re Tollemache*, (1903) 1 Ch. (C.A.) 955, where Cozens-Hardy, L.J., said that *Re New* "constitutes the high water mark of the exercise by

Trustees may not invest so as to subject the fund to the control of any *one* trustee.

53. Trustees would not be justified in making any investment that would subject the trust money to the power or control of any *one* of the trustees singly; they could not, for instance, lay out the fund upon Indian bills (supposing such a security to be warranted by the settlement), if made payable, not to all the trustees in their joint capacity, but to one of the trustees individually (*a*).

Solicitors.

54. Solicitors employed in negotiating a loan of trust moneys will not be liable for a breach of trust if they have no other privity with the transaction than what arises from their professional duty (*b*), but they will be deemed trustees and be responsible as such if they act professionally in carrying out a transaction which they know to be a breach of trust, and which is calculated to promote their own private ends (*c*).

Trustees lending should not employ the same solicitor as the borrower.

55. In laying out trust moneys, trustees would do well not to employ the solicitor who acts for the borrower. Besides the inconveniences that arise from the doctrine of implied notice, there is in this case such a conflict of duties on the part of the solicitor, that he cannot adequately represent the interests of both lender and borrower (*d*).

[Trustees whether bound to make periodical inquiries as to investments.]

56. [In the case of investments by way of mortgage authorised to be made by trustees as such, or transferred to them and thereby becoming authorised, there is no obligation on the trustees to make periodical or further investigations as to either the title to the security or the solvency or sufficiency of the mortgagor; but if there are circumstances which suggest to a reasonable man that the security is in jeopardy, the duty may arise (*e*).

[Directors not trustees.]

57. Directors of trading companies are not trustees in the sense in which that term is used with reference to settlements

the Court of its extraordinary jurisdiction in relation to trusts"; and see *Re Morrison*, (1901) 1 Ch. 701, where it was held that the Court had no jurisdiction to sanction the sale of a testator's business for shares or debentures in a company to be formed to take the business over, such shares or debentures not being within the powers of investment given by the will.]

(*a*) *Walker* v. *Symonds*, 3 Sw. 1, see 66; and see *Salway* v. *Salway*, 2 R. & M. 215; *Ex parte Griffin*, 2 Gl. & J. 114; *Clough* v. *Dixon*, 8 Sim. 594; 3 M. & Cr. 490. But see *ante*, p. 328; *Mendes* v. *Guedalla*, 2 J. & H. 259; *Consterdine* v. *Consterdine*, 31 Beav. 330; [*Lewis* v. *Nobbs*, 8 Ch. D. 591; *Re Massingberd*, 63 L. T. N.S. 296 (C.A.); *Stokes* v. *Prance*, (1898) 1 Ch. 212, 224].

[(*b*) See *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199; *Stokes* v. *Prance*, (1898) 1 Ch. 212.]

(*c*) *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199, see 204, 208; *Fyler* v. *Fyler*, 3 Beav. 550, and see *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; [*Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390; *Turner* v. *Smith*, (1901) 1 Ch. 123;] and *post*, Chap. XXXI. s. 3.

(*d*) See *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331; [*Crampton* v. *Walker*, 31 L. R. Ir. 437].

[(*e*) *Rawsthorne* v. *Rowley*, (1909) 1 Ch. (C.A.) 409; and see *Shaw* v. *Cates*, (1909) 1 Ch. 389.]

and wills (*a*). They are confidential agents having a large discretion (*b*), and may properly make advances on securities of a more speculative character than could be accepted by trustees (*c*).

[Liquidator.] And a liquidator is an agent of the company, and not, strictly speaking, a trustee either for creditors or contributories (*d*).]

SECTION V

LIABILITY OF TRUSTEES TO PAYMENT OF INTEREST

General laches.

1. It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing the fund or transferring it to the hand destined to receive it, he will be answerable to the *cestuis que trust* for interest during the period of his *laches;* and a trustee has been decreed to pay interest even where it was not prayed by the bill (*e*); and in a suit establishing *laches*, will be decreed to pay personally the costs up to the hearing of a suit arising out of the *laches* (*f*).

Executor must pay testator's debts as soon as he has assets.

2. An *executor or administrator* should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keep money in his hands idle, when there is an outstanding debt upon which interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and if the outstanding debt carry interest at 5 per cent., the executor will be charged with interest at the same rate (*g*).

After payment of debts and legacies executor must account for surplus.

3. After payment of debts and legacies, if the executor or administrator be guilty of *laches* in accounting for the surplus

[(*a*) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, 44 Ch. D. 412; and see *Re Lands Allotment Company*, (1894) 1 Ch. 616, 631, 639.]

[(*b*) *Marzetti's case*, 28 W. R. 541; 42 L. T. N.S. 206.]

[(*c*) *Knowles* v. *Scott*, (1891) 1 Ch. 717.]

[(*d*) *S. C.*]

(*e*) *Woodhead* v. *Marriott*, C. P. Coop. Cases, 1837-38, 62; *Turner* v. *Turner*, 1 J. & W. 39; *Stafford* v. *Fiddon*, 23 Beav. 286; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Chugg* v. *Chugg*, W. N. 1874, p. 185. But the Court is not in the habit of giving interest on what may be found due for arrears of income; *Blogg* v. *Johnson*, 2 L. R. Ch. App. 225.

(*f*) *Tickner* v. *Smith*, 3 Sm. & G. 42.

(*g*) *Dornford* v. *Dornford*, as cited in *Tebbs* v. *Carpenter*, 1 Mad. 301; *Hall* v. *Hallet*, 1 Cox, 134; *Turner* v. *Turner*, 1 J. & W. 39.

estate to the residuary legatee (*a*), or next of kin (*b*), he will be charged by the Court with interest for the balance improperly retained.

Trustee in bankruptcy must not neglect to pay dividends.

4. So, if the *trustee* of a bankrupt's estate neglect to pay a dividend to the creditors (*c*), or the *receiver* of an estate do not move the Court in proper time to have the rents in his hands made productive (*d*), they will be ordered to account for the money with interest from the time when the breach of duty commenced.

No excuse that the trustee or executor did not use the money.

5. And an executor or other fiduciary cannot excuse himself by saying that he made no actual use of the money, but lodged it at his banker's (*e*), and to a separate account (*f*), for it was a breach of trust to retain the money.

Delay may be explained by the mistake of the trustee or executor.

6. But, where an executor conceived himself to be entitled to the residue, and the Court considered his claim to be just in itself, but was obliged from a particular circumstance in the case to give judgment against him, it was thought too severe to put him in the situation of one who had neglected his duty, and the demand against him for interest was consequently disallowed (*g*).

Formerly the executor might have used the assets.

7. Formerly it was held that an executor might employ the assets in his trade, or lend them upon security, and he should not be called upon to account for the profits or interest (*h*). And such was the case even where money which had been lent by the testator on good security was called in by the executor for the express purpose of being re-lent by himself. For the executor,

(*a*) *Forbes* v. *Ross*, 2 Cox, 113 ; *Seers* v. *Hind*, 1 Ves. jun. 294 ; *Younge* v. *Combe*, 4 Ves. 101 ; *Longmore* v. *Broom*, 7 Ves. 124 ; *Rocke* v. *Hart*, 11 Ves. 58 ; *Piety* v. *Stace*, 4 Ves. 620 ; *Ashburnham* v. *Thompson*, 13 Ves. 402 ; *Raphael* v. *Boehm*, 11 Ves. 92 ; *S. C.* reheard, 13 Ves. 407 ; *S. C.* spoken to, 13 Ves. 590 ; *Dornford* v. *Dornford*, 12 Ves. 127 ; *Franklin* v. *Frith*, 3 B. C. C. 433 ; *Littlehales* v. *Gascoyne*, 3 B. C. C. 73 ; *Newton* v. *Bennet*, 1 B. C. C. 359 ; *Lincoln* v. *Allen*, 4 B. P. C. 553 ; *Crackelt* v. *Bethune*, 1 J. & W. 586 ; *Tebbs* v. *Carpenter*, 1 Mad. 290.

(*b*) *Hall* v. *Hallet*, 1 Cox, 134 ; *Perkins* v. *Baynton*, 1 B. C. C. 375 ; *Stacpoole* v. *Stacpoole*, 4 Dow, 209, see 224 ; *Heathcote* v. *Hulme*, 1 J. & W. 122 ; *Holgate* v. *Haworth*, 17 Beav. 259 ; [*Re Stevens*, (1898) 1 Ch. (C.A.) 162, 172].

(*c*) *Treves* v. *Townshend*, 1 B. C. C. 384 ; *Re Hilliard*, 1 Ves. jun. 89 ; *Hankey* v. *Garret*, 1 Ves. jun. 236.

(*d*) *Foster* v. *Foster*, 2 B. C. C. 616 ; *Hicks* v. *Hicks*, 3 Atk. 274 ; [as to judicial excuse under the Judicial Trustees Act, 1896, s. 3, see *post*, Chap. XXXI. s. 3.]

(*e*) *Younge* v. *Combe*, 4 Ves. 101 ; *Franklin* v. *Frith*, 3 B. C. C. 433 ; *Treves* v. *Townshend*, 1 B. C. C. 384 ; *Re Hilliard*, 1 Ves. jun. 89 ; *Dawson* v. *Massey*, 1 B. & B. 230 ; *Browne* v. *Southouse*, 2 B. C. C. 107 ; and see *Rocke* v. *Hart*, 11 Ves. 60.

(*f*) *Ashburnham* v. *Thompson*, 13 Ves. 402.

(*g*) *Bruere* v. *Pemberton*, 12 Ves. 386. But see *Sutton* v. *Sharp*, 1 Russ. 146 ; *Turner* v. *Maule*, 3 De G. & Sm. 497 ; [*Evans* v. *Evans*, 34 Ch. D. (C.A.) 597 ; *Re Hickey's Estate*, 27 L. R. Ir. 65.]

(*h*) *Grosvener* v. *Cartwright*, 2 Ch. Ca. 21 ; *Linch* v. *Cappy*, 2 Ch. Ca. 35 ; and see *Brown* v. *Litton*, 1 P. W. 140.

it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and if accountable for any loss, he was surely entitled to any gains (*a*). But Lord North overruled the doctrine in spite of the alleged practice of the Court for the last twenty years, and the authority of above forty precedents; and as to the argument that, if the money should be lost, the executor would be personally responsible, his Lordship said, it was very well known that a man might insure his money at the rate of *one per cent.* (*b*).

At least where he was solvent.

8. A distinction was afterwards taken between a *solvent* and an *insolvent* executor; that the former, as he might suffer a loss should take the gain, but, as an executor who was insolvent at the time of the loan could incur no risk of a loss personally, he should not be allowed to take to himself any benefit (*c*).

And where the assets used were not specifically bequeathed.

And Lord Hardwicke drew another distinction; that if an executor had *placed out* assets that were *specifically bequeathed*, he would be made to account for the interest, but that the Court never directed interest against an executor who made use in the way of his trade of *general* assets come to his hands (*d*).

Rule now general that executor must account for all profits.

9. But all these refinements have long since been swept away (*e*); and the rule is now *universal*, that, whether the executor be solvent or insolvent, whether the money be part of the general assets or specifically bequeathed, whether it be lent upon security or employed in the way of trade, the executor shall account for the utmost actual profit to the testator's estate (*f*).

Trustees using trust money in trade must account for it with interest, or the actual profits.

10. Where the money has been employed by breach of trust in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest (*g*). And executors cannot disguise the employment of the money in their business under the garb of a *loan* to one of themselves (*h*). And an executor who is a trader is considered to employ the money in trade, if he lodge it at his banker's and place it in his own name, for a merchant must generally keep a balance at his

(*a*) See *Ratcliff* v. *Graves*, 2 C. Ca. 152.

(*b*) *Ratcliff* v. *Graves*, 1 Vern. 196; *S. C.* 2 Ch. Ca. 152.

(*c*) *Bromfield* v. *Wytherley*, Pr. Ch. 505; *Adams* v. *Gale*, 2 Atk. 106.

(*d*) *Child* v. *Gibson*, 2 Atk. 603.

(*e*) As to the former distinction, see *Newton* v. *Bennet*, 1 B. C. C. 361; *Adye* v. *Feuilleteau*, 1 Cox, 25; and as to the latter, see *Newton* v. *Bennet*, 1 B. C. C. 361.

(*f*) *Tebbs* v. *Carpenter*, 1 Mad. 304, *per* Sir T. Plumer; *Lee* v. *Lee*, 2 Vern. 548; *Adye* v. *Feuilleteau*, 1 Cox, 24; *Piety* v. *Stace*, 4 Ves. 622, *per* Lord Alvanley.

(*g*) *Heathcote* v. *Hulme*, 1 J. & W. 122; *Anon. case*, 2 Ves. 630, *per* Sir T. Clarke; *Docker* v. *Somes*, 2 M. & K. 655; *Ex parte Watson*, 2 V. & B. 414; *Brown* v. *Sansome*, 1 M'Clel. & Y. 427; *Robinson* v. *Robinson*, 1 De G. M. & G. 257; see *ante*, pp. 307, 308.

(*h*) *Townend* v. *Townend*, 1 Giff. 201.

banker's, and this answers the purpose of his credit as much as if the money were his own (*a*).

11. [An executor has usually been charged with interest at the rate of 4 per cent. (*b*), except in those special cases where interest at the higher or mercantile rate of 5 per cent. has been charged. Recently, in view of the diminished rate of interest obtainable on investments of trust money, it was thought that the rate to be charged ought to be reduced, and in some of the later cases this view was acted on by the Court (*c*); but in the Court of Appeal it has now been clearly laid down that the general rule of the Court, that interest must be calculated at 4 per cent., has not been altered; and interest on advances which have to be brought into hotchpot must still be paid at that

[Rate of interest with which executor chargeable.]

(*a*) *Treves* v. *Townshend*, 1 B. C. C. 384; 1 Cox, 50; *Moons* v. *De Bernales*, 1 Russ. 301; *Re Hilliard*, 1 Ves. jun. 90; *Sutton* v. *Sharp*, 1 Russ. 146; *Rocke* v. *Hart*, 11 Ves. 61; but see *Browne* v. *Southouse*, 3 B. C. C. 107.

[(*b*) See *Fletcher* v. *Green*, 33 Beav. 426; *Forbes* v. *Ross*, 2 Cox, 116; *Hall* v. *Hallet*, 1 Cox, 138; *Tebbs* v. *Carpenter*, 1 Mad. 306; *Re Hilliard*, 1 Ves. jun. 90; *Browne* v. *Southouse*, 3 B. C. C. 107; *Mosley* v. *Ward*, 11 Ves. 582; *Perkins* v. *Baynton*, 1 B. C. C. 375; *Treves* v. *Townshend*, 1 B. C. C. 386; *Hicks* v. *Hicks*, 3 Atk. 274; *Younge* v. *Combe*, 4 Ves. 101; *Rocke* v. *Hart*, 11 Ves. 58; *Hankey* v. *Garret*, 1 Ves. jun. 236; but see *Bird* v. *Lockey*, 2 Vern. 744, 4th point; *Carmichael* v. *Wilson*, 3 Moll. 79; *Attorney-General* v. *Alford*, 4 De G. M. & G. 843; *Johnson* v. *Prendergast*, 28 Beav. 480; *Re Emmet's Estate*, 17 Ch. D. 142; *Owen* v. *Richmond*, W. N. 1895, p. 29; and see *Re Morley*, (1895) 2 Ch. 738; *Nicholson* v. *Nicholson*, W. N. 1895, p. 106.]

[(*c*) In *Re Metropolitan Coal Consumers' Association; Wainwright's case*, (62 L. T. N.S. 30, 33), Kay, J., on the submission of the applicant, allowed 4 per cent. only in lieu of the usual mercantile rate of 5 per cent. In *London, Chatham, and Dover Railway Company* v. *South Eastern Railway Company*, (1892) 1 Ch. 120; (1893) A. C. 439, Kekewich, J., expressed the opinion that a change was desirable, but could only be effected by some consensus of judicial opinion, or by higher authority, and the Lords Justices on appeal from his decision intimated that 5 per cent. was above the current commercial rate of interest at the present day. In *Re Dracup*, (1894) 1 Ch. 59, North, J., held that beneficiaries in a partition action who had purchased parts of the estate ought to be charged with 3 per cent. only on purchase-moneys payable by them, but set off against their respective shares of the proceeds of sale, on the ground that the funds ought to be dealt with in the division as nearly as possible as if the money had been paid into Court and invested in Consols. In *Re Lambert*, (1897) 2 Ch. 169, Stirling, J., in the absence of opposition, directed that money advanced, for which a beneficiary was accountable, should carry interest at 3 per cent. only, though observing that the 4 per cent. rate is still charged on debts proveable in administrations; and this case is to be treated as having laid down a general rule as to rate of interest chargeable: *Re Whiteford*, (1903) 1 Ch. 889, dissenting from *Re Hargreaves*, 86 L. T. N.S. 43; W.N. (1902) 18; S. C. W.N. (1903) 24. In *Re Barclay*, (1899) 1 Ch. 674, where there was a trust for accumulation, compound interest at 3 per cent. was charged on balances retained uninvested. It may be observed that by R. 11 of the recent rules under the Judicial Trustees Act, 1896, see *post*, Chap. XXIII., a judicial trustee unnecessarily retaining trust money in his hands is liable to pay interest at such rate, not exceeding 5 per cent., as the Court may fix.]

rate (*a*). It is still the rule of the Court that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment or, at the option of the *cestuis que trust*, be charged with interest at the rate of 5 per cent. (*b*); and the old rate of interest on debts has not been altered, 4 per cent. being allowed on a judgment debt (*c*).

However, as we have seen (*d*), the rate of 3 per cent. instead of 4 per cent. has been adopted in applying the rule for the adjustment of the relative rights of tenant for life and remainderman, in reference to the conversion of reversionary interests, and it seems (*e*) that generally, wherever the fair measure of liability is the interest obtainable on money in trust investments, interest at 3 per cent. will be computed.] The general rule holds only where it does not appear that the executor has made greater interest, for the Court invariably compels the executor to account for every farthing he has actually received (*f*).

Under what circumstances trustees will be charged with extra interest.

12. It is not easy to define the circumstances under which the Court will charge executors and trustees with *more than* the ordinary rate of interest, or with *compound* interest. It was laid down by Sir John Romilly, M.R.: 1. That if an executor retain balances in his hands, which he ought to have invested, the Court will charge him with simple interest, at 4 per cent. 2. That if, in addition to such retention, he has *committed a direct breach of trust*, or if the fund has been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum. 3. That if in addition to this, he has employed the moneys so obtained by him in trade or speculation, for his own benefit or advantage, he will be charged either with the profits actually obtained from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest (*g*).

Trustee charged the higher rate of interest where gross misconduct.

13. The dicta and decisions undoubtedly seem to establish, in

(*a*) *Re Davy*, (1908) 1 Ch. (C.A.) 61.]

[(*b*) *Re Davis*, (1902) 2 Ch. 314.]

[(*c*) *Re Hunt*, (1902) 2 Ch. (C.A.) 318.]

[(*d*) *Ante*, pp. 341, 342.]

[(*e*) See the cases referred to *ante*, p. 397, note (*c*).]

(*f*) *Forbes* v. *Ross*, 2 Cox, 116, *per* Lord Thurlow; *Re Hilliard*, 1 Ves. jun. 90, *per eundem*; *Hankey* v. *Garret*, 1 Ves. jun. 239, *per eundem*; *Brown* v. *Litton*, 10 Mod. 21, *per* Lord Harcourt; *Hall* v. *Hallet*, 1 Cox, 138, *per* Lord Thurlow.

(*g*) *Jones* v. *Foxall*, 15 Beav. 392; and see *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349; [*Gilbert* v. *Price*, W. N. 1878, p. 117. In Jamaica interest at the rate of 6 per cent. per annum was allowed; *De Cordova* v. *De Cordova*, 4 App. Cas. 692. As to charging compound interest where there is an express trust for accumulation, *vide post*, p. 400].

accordance with the view just quoted, that an executor will be charged with interest at the higher rate where he is guilty, not merely of negligence, but of actual corruption or misfeasance, amounting to a wilful breach of trust (*a*). But in *Attorney-General* v. *Alford* (*b*) Lord Cranworth expressed his disapprobation of charging the executor with a higher rate of interest by way of *penalty;* and laid it down that an executor was chargeable only with the interest which he had received, *or* which he ought to have received, *or* which it was so fairly to be presumed that he had received that he was estopped from saying that he did not receive it. And it was subsequently observed by V. C. Wood that there were three cases where the Court charged more than 4 per cent. upon balances in the hands of a trustee:—1. Where he *ought* to have received more, as by improperly calling in a mortgage carrying 5 per cent.; 2. Where he had *actually received* more than 4 per cent.; and 3. Where he must be *presumed* to have received more, as if he had traded with the money (*c*). But in a subsequent case, Lord Cranworth offered some explanatory remarks (*d*) upon the notions imputed to him. L. J. James, however, in a recent case (*e*), approved of the doctrine thought to have been laid down by Lord Cranworth, viz. that the Court had no jurisdiction to punish an executor for misconduct by making him account for more than he actually received, or which it presumed he did receive, or ought to have received, and that the Court was not a Court of penal jurisdiction.

Money used in trade.

14. Where money has been employed in trade, the *rate* of interest has been almost invariably 5 per cent. (*f*), the Court

(*a*) *Tebbs* v. *Carpenter*, 1 Mad. 306, *per* Sir T. Plumer; *Bick* v. *Motley*, 2 M. & K. 312; *Mousley* v. *Carr*, 4 Beav. 53, *per* Lord Langdale; and see *Crackelt* v. *Bethune*, 1 J. & W. 588; *Docker* v. *Somes*, 2 M. & K. 670; *Munch* v. *Cockerell*, 5 M. & Cr. 220; *Ex parte Ogle*, 8 L. R. Ch. App. 716; *Hooper* v. *Hooper*, W. N. 1874, p. 174. But see *Meader* v. *M'Cready*, 1 Moll. 119.

(*b*) 4 De G. M. & G. 851, 852; and see *Vyse* v. *Foster*, 8 L. R. Ch. App. 333; affirmed 7 L. R. H. L. 318.

(*c*) *Penny* v. *Avison*, 3 Jur. N.S. 62; and see *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233; [*Price* v. *Price*, 42 L. T. N.S. 626; but see *Re Jones*, 49 L. T. N.S. 91, where the executors and trustees were charged 5 per cent. on the balance in their hands, V. C. Bacon observing that if a man chooses not to invest money, but pays it into his account at his banker's, he borrows it, and must pay 5 per cent. from the date of the payment of the testator's debts and liabilities].

(*d*) *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 519; and see *Townend* v. *Townend*, 1 Giff. 212.

(*e*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 333; affirmed 7 L. R. H. L. 318. But see *Ex parte Ogle*, 8 L. R. Ch. App. 716.

(*f*) *Treves* v. *Townshend*, 1 B. C. C. 384; *Rocke* v. *Hart*, 11 Ves. 61, *per* Sir W. Grant; *Heathcote* v. *Hulme*, 1 J. & W. 122, see 134; *Attorney-General* v. *Solly*, 2 Sim. 518; *Mouseley* v. *Carr*, 4 Beav. 53, *per* Lord Langdale;

presuming every business to yield a profit to that amount. But Lord Thurlow, in one case, offered an inquiry whether, under the circumstances, such a rate of interest might not be too high (*a*); and in another, where an executor could plead extenuating circumstances, 4 per cent. only was charged (*b*).

Whether simple or compound interest chargeable where moneys used by executor or trustee in trade.

15. Whether, where the money has been employed in trade, *simple* or *compound* interest shall, *as a general rule*, be charged, is a point upon which the decisions are in conflict, the older authorities pointing to *simple* interest as the proper measure of liability, and the more recent to *compound* interest. The earliest reported case in which a trustee who had used trust money in trade appears to have been charged compound interest is that of *Walker* v. *Woodward* (*c*). The late Vice-Chancellor of England refused to charge a trustee of a charity estate, who had used the trust moneys in carrying on his trade, with compound interest (*d*); but Sir John Leach charged an executor with compound interest under similar circumstances (*e*), and in other later decisions Sir John Romilly, M.R., in accordance with the rule laid down by him (as before stated), directed an account with rests (*f*). But in a later case still, the Court of Appeal refused to direct compound interest (*g*). [In a still later case where an administratrix had allowed her solicitor to receive and retain the dividends on securities, which had been set apart for an infant next of kin, she was decreed to account for the dividends with interest at 3 per cent. with half-yearly rests, on the ground that the administratrix ought to have had the dividends invested from time to time in Consols, and the proceeds would have formed a common fund with the existing securities, and the dividends would thus have been invested at compound interest (*h*).]

Trustee neglecting a direction to accumulate, will be charged with compound interest.

16. If a testator *expressly directs an accumulation* to be made, and the executor, having the money in his hands, disregards the injunction, *compound* interest will be decreed (*i*). "Where

Westover v. *Chapman*, 1 Coll. 177; *Williams* v. *Powell*, 15 Beav. 461; *Robinson* v. *Robinson*, 1 De G. M. & G. 257; *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233; [*Re Davis*, (1902) 2 Ch. 314].

(*a*) *Treves* v. *Townshend*, 1 B. C. C. 384.

(*b*) *Melland* v. *Gray*, 2 Coll. 295; [and so in *M'Ardle* v. *Gaughan*, (1903) 1 I. R. 107, where a husband after his wife's death carried on the business of which she was tenant for life; and see *ante*, p. 397, note (*c*)].

(*c*) 1 Russ. 107.

(*d*) *Attorney-General* v. *Solly*, 2 Sim. 518.

(*e*) *Heighington* v. *Grant*, 5 M. & Cr. 258; 2 Ph. 600.

(*f*) *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, Id. 561; and see *Walrond* v. *Walrond*, 29 Beav. 586.

(*g*) *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233.

[(*h*) *Gilroy* v. *Stephens*, 51 L. J. N.S. Ch. 834; 30 W. R. 745.]

(*i*) *Raphael* v. *Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford* v. *Dorn-*

there is an express trust," said Lord Eldon, "to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as to the principal, to have lent the money to himself, upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest" (*a*). [If the accumulation be directed only during the minority of the *cestui que trust*, with a direction to hand the fund over to him on his attaining 21, and the trustee, after the determination of the minority, in lieu of paying over the trust funds, retains them uninvested or improperly invested, the trustee will be charged with compound interest (*b*). The order charging the compound interest may be made in an administration action although no allegation of wilful default is made in the pleadings (*c*).]

Executor not charged with interest during first year from testator's death.

17. An *executor* will not in general be charged with interest but from the *end of a year* from the time of the testator's decease. "It frequently," said Lord Thurlow, "may be necessary for an executor to keep large sums in his hands, especially in the course of the *first year* after the decease of the testator, in which case such necessity is so fully acknowledged, that, according to the constant course of the Court, the fund until that time is not considered distributable. *After that*, if the Court observes that an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the consequence of which is that the Court will charge the executor with interest" (*d*).

No interest on money lost that never came to hand.

18. It will be observed that, in the preceding cases, trustees and executors have been decreed to pay interest in respect only of moneys actually come to hand, and improperly retained; for when a fund has *never been received*, but has been inexcusably left outstanding and lost, it seems the Court contents itself with holding the trustees liable for the *principal*, without enforcing against them the equity, that as the fund, if got in, would have

ford, 12 Ves. 127; *Browne* v. *Sansome*, 1 M'Clel. & Younge, 427; *Knott* v. *Cottee*, 16 Beav. 77; *Pride* v. *Fooks*, 2 Beav. 430; *Wilson* v. *Peake*, 3 Jur. N.S. 155; [*Re Barclay*, (1899) 1 Ch. 674].

(*a*) *Raphael* v. *Boehm*, 11 Ves. 107; and see *S. C.* 13 Ves. 411.

[(*b*) *Re Emmet's Estate*, 17 Ch. D. 142.]

[(*c*) *Re Barclay*, (1899) 1 Ch. 674.]

(*d*) *Forbes* v. *Ross*, 2 Cox, 115; and see the observations of Sir A. Hart, in *Flanagan* v. *Nolan*, 1 Moll. 85; and see *Moyle* v. *Moyle*, 2 R. & M. 710; *Johnson* v. *Newton*, 11 Hare, 160; *Hughes* v. *Empson*, 22 Beav. 183; *Johnson* v. *Prendergast*, 28 Beav. 480.

become productive, the trustees ought further to be charged with interest (*a*).

Mistake.

19. Where an executor, under a mistaken impression of the law, but acting *bonâ fide*, retained one-third of the residue himself, and paid two-thirds to his co-executors, he was held accountable to the person entitled for the whole, but with interest only upon the one-third retained by himself (*b*). [But this case has been questioned on the ground that the executor ought to have been dealt with as if he had improperly retained the money in his own hands, on the principle that where a trustee has made an improper payment, he is still regarded in equity as having the money in his own hands, and that accordingly the executor should have been held accountable for interest on the whole fund (*c*).]

SECTION VI

OF THE DISTRIBUTION OF THE TRUST FUND

First. Where the distribution is made without the intervention of the Court.

Mistake as to rights is at the expense of the trustee.

1. It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, *who* are the parties legally and equitably entitled to it. He must therefore attend to all claims of which he has notice; and he may compel all persons who claim to be *cestuis que trust* to set forth their title (*d*).

Quasi trustees.

2. The necessity of seeing that the trust money reaches the proper hand is obligatory, not only on trustees regularly invested with the character, but on all persons having notice of the equities, as if A. lend a sum to B., and B. afterwards discovers that it is *trust money*, he cannot pay it back to A. unless A., as trustee, had a power of signing a receipt for it (*e*).

(*a*) *Tebbs* v. *Carpenter*, 1 Mad. 290; and see *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*b*) *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349; but see *Attorney-General* v. *Köhler*, 8 Jur. N.S. 467; 9 H. L. C. 655; *Shaw* v. *Turbett*, 14 Ir. Ch. Rep. 476.

[(*c*) *Re Hulkes*, 33 Ch. D. 552; *Attorney-General* v. *Köhler*, 9 H. L. C. 654; and see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 351.]

(*d*) *Hurst* v. *Hurst*, 9 L. R. Ch. App. 762; [and see *Davis* v. *Hutchings*, (1907) 1 Ch. 356, where trustees having paid a share of residue to their solicitor on his mere statement that he was the assignee of it, and without inquiry as to his title, were held liable;] and see *post*, p. 403, note (*d*).

(*e*) *Sheridan* v. *Joyce*, 7 Ir. Eq. Rep. 115. As to powers of trustees to sign receipts, see *ante*, p. 326.

Derivative equities.

3. As to persons claiming *directly* under the instrument creating the trust, or their real or personal representatives, the trustee has express notice of the rights of parties, and must regulate his conduct accordingly. But other interests may grow out of and be *grafted upon* the original trust, as by appointment under a power or by assignment, and these the trustee cannot know except by express or implied notice subsequent to the creation of the trust. Thus, a fund is settled upon trust for A. for life, with remainder to such one or more of his children as A. shall appoint, and in default of appointment for his children equally. Here A. may exercise the power by appointing to some one child exclusively, or a child may assign his share to a stranger. In such cases the trustee must use his best endeavours to ascertain who are the persons equitably entitled, as he is always in danger of being affected by *constructive* notice. But if a trustee has no express notice and cannot be affected by constructive notice, and he pays at the proper time to the person *primâ facie* entitled under the original instrument, he cannot afterwards be made to account over again to the person claiming under the *derivative* title (*a*), and therefore a trustee under such circumstances was held not to be justified in paying the fund into Court under the Trustee Relief Act (*b*).

[Improvident *cestui que trust*.]

[4. If the *cestui que trust* is *sui juris* and absolutely entitled to the trust fund, the trustees are not justified in withholding payment on the ground that the beneficiary intends to deal improvidently with the fund, and if they do so they will be liable for the costs of an action to enforce payment (*c*).]

Assignment.

5. After notice of an assignment the trustee cannot safely pay either principal or *interest* to the assignor (*d*), though the assignment be by way of mortgage only, for though a mortgagor in possession of real estate is not accountable for the *rents* until notice of the mortgagee's intention to enter, it cannot be assumed that the like rule will apply to personal estate in the hands of a trustee, as to which it has been said that the act of giving notice to the trustee is equivalent to taking possession (*e*). [And it

(*a*) *Cothay* v. *Sydenham*, 2 B. C. C. 391; *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; *Williams* v. *Williams*, 17 Ch. D. 437, 443; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91. In the latter case the effect of the marriage by the operation of a *foreign law*, may be regarded as equivalent to an assignment of which the trustee had not notice.

(*b*) *Re Cull's Trusts*, 20 L. R. Eq. 561.

[(*c*) *De Burgh* v. *M'Clintock*, 11 L. R. Ir. 220; and see *Re Selot's Trusts*, (1902) 1 Ch. 488 (the case of a French "prodigal"), *post*, p. 433.]

(*d*) *Cresswell* v. *Dewell*, 4 Giff. 460; [and see *Mack* v. *Postle*, (1894) 2 Ch. 449].

(*e*) See *Loveridge* v. *Cooper*, 3 Russ. 58; [*Ward* v. *Duncombe*, (1893) A. C. 369; *Mack* v. *Postle*, *ubi sup.*, and *post*, Chap. XXVIII. s. 1].

has been held that where a first mortgagee of a leasehold house had notice of a second charge, and the property was subsequently sold by the mortgagor, and the first mortgagee concurred in the sale, and allowed the balance of the purchase-money after satisfying his mortgage to be paid to the mortgagor, he was liable to the second mortgagee (*a*).]

Impeachable deeds.

6. An assignment is sometimes, though not void *per se*, yet of an *impeachable* character, as where there is a suspicion of the undue exercise of parental influence. In these cases it is conceived that while the deed remains unimpeached, the trustee may safely act on the assumption of its validity (*b*).

Assignment with receipt clause.

7. If the assignment confer on the assignee a power of signing receipts, the production of the deed with a receipt entitles the assignee to call for payment without tendering a release (*c*), [but not to payment of the whole of a fund assigned by way of mortgage, without regard to subsequent incumbrances of which the trustee has notice (*d*)].

Death of *cestui que trust.*

8. If the *cestui que trust* be dead the trustee must pay to his personal representative, and if he mix himself up with questions arising out of the *cestui que trust's* will, and so refuse to pay to the personal representative, he will be saddled with the costs of a suit for recovery of the fund (*e*).

Divorce of *cestui que trust.*

[Protection order.]

9. If the *cestui que trust* be a *feme* formerly married, but whose marriage has been dissolved (*f*), or there has been a judicial separation (*g*), [or a protection order (*h*),] the *chose en action,* though it accrued in right before the dissolution of marriage, or the separation, [or protection order,] is payable to the wife just as if the husband had previously died. [In every case of judicial separation the wife, from the date of the decree and whilst the separation continues, is to be considered as a *feme sole* with respect to property "which she may acquire or which may

[(*a*) *West London Commercial Bank* v. *Reliance Permanent Building Society,* 27 Ch. D. 187 ; 29 Ch. D. (C.A.) 954 ; but see *Noyes* v. *Pollock,* 32 Ch. D. (C.A.) 53.]

(*b*) See *Beddoes* v. *Pugh,* 26 Beav. 407 ; and *post,* Chap. XXVII. s. 1.

(*c*) *Foligno's Mortgage,* 32 Beav. 131.

[(*d*) *Re Bell,* (1896) 1 Ch. (C.A.) 1 ; and see *Hockey* v. *Western,* (1898) 1 Ch. (C.A.) 350 ; *Re Lloyd,* (1903) 1 Ch. (C.A.) 385, 403 (*per* Stirling, L. J.).]

(*e*) *Smith* v. *Bolden,* 33 Beav. 262.

(*f*) *Wells* v. *Malbon,* 31 Beav. 48 ; *Wilkinson* v. *Gibson,* 4 L. R. Eq. 162 ; and see *Fitzgerald* v. *Chapman,* 1 Ch. D. 563 ; [*Allcard* v. *Walker,* (1896) 2 Ch. 369, 384].

(*g*) *Johnson* v. *Lander,* 7 L. R. Eq. 228.

[(*h*) Under the Matrimonial Causes Acts, 1857, 1858, and 1878, 20 & 21 Vict. c. 85, ss. 21, 25 ; 21 & 22 Vict. c. 108, s. 8 ; 41 Vict. c. 19, s. 4 ; *Cooke* v. *Fuller,* 26 Beav. 99 ; *Re Coward and Adam's Purchase,* 20 L. R. Eq. 179 ; *Nicholson* v. *Drury Buildings Estate Company,* 7 Ch. D. 48 ; *Norton* v. *Molloy,* 7 L. R. Ir. 287, under the corresponding Act relating to Ireland, 28 Vict. c. 43.]

come to or devolve upon her," and such property may be disposed of by her as a *feme sole* (*a*), the intention and effect of the Act being to put the wife, during all the time that the decree is in force, in the same position as if the husband were dead (*b*); but this enactment does not apply to property to which the wife was entitled in possession at the date of the decree, so that a restraint on anticipation by her affecting any such property will continue notwithstanding the separation (*c*); and where a protection order is made *in case of desertion*, the like consequences follow as from the date of the desertion (*d*). In both of these cases property of or to which the wife is possessed or entitled in remainder or reversion at the date of the desertion or decree (as the case may be) is to be included in the protection given by the order or decree (*e*); but in the case of a protection order *on the ground of assault* the order is to have the same effect in all respects as a decree for separation on the ground of cruelty, and the protection will only commence as at the date of the order. On the resumption of cohabitation, which puts an end to all the effects of a separation (*f*), the property belongs to the *feme* for her separate estate (*g*). And property acquired by a *feme* after a decree for judicial separation and while the decree continues in force, is not bound by a covenant to settle after acquired property to accrue during the coverture (*h*); and as the object of such a covenant is to exclude the husband, it will not be effectual as to property of the wife acquired by her during the separation, and therefore not "during the coverture" within the meaning of the covenant; but it will be otherwise as to property reversionary at the date of the settlement, which falls into possession during the separation (*i*).

The life interest of a husband in property of his wife is not necessarily forfeited by a dissolution of the marriage on the ground of his misconduct (*j*); but where a life interest was given to the testator's son, with remainder to any wife of the son for her life, and he married a woman who was divorced from him on

[(*a*) 20 & 21 Vict. c. 85, s. 25.]

[(*b*) *Cuenod* v. *Leslie*, (1909) 1 K. B. (C.A.) 830.]

[(*c*) *Waite* v. *Morland*, 38 Ch. D. (C.A.) 135, and so as to the wife's contracts *in fieri* at the date of the decree: *Re Wingfield & Blew*, (1904) 2 Ch. (C.A.) 665.]

[(*d*) 20 & 21 Vict. c. 85, s. 21.]

[(*e*) 21 & 22 Vict. c. 108, s. 8.]

[(*f*) *Nicol* v. *Nicol*, 31 Ch. D. (C.A.) 524, 526; and see *Haddon* v. *Haddon*, 18 Q. B. D. 778, 782.]

[(*g*) *Re Emery's Trusts*, 50 L. T. N.S. 197; 32 W. R. 357; 20 & 21 Vict. c. 85, s. 25.]

[(*h*) *Dawes* v. *Creyke*, 30 Ch. D. 500.]

[(*i*) *Davenport* v. *Marshall*, (1902) 1 Ch. 82.]

[(*j*) *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; *Burton* v. *Sturgeon*, 2 Ch. D. 318.]

his petition, and died without marrying again, the woman was held not entitled to a life interest (*a*).]

Right of surviving trustee to have another trustee appointed.

10. If a *surviving* trustee be placed in an *embarrassing* situation as regards the distribution or management of the fund, it is *said* that he has a right to ask for the appointment of a new trustee to assist him by his counsel (*b*).

Advice of counsel.

11. If through any misapprehension on the part of the trustee, or the ill advice of his counsel, the trust money finds its way into a channel not authorised by the terms of the trust, the trustee will be held personally responsible for the misapplication to the parties who can establish a better claim. "I have no doubt," said Lord Redesdale, upon one occasion, "the executors *meant* to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If under the best advice he could procure he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer" (*c*).

In one case where a testator had executed a promissory note in Switzerland for 600*l.*, but by a counter-note executed shortly after it was declared that 400*l.* only was due upon valuable consideration, but a Swiss Court, upon proceedings taken there had awarded the payment of the whole 600*l.*, and the executor in England (though by our law but 400*l.* was demandable) had discharged the whole amount, Lord Alvanley observed: "If the executor had taken advice, and been advised by any gentleman of the law in this country that he was bound to make this payment, I would not have held him liable, for I will not permit a testator to lay a trap for his executor, by doing a foolish act which may mislead him" (*d*). But these remarks were addressed to the special circumstances of the case, and must not be taken as impugning the general rule.

Foreign law.

12. Every executor is taken to know the law of his country,

[(*a*) *Re Morrieson*, 40 Ch. D. 306, *per* Kay, J., dissenting from *Bullmore* v. *Wynter*, 22 Ch. D. 619.]

(*b*) *Livesay* v. *O'Hara*, 14 Ir. Ch. Rep. 12.

(*c*) *Doyle* v. *Blake*, 2 Sch. & Lef. 243; and see *Re Knight's Trusts*, 27 Beav. 49; *Urch* v. *Walker*, 3 M. & Cr. 705, 706; *Turner* v. *Maule*, 3 De G. & Sm. 497; *Peers* v. *Ceeley*, 15 Beav. 209; *Ex parte Norris*, 4 L. R. Ch. App. 280. [*Re Jackson*, 44 L. T. N.S. 467.] In *Boulton* v. *Beard*, 3 De G. M. & G. 608, the fact that the trustees had acted upon the advice of counsel, though stated at the bar, was not in evidence, which may account for the silence of the L.JJ. upon this point in their judgments.

(*d*) *Vez* v. *Emery*, 5 Ves. 141. As to the effect in reference to costs, of acting under advice of counsel, see *Angier* v. *Stannard*, 3 M. & K. 566; *Devey* v. *Thornton*, 9 Hare, 232; *Field* v. *Donoughmore*, 1 Dru. & War. 234; [*Stott* v. *Milne*, 25 Ch. D. (C.A.) 710; *Re Beddoe*, (1893) 1 Ch. 547; *ante*, p. 231, note (*a*)].

but otherwise as to foreign laws. Thus, where a legacy was given to a married woman domiciled in Scotland, and before payment of the legacy the husband died, and the executors of the testator paid the legacy to the wife, and the executors of the husband afterwards sued the executors of the testator for the same legacy on the ground that, by the law of Scotland where the wife was domiciled, the *chose en action* did not survive as by the law of England to the wife, but passed to the representatives of the husband, it was held that the executors were not bound to know the law of Scotland, and that as they had acted according to the *primâ facie* line of their duty and the ordinary practice, and express notice to them of the law of Scotland had not been proved, they were not answerable (*a*).

Foreign domicile.

13. As personal property is regulated by the law of the domicile, the trustee, if a *cestui que trust* be *domiciled abroad*, should be careful how he deals with the interest of that *cestui que trust*. By the law of some countries a male does not attain majority till twenty-two, but a female at seventeen (*b*) ; and in other countries, as in Scotland, infants above the age of puberty (fourteen in males, and twelve in females) can with their curators give valid receipts for debts and legacies (*c*). In some countries the wife has an equity to a settlement, and in others (as in Denmark) she has not (*d*). [In the State of New York, the wife is entitled to a legacy or distributive share, as if she were *sole* (*e*).] In Australia, the Court pays the money of a *married woman* to the husband, without examination of the wife (*f*). If the trustee has no notice of the difference between the two laws, he might not be liable, but the safer course would be to make inquiry.

Presumption of death.

14. It often happens that a *cestui que trust* has gone abroad and has *not been heard of for seven years*, and in that case the law presumes for certain purposes that the person was dead at the expiration of the seven years, but not that he died at any particular moment of that period (*g*). But as the fact of death is presumed only, the conclusion of law may be rebutted by explanatory

(*a*) *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91.

(*b*) *Re Hellman's Will*, 2 L. R. Eq. 363 ; and see *Re Blithman*, 2 L. R. Eq. 23 ; [*Donohoe* v. *Donohoe*, 19 L. R. Ir. 349].

(*c*) *Re Crichton's Trusts*, 24 L. T. 267.

(*d*) *Dues* v. *Smith*, Jac. 544.

[(*e*) *Re Lett's Trusts*, 7 L. R. Ir. 132.]

(*f*) *Re Swift's Trusts*, W. N. 1872, p. 195.

(*g*) *Dunn* v. *Snowden*, 2 Dr. & Sm. 201 ; *Lamb* v. *Orton*, 6 Jur. N.S. 61 ; *Doe* v. *Nepean*, 5 B. & Ad. 86 ; [*Reg.* v. *Tolson*, 23 Q. B. D. 168, 183 ;] and see *Sillick* v. *Booth*, 1 Y. & C. C. C. 117 ; *Re Phene's Trust*, 5 L. R. Ch. App. 139 ; [*Re Rhodes*, 36 Ch. D. 586 ; and see *Re Walker*, 7 Ch. 120].

circumstances (*a*) ; [and the *onus* of proving at what particular time the death took place lies with the person asserting a right depending on the death having occurred at that time (*b*) ; and there is no presumption of death *without issue*, but the fact must be proved by proper evidence (*c*)]. Should the person afterwards re-appear in fact, he may assert his right (*d*) ; and accordingly, where the Court pays out money on presumption of death, it requires the recipient to give security to refund it if necessary (*e*). It is evident, therefore, that a trustee *in pais*—that is, out of Court—cannot safely pay at the expiration of the seven years, but must accumulate the fund until he is satisfied of the actual death, or a sufficient indemnity is offered, or the sanction of the Court has been obtained (*f*).

Mistake.

15. [In one case it was held by Sir J. Romilly, M.R., that] if an executor or trustee has made a wrong payment, and is afterwards obliged to pay over again to the person rightfully entitled, he is not chargeable with interest, provided the erroneous payment was a *bonâ fide* mistake (*g*), [but this decision has not been acquiesced in, and seems not to be reconcilable with principle or the current of authority (*h*), but] of course a wrongful payment of interest will not create in the payee a right to the principal, for no wrong can create a right (*i*). The trustee of a creditors'

(*a*) *Bowden* v. *Henderson*, 2 Sm. & G. 360 ; [and see *Prudential Assurance Company* v. *Edmonds*, 2 App. Cas. 487].

[(*b*) *Re Phene's Trust*, 5 L. R. Ch. App. 139 ; *Re Lewes' Trusts*, 6 L. R. Ch. App. 356 ; *Re Corbishley's Trusts*, 14 Ch. D. 846 ; and see *Re Benjamin*, (1902) 1 Ch. 723, where the Court, without making any declaration as to the date of the death of the person who was presumed to be dead, simply directed that, in the absence of evidence that he survived the testator, the trustees were to be at liberty to distribute his share on the footing that he had predeceased the testator ; and *Re Aldersey*, (1905) 2 Ch. 181 where, an order having been made that a beneficiary was to be presumed to be dead at the expiration of seven years from the date when he disappeared, it was held that the onus was on his representative to prove that he survived the period when he was last heard of.]

[(*c*) *Re Jackson*, (1907) 2 Ch. 354.]

(*d*) *Woodhouselee* v. *Dalrymple*, 9 W. R. 475, 564 ; and see *Monckton* v. *Braddall*, 7 Ir. R. Eq. 30 ; 6 Ir. R. Eq. 352.

(*e*) *Dowley* v. *Winfield*, 14 Sim. 277 ; *Cuthbert* v. *Purrier*, 2 Ph. 199 ; and see *Davies* v. *Otty*, 35 Beav. 208.

(*f*) See *Re Phene's Trust*, 5 L. R. Ch. App. 139 ; *Hickman* v. *Upsall*, 20 L. R. Eq. 136. [As to the circumstances under which the Court will order payment on the presumption that a woman is past child-bearing, see Dan. Ch. Pr. 7th ed. p. 1492, note ; Taylor on Evidence, p. 129 ; Seton on Judgt. 6th ed. p. 1657 ; *Re White*, (1901) 1 Ch. 750 (the case of a widow) ; *Re Hocking*, (1898) 2 Ch. (C.A.) 567 ; *Re Thornhill*, (1904) W. N. (C.A.) 112. As to evidence of death of a person who was missed on a cross-channel steamer, see *Re Walker's Estate*, (1909) P. 115.]

(*g*) *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349.

[(*h*) *Re Hulkes*, 33 Ch. D. 552 ; *Attorney-General* v. *Köhler*, 9 H. L. C. 654.]

(*i*) *Remnant* v. *Hood*, 2 De G. F. & J. 404.

deed made a mistake in payment arising out of a misapprehension of the law, which at that time was not clear, and the Court held that as he had acted *bonâ fide* and was not a mere trustee, but filled a *quasi* judicial position, he could not be made accountable to the creditors, who were left to recover the amount from the person wrongfully paid (*a*).

[16. If an executor or trustee pay the income of a trust fund to the *cestui que trust* for several years without deducting the income tax, he will not be allowed afterwards to deduct the amount of such income tax on the past payments from future accretions of income (*b*); and where trustees paid annuities without deducting income tax, they were liable to the trust estate in respect of the overpayment (*c*).] [Income Tax.]

17. As a trustee cannot be expected to part with the fund unless the right of the *cestui que trust* be undisputed, if a third person claim improperly, or refuse to say whether he claims or not in a case where the trustee has a right to ask the question, such third person will make himself amenable to costs (*d*); [but where a share in a trust fund has been assigned, the trustee, on distributing, has no right to require delivery of the assignment and other documents to him, before paying the assignee (*e*)]. Claim by another.

18. In cases where there exists a mere shadow of doubt as to the rights of the parties interested, and it is highly improbable that any adverse claim will, in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the Court is not disposed to show mercy towards a trustee who admits himself to have *wilfully* erred by having endeavoured to arm himself against the consequences (*f*). Bond of indemnity.

[19. It oftens happens that a testator engaged in trade gives an option to a son to purchase his business, and empowers his [Option to purchase testator's business.]

(*a*) *Ex parte Ogle*, 8 L. R. Ch. App. 711.

[(*b*) *Currie* v. *Goold*, 2 Mad. 163, and as to deduction of income tax, see *ante*, p. 120.]

[(*c*) *Re Sharp*, (1906) 1 Ch. 793.]

(*d*) See *Re Primrose*, 23 Beav. 590; *Lonergan* v. *Stourton*, 11 W. R. 984.

[(*e*) *Re Palmer*, (1907) 1 Ch. 486.]

(*f*) A *verbal* promise of *indemnity* has been held not to be within the Statute of Frauds; *Wildes* v. *Dudlow*, 19 L. R. Eq. 198. [If the trustee is also a beneficiary, and the bond is intended to operate in his favour as such beneficiary, express words will be necessary, as *primâ facie* such a bond extends only to indemnity from demands against the trustee as such; *Evans* v. *Benyon*, 37 Ch. D. (C.A.) 329.]

trustees to accept the bond of the son as security for payment of the purchase money by instalments. Where such an option is exercised, it may be proper for the trustees, on transferring the business and chattels, to reserve a lien for the unpaid purchase money. A clause in an agreement conferring such a lien was held to operate as a bill of sale within sects. 4 and 8 of the Bills of Sale Act, 1878, and, not having been registered, was void as against the trustee in the subsequent bankruptcy of the son (*a*).]

Authority from the *cestui que trust* to receive the money.

20. When the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to an agent empowered by them to receive it; and the authority need not be by *power of attorney*, or by *deed*, or even in *writing*. The trustee is safe if he can prove the authority however communicated. But a trustee would not be acting *prudently* if he parted with the fund to an agent without some document, producible at any moment, by which he could establish the fact of the agency.

Genuineness of the authority.

21. The trustee must look well to the *genuineness* of the authority, for if he pay to a wrong party it will be at his own peril. Thus, where A., possessed of 1000*l.* Million Bank stock, employed B., a broker, to receive the dividends for her, and B. *forged* a letter of attorney authorising him to sell the stock, and a sale was effected accordingly, it was decreed by Lord Northington that the company must bear the loss: for "a trustee," he said, "whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust money; and if the transfer be made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before" (*b*).

Mortgage forged by trustee's solicitor.

22. Where a trustee [handed over money to his solicitor for investment, and subsequently took] a supposed mortgage, which in fact, had been *forged* by the solicitor, and the trustee did not take all the precautions that he might have taken (viz. by calling for a receipt under the hands of the mortgagor for the money), it was held that the loss must fall on the trustee,

[(*a*) *Coburn* v. *Collins*, 35 Ch. D. 373. Where property which was to be offered to the testator's son at a price named, was sold in a creditor's action, the son was held entitled to receive the excess of the purchase-money above such price; *Re Kerry*, W. N. 1889, p. 3.]

(*b*) *Ashby* v. *Blackwell*, 2 Eden, 299; *Sloman* v. *Bank of England*, 14 Sim. 475; *Eaves* v. *Hickson*, 30 Beav. 136; *Sutton* v. *Wilders*, 12 L. R. Eq. 373; and see *Harrison* v. *Pryse*, Barn. 324; *Ex parte Joliffe*, 8 Beav. 168; [*Barton* v. *North Staffordshire Railway Company*, 38 Ch. D. (C.A.) 458].

and was not to be borne by the trust estate so as to fall upon the *cestui que trust* (*a*).

Cestui que trus abroad.

23. A *cestui que trust* is often abroad, and then the trustee cannot be sure that at the time of payment under the power of attorney the *cestui que trust* is alive, and if he were dead the power of attorney would be at an end (*b*). If, however, the *cestui que trust* give to the trustee a written direction by deed or otherwise to pay money to a particular person, any payment made under such written direction, until it is revoked, and the revocation comes to the knowledge of the trustee, would be binding on the *cestui que trust's* executors (*c*). A convenient course in cases of this kind is to transmit the money to a Bank abroad, making it payable to the *order* of the *cestui que trust;* but where the *cestui que trust* is unable to receive his money in person, his direction had better be asked as to the particular mode of remittance to be adopted. [By the Trustee Act, 1893 (*d*), sect. 23, a trustee, acting or paying money in good faith under or in pursuance of any power of attorney, is not to be liable for any such act or payment by reason of the fact that, at the time of the payment or act, the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. And a similar exemption from

[Exoneration of trustees in respect of powers of attorney.]

(*a*) *Bostock* v. *Floyer*, 1 L. R. Eq. 26; 35 Beav. 603. ["The *ratio decidendi* of the case was this, that it was not the ordinary course of business to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment," *per* L. J. Lindley, *Re Speight*, 22 Ch. D. (C.A.) 727, 761;] and see *Hopgood* v. *Parkin*, 11 L. R. Eq. 75; *Sutton* v. *Wilders*, 12 L. R. Eq. 373; *National Trustees Company of Australasia* v. *General Finance Company of Australasia*, (1905) A. C. (P. C.) 373.]

[(*b*) Now by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 8, a power of attorney given for valuable consideration since the 31st December, 1882, and expressed to be irrevocable, is not, *in favour of a purchaser*, revoked by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donor; and by s. 9, a power of attorney, whether for valuable consideration or not, given since the 31st December, 1882, and expressed to be irrevocable for a fixed time not exceeding one year from the date of the instrument, is not, *in favour of a purchaser*, during the fixed time, revoked by any similar act or occurrence.]

(*c*) See *Vance* v. *Vance*, 1 Beav. 605; *Harrison* v. *Asher*, 2 De G. & Sm. 436; *Kiddill* v. *Farnell*, 3 Sm. & G. 428.

(*d*) [56 & 57 Vict. c. 53, reproducing the Law of Property Amendment Act, 1859 (Lord St Leonards' Act), 22 & 23 Vict. c. 35, s. 26.] But where the title of the person giving the power determines with his life, as in the case of a husband claiming in right of his wife, the difficulty seems insurmountable. See *Re Jones*, 3 Drew. 679.

liability is extended by the Conveyancing and Law of Property Act, 1881, to cases of payments or acts made or done by any person in good faith since the 31st December, 1881, whether "the donor of the power has died or become lunatic, of unsound mind or bankrupt, or has revoked the power," if the fact was not known to the donee of the power at the time of exercising it (*a*).]

Letters of administration.

24. If a legacy to a wife be a small sum, as under 50*l.*, and the husband survives her, the Court orders payment to him without taking out letters of administration to the wife (*b*); and, on the other hand, where the wife has survived, the Court has ordered a small sum, as a legacy of 13*l.*, to which the husband was entitled, to be paid to the widow, without taking out administration to the husband (*c*). But the Court refused to order payment to the husband, without letters of administration to the wife, of a sum of 80*l.*, and remarked that the husband was not liable after the wife's death for her debts contracted before marriage, and that the fund would get into a wrong channel (*d*). Where a married woman was entitled to a small sum under 50*l.*, representing *real* estate, the Court ordered it to be paid to her without a deed of acknowledgment (*e*). It is presumed that a trustee, acting in a similar manner under similar circumstances, would be protected by the Court.

Payment to an infant.

25. A testamentary guardian has, by Act of Parliament (12 Car. 2. c. 24), the "custody, tuition, and management of the infant's goods, chattels, and personal estate," [and this has generally been considered as not] authorising a trustee to pay to the guardian a *capital* sum to which the infant is entitled. [But under the corresponding Irish Act, 14 & 15 Car. 2. c. 19 (*Ir.*) it has been held that the receipt of the testamentary guardian for a legacy of the infant is a good discharge (*f*); and in a recent case in England, Fry, J., while refusing payment to the testamentary guardian of a legacy which had been paid into Court under the Legacy Duty Act, 1796 (*g*), on the special ground that the testamentary guardian was not a "person entitled" within the meaning

[(*a*) 44 & 45 Vict. c. 41, s. 47.]

(*b*) *Re Jones' Trusts*, W. N. 1866, p. 65; *Hinings* v. *Hinings*, 2 H. & M. 32; *King* v. *Isaacson*, 9 W. R. 369.

(*c*) *Callendar* v. *Teasdale*, 3 W. R. 289.

(*d*) *Re Cabel*, 3 W. R. 280, reversing *S. C.* 3 W. R. 84.

(*e*) *Knapping* v. *Tomlinson*, W. N. 1870, p. 107; *Re Clarke's Estate*, 13 W. R. 401; [*Frith* v. *Lewis*, W. N. 1881, p. 145].

[(*f*) *M'Creight* v. *M'Creight*, 13 Ir. Eq. R. 314.]

[(*g*) 36 Geo. 3 c. 52, s. 32, now replaced by s. 42 of the Trustee Act, 1893, (56 & 57 Vict. c. 53); see *post*, p. 424.]

of that Act, intimated that he had no intention of interfering with the decision in the Irish case (*a*); and] where an infant *cestui que trust* represented himself to be of age, and induced the trustee to pay him, it was held that as the infant was old enough to commit a fraud, the trustee was not liable to him over again when he came of age (*b*).

Lunatic.

26. The mere appointment by the Court of the *committee of the estate* of a lunatic would not justify a trustee in paying trust money, to which the lunatic is entitled, to the committee of his estate, in the absence of any special power to receive conferred upon him by the Court (*c*).

Payment to a partner.

27. Where a debt is owing to a firm jointly the amount may be paid to the surviving partners without the concurrence of the representatives of the deceased partners (*d*).

Payment to a single trustee.

28. The Court will not, in the exercise of its discretion, except under special circumstances (*e*), pay out money to a single trustee who has survived his co-trustees (*f*); and a *trustee* out of Court would do well to throw all the protection he can about a trust fund; but it must not be inferred that he would not be *safe* in paying to a single surviving trustee, for payment to a surviving trustee for sale is of constant occurrence. [In cases of sales under the Settled Land Act, 1882, it must be borne in mind that sect. 39 expressly provides that capital money arising under that Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt by one trustee (*g*).]

Overpayment.

29. If a trustee or executor has made an overpayment in error to a *cestui que trust* or legatee, he has a right to recoup himself out of any other interest in the trust fund of that *cestui que trust* or legatee (*h*), [but is not entitled to adjustment *ex post facto*, if he is responsible for the mistake which has occasioned the inconvenience (*i*).]

Repayment to executor.

The Court will not, generally, in favour of an executor,

[(*a*) *Re Cresswell*, 45 L. T. N.S. 468; 30 W. R. 244.]

(*b*) *Overton* v. *Banister*, 3 Hare, 503; and see *Wright* v. *Snowe*, 3 De G. & Sm. 321; *Nelson* v. *Stocker*, 4 De G. & J. 458.

[(*c*) As to payment to a lunatic under the Public Trustee Act, 1906, see *post*, Chap. XXIII.]

(*d*) *Philips* v. *Philips*, 3 Hare, 289; [and see the Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 38].

(*e*) *Re Courts of Justice Concentration* (*Site*) *Act*, 1865, W. N. 1867, p. 148. In *Clark* v. *Fenwick* or *Fennick*, W. N. 1873, p. 38; 21 W. R. 320, the Court ordered a sum of cash, the accumulation of income, to be paid to three out of four trustees, the fourth trustee being abroad.

(*f*) *Re Dickinson's Trust*, 1 Jur. N.S. 724; *Re Roberts*, 9 W. R. 758; and see *Baillie* v. *M'Kewan*, 35 Beav. 183; *Re Dickson's Estate*, 3 Ir. R. Eq. 344.

[(*g*) See *Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

(*h*) *Livesey* v. *Livesey*, 3 Russ. 287; *Dibbs* v. *Goren*, 11 Beav. 483.

[(*i*) *Re Horne*, (1905) 1 Ch. 76.]

make an order on a legatee to refund *personally* (*a*); and it certainly will not make an order to refund to an executor who voluntarily, and in spite of expression of doubts on the part of a legatee, has made overpayments to the latter (*b*); and the Court will not, it seems, at the instance of an executor who is liable to a *creditor*, compel a *purchaser* from a legatee to refund (*c*.) But an executor who has been made to pay a creditor, and has under his control a legacy appropriated by him as such, but not actually paid over, has been allowed to throw the debt upon the legacy (*d*), but is disentitled to his costs of obtaining relief (*e*). And an executor who has distributed assets amongst residuary legatees, with notice, not of an existing debt, but [merely of a liability which may become a debt, as for example a liability to possible future calls on shares], may, if called upon to pay such debt, recover back from the residuary legatees the amount paid to them, but without interest (*f*).

[Payment by mistake to officer of Court.]

[Notwithstanding the general rule of law that money voluntarily paid under a mistake of law cannot be recovered, if money be paid to a trustee in bankruptcy under a mistake of law, the Court will order it to be refunded, for "the Court of Bankruptcy ought to be as honest as other people," and to "act in the way in which any high-minded man would act" (*g*), and the same principle extends to a liquidator or other officer of the Court (*h*).]

Rights of creditors.

30. A *creditor* who is not barred by the Statute of Limitations or to whose debt the statute is not pleaded, may recover assets from a legatee to whom they have been erroneously paid by the executor (*i*), but not from purchasers for value, as from persons claiming under a marriage settlement (*j*); [and where the residuary estate had been assigned by the surviving executor to the residuary legatees, it was held by the Court of Appeal that a

(*a*) *Downes* v. *Bullock*, 25 Beav. 54.
(*b*) *Bate* v. *Hooper*, 5 De G. M. & G. 338.
(*c*) *Noble* v. *Brett*, 24 Beav. 499.
(*d*) *Noble* v. *Brett*, 24 Beav. 499.
(*e*) *S. C.* (No. 2), 26 Beav. 233.
(*f*) *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18; [*Whitaker* v. *Kershaw*, 45 Ch. D. (C.A.) 320].
[(*g*) *Ex parte James*, 9 L. R. Ch. App. 609, 614; *Ex parte Simmonds*, 16 Q. B. D. (C.A.) 308; *Re Brown*, 32 Ch. D. 597; but equity does not profess to cure every inconvenience that may arise from its appointing a receiver; *Hand* v. *Blow*, (1901) 2 Ch. (C.A.) 721, *per* Collins, L. J.]
[(*h*) *Re the Opera, Limited*, (1891) 2 Ch. 154.]
(*i*) *Fordham* v. *Wallis*, 10 Hare, 217.
(*j*) *Dilkes* v. *Broadmead*, 2 Giff. 113; 2 De G. F. & J. 566; [and it would seem that, as the right of a creditor to recall a legacy, which has been paid when assets are insufficient, depends on his right to follow the assets, there can be no such right in respect of a legacy which has been in fact paid by the executor *de bonis propriis*; *Re Brogden*, 38 Ch. D. (C.A.) 546, 569, 573].

creditor might proceed against the residuary legatees without making the executor a party to the action (*a*). But, as this right of the creditors "is a right only in equity, equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant that equitable relief to which, under ordinary circumstances, creditors are entitled" (*b*), and accordingly the relief was refused to mortgagees of real estate whose security was insufficient, but who had assented to the distribution of the personalty among the residuary legatees (*c*); but mere delay on the part of the mortgagees, unaccompanied by conduct inducing an alteration of the position of the legatees, or amounting to a waiver or release in equity, will not prevent the relief being granted (*d*). A claim by a creditor against the executor *personally* for a *devastavit* in distributing the assets without providing for the debt of the claimant, is barred after six years from the time of the *devastavit* (*e*), but the executor may be made liable in equity after the expiration of that period on the ground of breach of trust or duty in the administration of his testator's estate (*f*), for (independently of the provisions of the Trustee Act, 1888 (*g*), to be considered hereafter) an executor cannot, when called upon to account, set up his own *devastavit* as a defence, and then claim the benefit of the Statute of Limitations (*h*)].

[Limitation Act, 1623.]

31. A *cestui que trust* may, notwithstanding the Statute of Limitations, if there has been no improper *laches*, recover from another *cestui que trust* an overpayment erroneously made to him by the trustee (*i*); and *residuary legatees*, plaintiffs in a suit, have been ordered to refund to unpaid particular *legatees* (*j*).

Rights of *cestui que trust*.

32. Where a trustee had paid to wrong parties upon the evidence of certificates which had been forged by one of the *cestuis que trust*, the Court not only compelled repayment by the wrong parties of what each had received, but also ordered

Overpayment through misconduct of *cestui que trust*.

[(*a*) *Hunter* v. *Young*, 4 Ex. D. (C.A.) 256; and see *Re Frewen*, 60 L. T. N.S. 952.]

[(*b*) *Per* L. J. Cotton, *Blake* v. *Gale*, 32 Ch. D. (C.A.) 571, 578, affirming *S. C.* 31 Ch. D. 196; *Ridgway* v. *Newstead*, 3 De G. F. & J. 474.]

[(*c*) *Blake* v. *Gale*, *sup.*]

[(*d*) *Leahy* v. *De Moleyns*, (1896) 1 I. R. (C.A.) 206; *Re Baker*, 20 Ch. D. (C.A.) 230; and see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196; *Re Birch*, 27 Ch. D. 622.]

[(*e*) *Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale*, 22 Ch. D. 820; *Re Hyatt*, 38 Ch. D. 609.]

[(*f*) *Re Marsden*, 26 Ch. D. 783; *Re Baker*, 20 Ch. D. (C.A.) 230; *Re Birch*, 27 Ch. D. 622; *Re Hyatt*, *ubi sup.*; and see *Re Baker*, *ubi sup.*; *Re Birch*, *ubi sup.*]

[(*g*) 51 & 52 Vict. c. 59, s. 8, see *post*, Chap. XXXI. s. 1.]

[(*h*) *Re Marsden*, 26 Ch. D. 783; *Re Hyatt*, 38 Ch. D. 609.]

(*i*) *Harris* v. *Harris* (No. 2), 29 Beav. 110.

(*j*) *Prowse* v. *Spurgin*, 5 L. R. Eq. 99.

the *cestui que trust* who had forged the certificates, to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid (*a*); and in suits against trustees for breaches of trust, the Court has ordered a tenant for life who was *overpaid* by the breach of trust, to pay back to the trustees without the institution of *another suit* for the purpose (*b*). [But where trust money had been invested incautiously by trustees on a 5 per cent. mortgage, and on the failure of the security the trustees were ordered to replace the fund with interest at 4 per cent., it was held that the tenant for life could not be called upon to return to the trustees the additional 1 per cent. which he had received (*c*).]

Settlement with one residuary legatee.

33. If one of several residuary legatees receives only what is his fair share at the time, the subsequent wasting of the assets will not entitle the other residuary legatees to call upon him to refund; for if the executor renders his accounts to a residuary legatee and pays him his share, what right or business has such residuary legatee to interfere further in the matter of the administration of the estate? He cannot take proceedings for the administration of it; and, were he to do so, he would probably have to pay the costs. If so, why is he to suffer for the *laches* and neglect of the other residuary legatees, who have not required the executor to account to them or to pay over the balance in his hands or due from him (*d*)? [The principle has been applied to a case where a beneficiary, who in the result proved to have been overpaid, was one of the trustees of the will, and an order on further consideration in an administration action had been made, and there was nothing to show that the deficiency had not arisen from subsequent wasting of the estate (*e*). And where payments were rightly made to certain appointees, and afterwards an unavoidable loss occurred by which the trust funds were rendered insufficient to pay all in full, there being no

(*a*) *Eaves* v. *Hickson*, 30 Beav. 126.

(*b*) *Hood* v. *Clapham*, 19 Beav. 90; and see *Baynard* v. *Woolley*, 20 Beav. 583; *Davies* v. *Hodgson*, 25 Beav. 177; *Griffiths* v. *Porter*, 25 Beav. 236. As to overpayment to a *feme covert* whose anticipation is restrained, see *Moore* v. *Moore*, 1 Coll. 54. As to a wrong payment to one *cestui que trust* by arrangement with another *cestui que trust*, see *Rogers* v. *Ingham*, 3 Ch. D. (C.A.) 351; [and as to the power of the Court to relieve against mistakes of law, see *S. C.* and *Stone* v. *Godfrey*, 5 D. M. & G. 76, 90; *Allcard* v. *Walker*, (1896) 2 Ch. 369, 381].

[(*c*) *Re Whiteley*, 33 Ch. D. (C.A.) 347; affirmed in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas. 727; but see *Fry* v. *Tapson*, 28 Ch. D. 268, 282.]

(*d*) *Peterson* v. *Peterson*, 3 L. R. Eq. 111; see 114; [and see *Re Bacon*, 42 Ch. D. 559].

[(*e*) *Re Winslow*, 43 Ch. D. 249, citing *Fenwick* v. *Clarke*, 4 D. F. & J. 240.]

hotchpot clause, the payments so made were final and not to be brought into account (*a*).

However, if any question of construction of the will is likely to arise as to any share, which will involve costs which are properly payable out of the general estate, the trustee should retain a sufficient sum to protect himself against such costs (*b*).]

34. On the final adjustment of the trust accounts it is usual for the trustee, on handing over the balance to the parties entitled, to require from them an acknowledgment that all claims and demands have been settled (*c*). It is reasonable that when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed by the party receiving the benefit in the utmost security against future litigation. But a receipt in full of all claims extends only to all claims that are then known (*d*). **Release.**

In practice it is usual to require a release under seal, for although an acquittance of this kind *may* be opened by the *cestui que trust* on showing fraud, concealment, or mistake, it is *primâ facie* a solemn, simple, and valid defence, and throws on the relessor the heavy *onus* of displacing it (*e*). In strict right, however, a trustee in the absence of special circumstances cannot insist upon a release under seal (*f*). But it has been held that an *executor*, though he cannot insist on a release from a pecuniary legatee (*g*), yet, on the estate being wound up, has a right to a release from the residuary legatee (*h*).

In one case (*i*), where the trust was by parol for A. for life, and on her death for B. and C., and the costs of the suit depended on the question whether the trustee ought, as required, to have transferred the sums on the joint receipt of A., B., and C., or whether he was right in refusing, unless they executed a release under seal, Vice-Chancellor Kindersley decided that the trustee was entitled to a release on the grounds, first, that the trust was by parol, and secondly, that the time of payment, according to the tenor of the deed, was anticipated, as the tenant for life was **King v. Mullins.**

[(*a*) *Re Bacon's Settlement*, 42 Ch. D. 559.]

[(*b*) *Re Potts*, W. N. 1884, p. 106.]

(*c*) See —— v. *Osborne*, 6 Ves. 455; but *query* if the *release* spoken of was not a *conveyance*.

(*d*) *Eaves* v. *Hickson*, 30 Beav. 142.

(*e*) See *Fowler* v. *Wyatt*, 24 Beav. 232.

(*f*) *Chadwick* v. *Heatley*, 2 Coll. 137; *Fulton* v. *Gilmour*, Hill on Trustees, 604; *Re Wright's Trust*, 3 K. & J. 421; *Warter* v. *Anderson*, 11 Hare, 303; *Re Cater's Trusts*, 25 Beav. 366; *Foligno's Mortgage*, 32 Beav. 131.

(*g*) *Re Fortune's Trusts*, 4 Ir. R. Eq. 351.

(*h*) *King* v. *Mullins*, 1 Drew. 311.

(*i*) *King* v. *Mullins*, Vice-Chancellor Kindersley, 21st Dec. 1852, M.S.; 1 Drew. 308.

still living. These reasons are not satisfactory. The circumstance that the trust was by parol, and therefore obscure, might have been an excuse for not paying at all, or ground for demanding an indemnity, but seems to afford no reason for requiring a release under seal, as distinguished from a simple receipt or acquittance in writing. Neither does the anticipation of the time appear to be material, for A., B., and C. were admitted to be the only *cestuis que trust*, and their concurrence in the receipt was equivalent to a reduction into possession (*a*).

In another case, V. C. Wood observed, that every trustee had a right to have some sort of a discharge, perhaps not a *release*, unless the trust was created by an instrument *under seal* (*b*). But no such distinction has ever yet been made, and V. C. Kindersley, as we have seen, required a release because the trust was by *parol*.

[Property falling in after release.]

[35. A release of the executors and the estate of the testator given by a pecuniary legatee on payment of part of his legacy, on the footing of the estate being insufficient for payment of the legacies in full, will not enure for the benefit of the residuary legatee, if, by reason of additional funds falling in, the estate subsequently becomes sufficient to make a further payment to the legatees (*c*).]

Release from trustees to trustees.

36. The trust fund is not unfrequently transferred from the trustees of an old settlement to the trustees of a new settlement, and the trustees of the old settlement insist on a general release before they will part with the fund, while, on the other hand, the trustees of the new settlement feel a reluctance to give more than a simple receipt. The requisition of the trustees of the old settlement has usually been complied with, but perhaps it could not be enforced (*d*). Of course, the trustees of the new settlement cannot be called upon to enter into any covenant of indemnity.

Expense of the release.

37. As the party to benefit by the deed is, in general, the one to prepare it, the release will be drawn by the solicitor of the trustee. Another reason would be that the trustee has the necessary documents in his possession. The expense must be paid out of the trust fund.

Order of the Court.

38. When a trustee pays money under the direction of the Court, he is indemnified by the order itself, and is not entitled to

[(*a*) See *Anson* v. *Potter*, 13 Ch. D. 141.]

(*b*) *Re Wright's Trust*, 3 K. & J. 421; and see *Re Cater's Trusts*, 25 Beav. 366.

[(*c*) *Re Ghost's Trusts*, 49 L. T. N.S. 588.]

(*d*) *Re Cater's Trusts*, 25 Beav. 366.

any release from the parties (*a*). It would be impossible to hold a trustee answerable for an act not done by himself, but by the Court. It is the duty, however, of the trustee to fully inform the Court of all the material facts within his knowledge, and if he improperly withhold them, he will be made responsible for the results of his suppression of facts.

[39. Where a settlement is executed in contemplation of an intended marriage, which is never solemnised, or of a marriage which is annulled on the ground of impotency, the trustees of the settlement will be ordered to reconvey the trust property to the settlor discharged from the trusts (*b*).] [Abortive settlement.]

Secondly. Where the intervention of the Court is sought in reference to the distribution.

1. A trustee cannot be expected to incur the least risk, and therefore if the equities be not perfectly clear, he should decline to act without the sanction of the Court, and he will be allowed all costs and expenses incurred by him in an application for that purpose (*c*). But as a trustee is indemnified by the decree of the Court, he will *appeal* from any decision to the Court above at *his own risk* (*d*). If the rights be perfectly clear, and the trustee appeals to the Court without reason, he will be answerable in costs, though he do not act either fraudulently or maliciously (*e*). Suit.

2. Where there was no dispute as to the *amount* of the fund, but only as to *who* was entitled to it, and the trustee, instead of transferring the fund into Court under the provisions of the Trustee Relief Act (*f*), needlessly commenced an action, he was Where no dispute as to amount.

(*a*) See *Waller* v. *Barrett*, 24 Beav. 413; *Gillespie* v. *Alexander*, 3 Russ. 137; *Underwood* v. *Hatton*, 5 Beav. 39; *Farrell* v. *Smith*, 2 B. & B. 337; *Fletcher* v. *Stevenson*, 3 Hare, 370; *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 126; *David* v. *Frowd*, 1 M. & K. 209; *Sawyer* v. *Birchmore*, 1 Keen, 401; *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Bennett* v. *Lytton*, 2 J. & H. 155; *Williams* v. *Headland*, 4 Giff. 495; *England* v. *Lord Tredegar*, 35 Beav. 256; *Lowndes* v. *Williams*, 24 L. T. N.S. 465.

[(*b*) *Essery* v. *Cowlard*, 26 Ch. D. 191; *Addington* v. *Mellor*, 33 W. R. 232.]

(*c*) *Re Wylly's Trust*, 28 Beav. 458; *Talbot* v. *Earl of Radnor*, 3 M. & K. 252; *Goodson* v. *Ellison*, 3 Russ. 583; *Curteis* v. *Candler*, 6 Mad. 123; *Knight* v. *Martin*, 1 R. & M. 70; *S. C.* Taml. 237; *Taylor* v. *Glanville*, 3 Mad. 176; *Angier* v. *Stannard*, 3 M. & K. 566. And see *Campbell* v. *Home*, 1 Y. & C. C. C. 664; *Gardiner* v. *Downes*, 22 Beav. 397; *Merlin* v. *Blagrave*, 25 Beav. 137; *Cook* v. *Harvey*, W. N. 1874, p. 69.

(*d*) *Rowland* v. *Morgan*, 13 Jur. 23; *Tucker* v. *Horneman*, 4 De G. M. & G. 395; and see *Wellesley* v. *Mornington*, W. N. 1870, p. 192.

(*e*) *Re Knight's Trust*, 27 Beav. 45; *Lowson* v. *Copeland*, 2 B. C. C. 156; [and see *Re Chapman*, 72 L. T. N.S. 66 (C.A.).]

(*f*) 10 & 11 Vict. c. 96 [now superseded by s. 42 of the Trustee Act, 1893, see *post*, p. 424].

allowed only the costs that would have been incurred had he taken advantage of the provision of the Act (*a*).

[Originating summons.]

[3. Under the Rules of Court of 1883, a convenient process has been introduced which enables either trustees, executors, or administrators, or their *cestuis que trust*, by means of an originating summons, to procure the determination, *without an administration by the Court of the estate or trust*, of various questions and matters arising out of or affecting the trusts or the persons interested thereunder, or to obtain an order for the administration of the estate or trust without the delay and formalities of an action (*b*); but this form of proceeding is not applicable, otherwise than by consent, for the determination of questions involving charges of breach of trust (*c*), even though the persons charged with default are plaintiffs submitting to account (*d*), nor unless the question raised is one which would have arisen in the administration of an estate or the execution of a trust (*e*). Thus it is not applicable to cases where questions arise between the estate of a testator, or devisees and legatees under a will, or beneficiaries under an instrument, and persons claiming adversely (*f*); nor where the question is whether or not the defendant became trustee (*g*); or whether a solicitor trustee ought to be ordered to pay into Court the amount of profit costs paid to him (*h*); nor to a case where an executor has distributed the fund, and administration is sought on the ground that he has by mistake overlooked in the distribution some of the *cestuis que trust* (*i*); and the Court refused to make an order under the rule, directing trustees to concur in a sale of property in a partition action (*j*), and, in general, the procedure is only intended for the decision of simple questions (*k*).

(*a*) *Wells* v. *Malbon*, 31 Beav. 48.

[(*b*) Order 55, Rule 3; and see Rule 4, *et seq.* As to the parties to be served, see Rule 5; and that a person having only a future contingent claim (*e.g.* a company in respect of future possible calls on testator's shares) ought not to be made a party, see *Re King*, (1907) 1 Ch. 72. Counsel ought not to appear on such a summons both for a neutral trustee and for the tenant for life: *Re Burton*, W. N. (1901) 202. As to the practice generally, see Dan. Ch. Pr. 7th ed. pp. 771 *et seq.*]

[(*c*) *Re Weall*, 42 Ch. D. 674; *Dowse* v. *Gorton*, (1891) A. C. 202, *per* Lord Macnaghten.]

[(*d*) *Re Hengler*, W. N. (1893) p. 37; and see *Re Stuart*, 74 L. T. N.S. 546.]

[(*e*) *Re Davies*, 38 Ch. D. 210; *Re Royle*, 43 Ch. D. (C.A.) 18.]

[(*f*) *Re Bridge*, 56 L. J. Ch. 779; 56 L. T. N.S. 726; 35 W. R. 663; *Re Carlyon*, 56 L. J. Ch. 219; 56 L. T. N.S. 151; 35 W. R. 154; *Re Gladstone*, W. N. 1888, p. 185.]

[(*g*) *Elworthy* v. *Harvey*, 37 W. R. 164; 60 L. T. N.S. 30.]

[(*h*) *Re Thorpe*, (1891) 2 Ch. 360.]

[(*i*) *Re Warren*, W. N. 1884, p. 112.]

[(*j*) *Suffolk* v. *Lawrence*, 32 W. R. 899.]

[(*k*) *Re Giles*, 43 Ch. D. (C.A.) 391; *Re Hargreaves*, 43 Ch. D. (C.A.) 401.]

Under this rule, the question of the validity of a release given by legatees, without (as they alleged) having had independent advice, has been decided (*a*); but in this case no objection was taken to the jurisdiction, and L. J. Cotton intimated that it was not to be taken as a precedent (*b*); and in a subsequent case Kay, J., declined to entertain a similar application (*c*).

Directions have been given under the rule for an advance by the trustees to the tenant for life, for the purpose of stocking and taking a farm subject to the trust, for which a tenant could not be found (*d*), and for an inquiry with a view to the expenditure of settled money in repairing buildings on a farm included in the settlement, which were so much out of repair as to make the farm untenantable (*e*).

[Present practice.]

4. Under the present practice it is sometimes less expensive to determine the point in dispute in an action, or by originating summons, than by paying the money into Court under sect. 42 of the Trustee Act, 1893 (*f*), and in such cases a trustee ought not to adopt the more expensive process (*g*), and if he do so without sufficient justification, he will be made to pay the additional costs necessitated by his conduct (*h*). But, on the other hand, the procedure by way of originating summons was not intended to be substituted for the statutory procedure under the Trustee Relief Act, so as to take away a trustee's right to pay trust money into Court (*i*).

[Order for general administration not usually made.]

5. Under the new Rules of Court (*j*) it is not obligatory on the Court to make an order for the administration of any trust,

[(*a*) *Re Garnett*, 50 L. T. N.S. 172; 32 W. R. 474. As to costs of summons by executors of testator, who died after the Land Transfer Act, 1897, to determine a question as between heir at law and specific devisee, see *Re Peel*, W. N. (1899) 208.]

[(*b*) *Re Garnett*, 31 Ch. D. (C.A.) 1, 12.]

[(*c*) *Re Ellis; Kelson* v. *Ellis*, 59 L. T. N.S. 924; 37 W. R. 91.]

[(*d*) *Re Household*, 27 Ch. D. 554.]

[(*e*) *Conway* v. *Fenton*, 40 Ch. D. 512, where Kekewich, J., intimated that the Court had precisely the same jurisdiction on an originating summons as in an administration action properly constituted; and this has been followed in Ireland, see *Re Hurst*, 29 L. R. Ir. 209. As to the jurisdiction of the Court to deal with the question of costs of such a summons as in an action for administration, see *Re Medland*, 41 Ch. D. (C.A.) 476.]

[(*f*) 56 & 57 Vict. c. 53, see *post*, p. 424.]

[(*g*) See observations of Sir George Jessel, M.R., in *Re Birkett*, 9 Ch. D. 581.]

[(*h*) See *Re Giles*, 55 L. J. N.S. Ch. 695; 34 W. R. 712; *Re Beddoe*, (1893) 1 Ch. (C.A.) 547.]

[(*i*) *Re Parker's Will*, 58 L. J. Ch. 23, 24, *per* Cotton, L. J.; *S. C.* 39 Ch. D. 303. The Lord Justice also said that he was not sure a summons was the cheaper course, see 39 Ch. D. 305.]

[(*j*) Ord. 55, R. 10; as to the principles upon which the Court acts in the exercise of its discretion under this order, see *Re Wilson*, 28 Ch. D. 457; *Re Blake*, 29 Ch. D. (C.A.) 913; *Campbell* v. *Gillespie*, (1900) 1 Ch. 225; and as to the jurisdiction to give costs, see *Re Medland*, 41 Ch. D. (C.A.) 476.]

or of the estate of any deceased person, if the questions between the parties can be properly determined without administration, and the Court usually refuses to make an order for general administration, unless satisfied that it is *necessary* for the protection of the trustees and executors (*a*). An order for accounts and inquiries will be made under Order 15, if the circumstances of the case require it (*b*); but the Court will not direct the ordinary accounts under Order 15, where charges of breaches of trust are made which may necessitate accounts being directed at the hearing on a different footing (*c*).

Where there is an application for administration or execution of trusts by a creditor, or beneficiary, and no accounts or insufficient accounts have been rendered, the Court may order the application to stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render a proper account, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*d*); and, when necessary, to prevent proceedings by other creditors, may make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

In considering whether an administration order ought to be made, the Court will have regard to a direction by the testator that his executors shall take proceedings to have his estate administered by the Court (*e*).

Frame of the action.

6. If an action be necessary it] may be instituted either by the trustee or by the *cestui que trust;* but in most cases an action is sustained rather than originated by the trustee. Whether the trustee be plaintiff or defendant, he should take care before an order is made, that all proper parties are before the Court, for if the trustee fail in his duty to point out the proper parties, it might be held that the order of the Court under such circumstances did not indemnify him (*f*).

[If the trustee is plaintiff, and his accounts are directed to be taken, the conduct of the proceedings will be given to the defendants (*g*).]

[(*a*) *Re Llewellyn*, 25 Ch. D. 66; *Re Dickinson*, W. N. 1884, p. 199.]

[(*b*) *Borthwick* v. *Ransford*, 28 Ch. D. 79.]

[(*c*) *Re Gyhon*, 29 Ch. D. (C.A.) 834.]

[(*d*) Ord. 55, R. 10 A.]

[(*e*) *Re Stocken*, 38 Ch. D. (C.A.) 319.]

[(*f*) As to persons unborn or necessarily unascertained being sufficiently represented by the trustees of the will, see *Cardigan* v. *Curzon Howe*, (1901) 2 Ch. 479; *Re Whiting's Settlement*, (1905) 1 Ch. (C.A.) 96.]

[(*g*) *Allen* v. *Norris*, W. N. 1884, p. 118; *S. C.* 27 Ch. D. 333.]

Plaintiff held to have no interest.

7. Where the suit is commenced by a *cestui que trust*, and it is found at the hearing that upon the true construction of the instrument he has no interest in the fund, yet if the point was so doubtful that the fund could not have been distributed without the opinion of the Court, and *either* the fund is administered by the Court under the suit of the plaintiff, *or* the Court makes a declaration of the rights of the parties in the suit, the plaintiff will as a general rule have his costs (*a*). But where a plaintiff, instituting proceedings as claiming a contingent interest, obtains an order for taking the accounts in an administration suit, and pending the reference, his interest ceases, and the parties interested, instead of adopting, repudiate the proceedings, the plaintiff cannot have his costs (*b*).

Alterations in practice.

8. The Court, according to the old practice, could not have made a mere *declaratory order* without consequential directions (*c*), and could not have administered the trust in the presence of *some only* of the parties interested, or as to a *part only* of the trust estate, or as to the rights of persons entitled under a will without taking preliminary *accounts;* but [under the present practice] the Court is authorised to make orders merely declaratory, as also to adjudicate on questions in the presence of some only of the persons interested, and as to part only of the trust estate, and without ascertaining the particulars or accounts of the property touching which the question has arisen (*d*).

Special case.

9. The opinion of the Court may also be obtained upon a special case [in the manner provided by] Sir George Turner's Act, 13 & 14 Vict. c. 35 (*e*); but where the parties are numerous, it is found in practice that much time is consumed and expense incurred in settling the case so as to meet the different views

(*a*) *Westcott* v. *Culliford*, 3 Hare, 274, and cases there cited; *Turner* v. *Frampton*, 2 Coll. 336; *Boreham* v. *Bignall*, 8 Hare, 134; *Lee* v. *Delane*, 1 De G. & Sm. 1; *Merlin* v. *Blagrave*, 25 Beav. 134; *Wedgwood* v. *Adams*, 8 Beav. 103.

(*b*) *Hay* v. *Bowen*, 5 Beav. 610.

(*c*) See *Daniel* v. *Warren*, 2 Y. & C. C. C. 292; *Shewell* v. *Shewell*, 2 Hare, 154; *Gaskell* v. *Holmes*, 3 Hare, 438; *Say* v. *Creed*, 3 Hare, 455.

[(*d*) See Rules of the Supreme Court, 1883, Ord. 25, R. 5; Ord. 16, RR. 9, 11, 32; Ord. 34, R. 2; Ord. 55, R. 3. And see the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), ss. 50 & 51, which have, however, been repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49.]

[(*e*) This Act is repealed by 46 & 47 Vict. c. 49, but by Ord. 34, R. 8, of the Rules of the Supreme Court, 1883, any special case may be stated for the same purposes, and in the same manner, as provided by the Act, and the effect of this order is to keep alive the provisions of the Act, so that trustees who act upon a declaration made by the Court upon a special case stated under it are still protected by s. 15 of the Act; *per* Pearson, J.; *Re Benzon*, W. N. 1886, p. 19; *S. C. nom. Forster* v. *Schlesinger*, 54 L. T. N.S. 51.]

of the parties, and [it will generally be found a shorter and simpler course to issue a writ of summons, and then state the question in the form of a special case under Order 34 of the Rules of the Supreme Court, 1883].

36 Geo. 3 c. 52.

10. By the Legacy Duty Act, 1796, sect. 32, *executors and administrators*, where legatees or next of kin [were] *infants*, or *beyond seas*, [were empowered to] pay the legacies or shares into Court, and by the Legacy Duty Act, 1805, the provisions of the former Act were extended to trustees and owners of *real estate* charged with *legacies*, and by the Trustee Relief Act, 1847, entitled "An Act for better securing trust funds, and for the relief of trustees," as extended by the Trustee Relief Act, 1849, provisions were made enabling trustees, or the major part of them, to pay or transfer trust funds into Court, [but these enactments have now been repealed, and their provisions reproduced in a more concise form by the enactment stated in the next paragraph.

45 Geo. 3 c. 28.

10 & 11 Vict. c. 96 ; 12 & 13 Vict. c. 74.

[Trustee Act, 1893. Payment into Court by trustees.]

11. By sect. 42 of the Trustee Act, 1893 (*a*) it is enacted as follows :—"(1) Trustees (*b*), or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court ; and the same shall, subject to Rules of Court (*c*), be dealt with according to the orders of the High Court. (2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court. (3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others ; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment, and delivery made in pursuance of any such

[(*a*) 56 & 57 Vict. c. 53.]

[(*b*) For the definition of trustee, see s. 50, and *ante*, p. 366 ; *post*, Chap. XXVI.]

[(*c*) For the Rules of Court under the statute, and notes as to the practice under the Rules, see Appendix No. 2. It will be observed that by Rule 41 of the Supreme Court Fund Rules, 1894, two modes of lodgment under the Trustee Act, 1893, are provided for, viz. one by a legal personal representative without affidavit, and the other by a trustee or other person upon affidavit. The former mode seems to be intended to reproduce the procedure under the Legacy Duty Act, and the other the procedure under the Trustee Relief Act.]

order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered."

[Trustee within the Act.]

12. A mortgagee having surplus proceeds of sale in his hands has been treated as a trustee under the Trustee Relief Act (*a*); but the owner of an estate *charged* with a sum in favour of another was not a trustee within the Act, for he had not the moneys in his hands (*b*); nor were bankers trustees within the Act as to money deposited with them, the right to which was in dispute (*c*).

[Policy moneys.]

13. With respect to moneys payable under a policy of life assurance, it was held that, as the relation between the company and the policy holder was that of debtor and creditor, the policy moneys, unless held by the company upon trust, could not be paid into Court under the Act, so as to discharge the company (*d*), and the provisions of the Judicature Act, 1873 (*e*), sect. 25, subsect. 6, were available only where the company had received notice of an assignment in writing (*f*). But all difficulty on this score has now been removed by the Life Assurance Companies (Payment into Court) Act, 1896 (*g*), which enables any life assurance company (*h*), subject to Rules of Court (*i*), to pay into

[Life Assurance Companies (Payment into Court) Act, 1896.]

[(*a*) *Roberts* v. *Ball*, 1 Jur. N.S. 585; 3 W. R. 466; 24 L. J. Ch. 471.]

[(*b*) *Re Buckley's Trusts*, 17 Beav. 110; for if it were held otherwise, the money might be paid into Court, and the incumbrancer would have to bear the costs of getting it out, whereas the nature of a charge is that the beneficiary is entitled to have it raised out of the estate, together with the costs of raising it; and see *Re Cooper's Legacy*, 17 Jur. 1087; *Warburton* v. *Cicognara*, 3 Ir. R. Eq. 592. Trustees of charitable funds have a *strict right* to pay their trust money into Court and relieve themselves of the trust, without giving notice to the Charity Commissioners, notwithstanding the 17th section of the Charitable Trusts Act, 1853, but their proper course is to apply first to the Commissioners; *Re Poplar and Blackwall Free School*, 8 Ch. D. 543.]

[(*c*) *Re Sutton's Trusts*, 12 Ch. D. 175.]

[(*d*) *Matthew* v. *Northern Assurance Company*, 9 Ch. D. 80; *Re Haycock's Policy*, 1 Ch. D. 611.]

[(*e*) 36 & 37 Vict. c. 66; see *ante*, p. 76.]

[(*f*) See *Re Sutton's Trusts*, 12 Ch. D. 175.]

[(*g*) 59 Vict. c. 8.]

[(*h*) Defined by s. 2 as meaning "any corporation, company, or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies."]

[(*i*) Rules under the Act have been issued, which are similar to those under the Trustee Act, 1893, s. 42. The company is not to deduct any costs or expenses of or incidental to payment into Court (R. 2), and in general is not to be served with the petition or summons except when the applicant asks for payment of a further sum by the company for costs (R. 7). The Rules may be cited as the Rules of the Supreme Court (Life Assurance Companies), 1896, or as Order LIV. C. These rules were held applicable where an action was brought against a life assurance company upon a life policy which had been lost, and the directors were of opinion that no discharge could otherwise be obtained: *Harrison* v. *Alliance Assurance*, (1903) 1 K. B. (C.A.) 284.]

the High Court any moneys payable by them under a life policy (*a*), in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.

[Money payable by instalments.]

14. Where a sum of money was payable by instalments, and the first instalment was paid into Court by the trustee, the Court, on the petition of the *cestui que trust*, not only administered the instalment paid in, but also gave directions to the trustees as to the future instalments; and said that the order would give ample indemnity to the trustee (*b*).

[Payment into Court when justifiable.]

15. In considering the propriety of paying money into Court under the Act, trustees must have regard to the facility of procedure by way of originating summons, already referred to (*c*). Trustees have been held justified in paying the money into Court under the Trustee Relief Act, where there were *bonâ fide* doubts as to the person entitled (*d*), or conflicting claims (*e*). The trustees of a benevolent fund, acting under the advice of counsel, where the validity of a mortgage given by a subscriber was in dispute, were considered to be justified in paying his share of the fund into Court under the Act (*f*); and in a recent case, where trustees declined, on reasonable grounds, to pay a fund to the mortgagee except upon the taking of an account, an action by the mortgagee to compel the trustees to pay to him on his receipt under sect. 22, sub-sect. 1 of the Conveyancing and Law of Property Act, 1881, was dismissed on the trustees undertaking to pay the money into Court, under sect. 42 of the Trustee Act, 1893 (*g*). But a trustee has been held not to be justified in making the payment into Court merely in order to avoid an action which is about to be brought against him (*h*), or to escape liability where there is no reasonable doubt as to the performance

[(*a*) Defined by s. 2 as including "any policy not foreign to the business of life assurance."]

[(*b*) *Re Wright's Settlement*, 1 Sm. & Giff. App. v. The Court had, in fact, no jurisdiction as to the instalments payable in future, and the order would be an indemnity in this sense only, that the trustee would be acting in a way which had received the sanction of the Court extra-judicially; see *Re Lloyd's Trusts*, 2 Ir. R. Eq. 507; *Re Fortune's Trusts*, 4 Ir. R. Eq. 351.]

[(*c*) See *ante*, p. 420.]

[(*d*) *Re Wylly*, 28 Beav. 458; 6 Jur. N.S. 906; *Re Jones*, 3 Drew. 679.]

[(*e*) *Re Headington*, 6 W. R. 7; *Re Provident Clerks' Mutual Association*, 18 W. R. 126, and for other cases see Seton on Judgments, 6th ed. p. 1193.]

[(*f*) *Re Maclean*, 19 L. R. Eq. 274, 282. In *Re Swan*, 2 H. & M. 34, the trustee of a fund to which a married woman was entitled, was held justified in paying it into Court so as to afford her an opportunity of asserting her equity to a settlement, but see *Re Roberts*, 38 L. J. Ch. 708; 17 W. R. 639; *Re Wise*, I. R. 3 Eq. 599.]

[(*g*) *Hockey* v. *Western*, (1898) 1 Ch. (C.A.) 350.]

[(*h*) *Re Waring*, 16 Jur. 652; and see *Re Fagg's Trust*, 19 L. J. N.S. Ch. 175.]

of the trust (*a*), or because the person entitled to the fund has become a nun, and gone to reside in a convent abroad (*b*), or because of the existence of a power of appointment, when there is no notice of any appointment, and no ground for believing that any was ever made (*c*), or because of claims against the fund which are clearly unfounded (*d*), or merely because the persons entitled have refused to execute a release (*e*). The effect of improper payment into Court may be to render the trustee liable to pay costs (*f*).

[Payment into Court to what account.]

16. The money ought not to be paid in (*g*) to a general account, as *ex. gr.*, the account of "the trusts of a testator's will," for this implies not a particular trust, but a general administration of the estate. The executor must take on himself the responsibility of severing the fund from the testator's assets, and appropriating it to the particular purpose, and then pay it in to the limited account. If it has already been paid in to an account too general for the Court to deal with, it may be carried over to the correct account, and the Court will then proceed to adjudicate upon the rights of the parties (*h*). If the fund has been paid to the account of the *testator's estate, and in the matter*, &c., the Court will not proceed without the presence of the personal representative and his admission of assets (*i*).

[Deduction of costs.]

17. Trustees may deduct the reasonable costs of the payment into Court where no dispute has arisen or is likely to arise as to the deduction (*j*), but the better course seems to be for the trustees to pay in the whole fund, leaving it for the Court to settle the amount of costs to which they are entitled, upon an application for payment out (*k*).

[(*a*) *Re Elliott*, 15 L. R. Eq. 193.]

[(*b*) *Re Metcalfe*, 2 De G. J. & S. 122; 10 Jur. N.S. 287.]

[(*c*) *Re Cull*, 20 L. R. Eq. 561.]

[(*d*) *Re Thakeham Sequestration Moneys*, 12 L. R. Eq. 494, 500; *Re Glendenning*, W. N. (1867) p. 191; *Re Carroll's Policy*, 29 L. R. Ir. 86.]

[(*e*) *Re Cater*, 25 Beav. 366; *Re Roberts*, W. N. (1869) p. 88; 17 W. R. 639.]

[(*f*) See *post*, p. 434.]

[(*g*) As to the mode of payment in, see Rules in Appendix No. 2.]

[(*h*) *Re Joseph's Will*, 11 Beav. 625; *Re Everett*, 12 Beav. 485; *Re Wright's Will*, 15 Beav. 367; *Re Robinson's Trust*, 1 Jur. N.S. 750; *Re Coulson's Trust*, 4 Jur. N.S. 6; *Re Godfrey's Trust*, 2 Ir. Ch. Rep. 105; and see *Re Monahan*, 8 Ir. R. Eq. 353.]

[(*i*) *Re Edward's Estate*, 4 W. R. 801. As to the proper heading of the account, see further, *Re Jervoise*, 12 Beav. 209; *Re Tillstone's Trusts*, 9 Hare, App. 59; and as to the effect of carrying over a fund to a separate account, see *Edgar* v. *Plomley*, (1900) A. C. (P.C.) 431.]

[(*j*) *Beaty* v. *Curson*, 7 L. R. Eq. 194; and see *Re Fortune's Trusts*, 4 Ir. R. Eq. 351.]

[(*k*) *Re Parker's Will*, 58 L. J. Ch. 25, *per* Fry, L.J.; *S. C.* 39 Ch. D. (C.A.) 303; and see *Mitchell* v. *Cobb*, 17 L. T. 25. Where the payment is made by a personal representative without an affidavit under the Supreme Court Fund Rules, 1894, Rule 41 (see Appendix), no deduction for costs and expenses can be made. See footnote to Schedule to Rules.]

[Effect of payment into Court.]

18. The payment into Court is a *discharge* only as to the money paid in, and leaves the trustee liable to be sued under the ordinary jurisdiction of the Court in respect of the costs deducted by him, or to account for any other moneys upon the footing of the trust (*a*). It does not discharge the trustee from the consequences of a breach of trust (*b*), and he cannot require a fund to be kept in Court to indemnify him against threatened proceedings (*c*).

Trustees by paying money into Court *retire* from their trust and cannot thereafter exercise the powers of the trust (*d*); and come under the usual words of "trustees desirous of being discharged," so as to call into operation a power of appointing new trustees in that event (*e*); but they are not actually deprived of office, nor is the Court or Paymaster-General constituted a trustee in their place (*f*).

[Payment out of Court.]

[Application for.]

19. Under the Rules of Court (*g*), the application for payment out of Court is in general by summons, where the money or securities in Court does or do not exceed 1000*l.* or 1000*l.* nominal value, and in other cases by petition. The trustees themselves are *competent* to make the application, but they are not the proper persons, and if they present a petition the Court will not allow them more than respondents' costs (*h*). A petition may be presented by a person entitled to an *aliquot share* without bringing the other parties interested before the Court (*i*). Such a petition should ask that the other shares should be carried to the separate accounts of the other persons entitled, in order to save expense on

[(*a*) See *Beaty* v. *Curson*, 7 L. R. Eq. 194; *Goode* v. *West*, 9 Hare, 378; *Re Jephson*, 1 L. T. N.S. 5; *Attorney-General* v. *Alford*, 2 Sm. & G. 488; *Thorp* v. *Thorp*, 1 K. & J. 438.]

[(*b*) *Attorney-General* v. *Alford*, 2 Sm. & G. 488; 4 De G. M. & G. 843; 18 Jur. 592; 1 Jur. N.S. 361; *Re Waring*, 16 Jur. 652.]

[(*c*) *Re Wright's Trust*, 3 K. & J. 419; and see *England* v. *Lord Tredegar*, 35 Beav. 256.]

[(*d*) *Re Coe's Trusts*, 4 K. & J. 199; *Re Williams's Settlement*, 4 K. & J. 87; *Re Tegg*, 15 L. T. N.S. 236; 15 W. R. 52; *Re Mulqueen's Trusts*, 7 L. R. Ir. 127; *Re Nettlefold's Trusts*, W. N. 1888, p. 120; 59 L. T. N.S. 315; *Re Murphy's Trusts*, (1900) 1 I. R. 145.]

[(*e*) *Re Bailey's Trust*, 3 W. R. 31; but discretionary trusts, as for maintenance, may thereafter be exercised by the Court, *Re Ashburnham's Trust*, 54 L. T. N.S. 84; and as to the exercise of a discretionary power personal to the trustee, see *Re Landon*, 40 L. J. Ch. 370; *Re Coe*, 4 K. & J. 199; *Re Tegg*, *ubi sup.*; *Re Nettlefold*, 59 L. T. N.S. 315; but see *Re Murphy's Trusts*, (1901) 1 I. R. 145, where the money was paid into Court by derivative executors, and it was held that the discretionary power was gone.]

[(*f*) *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; 8 Jur. N.S. 185; *Barker* v. *Peile*, 2 Dr. & Sm. 340; *Re Tegg*, 15 W. R. 52.]

[(*g*) See Appendix No. 2.]

[(*h*) *Re Cazneau's Legacy*, 2 K. & J. 249; *Re Hutchinson's Trusts*, 1 Dr. & Sm. 27; and see *Re Poplar and Blackwall Free School*, 8 Ch. D. 543; *Re Trower*, 1 L. T. N.S. 54; *Re Cooper*, 4 De G. M. & G. 757; *Re Partington*, 3 Giff. 378; 8 Jur. N.S. 877.]

[(*i*) *Re Befford's Will*, 21 L. T. 164.]

any future application (*a*); or liberty may be given to the other parties entitled to apply at *chambers* (*b*).

Payment out of Court cannot be ordered, on the petition of a number of persons, to persons nominated by them to receive the money as trustees, in the absence of a deed of assignment in trust duly executed and proved. The only exceptions are (1) in the case of corporations, where the petition has been sealed with the corporate seal, and (2) in the case of the corporation of the City of London, on whose unsealed petition it is the practice to pay out to the Chamberlain by reason of the dignity of his office (*c*).

[Service.]

20. Applications dealing with funds lodged in Court on affidavit under the Act, or under the Trustee Relief Act, must in ordinary cases be served upon the trustees and the persons named in the trustees' affidavit as interested in or entitled to the money or securities (*d*). If the trustee cannot be found, or try to avoid service, service on him at the address for service given in the affidavit may be deemed sufficient (*e*); and where the trustees had not been heard of for ten years, and the place named for service in the trustees' affidavit had been pulled down, the Court dispensed with service on the trustees, but directed an inquiry at chambers who were the persons entitled (*f*). When money has been paid into Court, and part of it has, by an order of the Court, been carried to the *separate account* of a *cestui que trust*, the trustees need not be served again on application by the *cestui que trust* to have it paid out of Court (*g*); but if a fund has been carried over not merely to the "account of A. B," but to the "account of A. B. with remainder over," the trustees must be served, as they may have received notices of assignments or dealings (*h*).

[Service on trustee when dispensed with.]

[Where numerous parties interested.]

Where on the hearing of a petition class inquiries were directed and the chief clerk made a certificate finding that numerous persons were interested in arguing the question in dispute, but

[(*a*) *Re Hawk's Trust*, 18 Jur. 33; and see *Re Young*, 5 W. R. 400; *Re Beauclerck*, 11 W. R. 203; *Re Thomas*, 11 W. R. 276.]

[(*b*) *Winkworth* v. *Winkworth*, 32 Beav. 233; and see *Re Tracy's Trusts*, 6 Ir. R. Eq. 271. Where the claimants to the fund in opposition to the petitioner reside *abroad*, the Court will give them time to make out their case; *Re Hodson's Will*, 22 L. J. N.S. Ch. 1055; 17 Jur. 826.]

[(*c*) *Re Brettingham*, W. N. (1904) 168, referring to *Ex parte Corporation of London*, W. N. (1878) 238.]

[(*d*) See Appendix No. 2.]

[(*e*) *Ex parte Baugham*, 16 Jur. 325; *Re Lawrence*, 14 W. R. 93.]

[(*f*) *Re Bolton's Will*, 18 W. R. 56; 21 L. T. N.S. 413; W. N. (1869) p. 226. As a general rule, funds in Court belonging to the estate of a deceased person will not, after the expiration of ten years from his death, be paid to his legal personal representative without notice to beneficiaries: *Practice Note*, (1904) W. N. 135.]

[(*g*) *Re Young*, 5 W. R. 400, and see *ante*, p. 428.]

[(*h*) *Practice Note*, (1908) W. N. (C.A.) 75.]

several of them were not respondents, the petitioner was authorised by the Court to serve a copy of the petition, the order made on the first hearing, and the certificate, on those persons, and the hearing of the petition was adjourned to give the persons served an opportunity of appearing (*a*).

[Remaindermen.] On a petition by a tenant for life for payment of the income, it was held unnecessary to *serve* the *remainderman* (*b*); and where the corpus was only carried over to a particular account, service on the remaindermen, who were extremely numerous, was dispensed with (*c*); and in another case the Court gave no costs to the remainderman, who, the Court said, merely came to look after his own interests (*d*).

[Service out of jurisdiction.] Under the rules of 1883, which are to be regarded as forming a complete code in reference to service out of the jurisdiction (*e*), leave cannot be given to serve the petition out of the jurisdiction (*f*).

[Jurisdiction of Court.] 21. The Court, under the Trustee Relief Act, exercised as ample jurisdiction as in a suit, as, for example, by declaring the *validity* or *invalidity* of a deed without directing fresh proceedings, if the Court, in the exercise of its discretion, did not think a suit necessary (*g*), or by determining a question of construction (*h*). But in general the Court would not allow a deed to be impeached upon the petition without a suit (*i*). In one case Wood, V.C., in disposing of a fund on petition, said that if there were creditors or other unascertained claims, a suit might be necessary, but that otherwise the Court had jurisdiction as in a suit, and might direct an issue to try a question of *sanity* or the like (*j*). The Court

[(*a*) *Re Battersby's Trusts*, 10 Ch. D. 228.]

[(*b*) *Re Whitling's Settlement*, 9 W. R. 830; 7 Jur. N.S. 754; *Ex parte Peart*, 17 L. J. N.S. Ch. 168; *Re Fletcher*, 12 Jur. 619.]

[(*c*) *Re Hodges*, 6 W. R. 487.]

[(*d*) *Re Thornton's Trust*, 9 W. R. 475.]

[(*e*) *Re Busfield*, 32 Ch. D. (C.A.) 223.]

[(*f*) *Re Jellard*, 39 Ch. D. 424; *Re Stanway*, W. N. (1892) p. 11; *Re Cliff*, (1895) 2 Ch. (C.A.) 21, and see Seton, 6th edit. pp. 18, 1194. In *Re Cliff*, where an order for administration had been made on originating summons, it was intimated that the person having the conduct of the proceedings could, without leave, give to the person out of the jurisdiction notice of the making of the order, and that, if he did not appear and object, he would be taken as assenting to the distribution of the estate, and it would be carried out in his absence.]

[(*g*) *Lewis* v. *Hillman*, 3 H. L. C. 607; or even, it would seem, rectification of a deed, see *Re Bird's Trusts*, 3 Ch. D. 214; *Re Morse*, 21 Beav. 174; 2 Jur. N.S. 6; *Re De La Touche*, L. R. 10 Eq. 599.]

[(*h*) *Re Dalton*, 1 De G. M. & G. 265; 16 Jur. 253.]

[(*i*) *Re Way's Settlement*, 10 Jur. N.S. 1166.]

[(*j*) *Re Allen's Will*, Kay, App. 51. Where trustees of a marriage settlement had transferred the fund into Court, and a petition was presented by a person claiming adversely to

directed a suit for its own satisfaction only, and would not authorise the petitioner to commence an action because it might be the more convenient course for making out his title (*a*).

[Declarations and inquiries.]

22. The Court has *declared the rights* of parties upon a petition under the Act (*b*); and where, in the event, the petitioner proved not to be entitled, and it was necessary to declare the rights, and the trustees desired the opinion of the Court, the rights were declared and costs given, as in a suit under similar circumstances (*c*).

Where the Court was not satisfied as to the facts by affidavit, it would, before making an order, direct an *inquiry* (*d*).

[Payment into Court made under misapprehension.]

23. Where an executor, after paying money into Court, discovered *debts* of the testator, he was allowed to have the money paid back to him out of Court on his undertaking to apply it properly (*e*); and where the administrator of a supposed intestate paid money into Court to the credit of infants who were next of kin, and a will was afterwards discovered, under which the infants were entitled to small legacies, the Court ordered payment out to the administrator on proof that the legacies to the infants were secured (*f*).

[Money belonging to lunatic.]

24. Where money in which a *lunatic* is interested has been paid into Court under the Act, the Court has jurisdiction to order repayment to the *Poor Law Guardians* of the expenses incurred by them for the support of the lunatic (*g*); but only to the extent of six years' arrears (*h*); or, in the case of a lunatic not so found by

the settlement, Wood, V.C., disposed of the case upon the petition, no party having objected; but before the Lords Justices, the respondent not consenting, the petition was ordered to stand over that a bill might be filed; *Re Fozard's Trust*, 1 K. & J. 233; 24 L. J. N.S. Ch. 441; and see *Re Bloye's Trust*, 2 H. & Tw. 140; 1 Mac. & G. 488; *Ex parte Stutely*, 1 De G. & Sm. 703.]

[(*a*) *Re Harris's Trust*, 18 Jur. 721.]

[(*b*) *Re Walker's Trusts*, 16 Jur. 1154; *Re Morgan*, 2 W. R. 439.]

[(*c*) *Re Woollard's Trust*, 18 Jur. 1012.]

[(*d*) *Re Wood's Trust*, 15 Sim. 469; and see *Re Sharpe's Trust*, 15 Sim. 470. In one case the trustees, after paying in, applied by petition to have the fund distributed as in an administration action, and the Court directed proper inquiries accordingly as to the persons interested; *Re Trower's Trust*, 1 L. T. N.S. 54.]

[(*e*) *Ex parte Tournay*, 3 De G. & Sm. 677.]

[(*f*) *Re Hood's Trusts*, (1896) 1 Ch. 270.]

[(*g*) *Re Upfull's Trust*, 3 Mac. & G. 281; *Re Colman's Trust*, 14 L. T. N.S. 587; *Re Parker*, 2 W. R. 139; *Re Ward's Estate*, 2 W. R. 406; *Re Drewery's Trust*, 2 W. R. 436; *Re Buckley's Trust*, Johns. 700. Where the lunatic is not so found by inquisition, the application need not be made in lunacy, see Renton on Lunacy, 656.]

[(*h*) *Re Newbegin's Estate*, 36 Ch. D. 477; *Re Watson*, (1899) 1 Ch. 72, the liability not being cut down by the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103) s. 16, which gives special means of recovering one year's maintenance: *Re Clabbon*, (1904) 2 Ch. 465. As to protection of the trustee for a pauper *non compos*, as against the guardians of the poor, by placing the fund under the control of the Court in lunacy, see *Winkle* v. *Bailey*, (1897) 1 Ch. 123; *Re Clarke*, (1898) 1 Ch. 336.]

inquisition, to order the maintenance of the lunatic (*a*); and to order such maintenance out of capital (*b*). But where, under an order in lunacy, payments had been made by a receiver to the guardians, the effect of such payment was to take the case out of the Statute of Limitations, and so entitle the guardians to payment of all the arrears (*c*).

[Discretion of Court.]

In dealing with the property of a lunatic the Court has a *discretion* to be governed by the circumstances of the case, and, therefore, where money belonging to a lunatic found such in France was paid into Court, and the French curator (in whom by the French law the property became vested for the maintenance of the lunatic) applied for payment of the fund to himself, the Court refused to transfer the capital, and directed payment to him of the dividends only (*d*); and where there was a fund in Court belonging to a "lunatic patient" in New South Wales, not found lunatic by inquisition, and it appeared that by the law of the colony, the colonial master in lunacy had large powers of management and of suing for the recovery of the lunatic's property, though the property itself was not vested in him, the Court declined to pay over the whole fund to the master, but directed payment only of so much as was shown to be necessary for the maintenance and benefit of the patient (*e*); but where the authority of the foreign curator to get in the trust property is clear, the Courts of this country are bound, on general principles of private international law, to

[(*a*) *Be Sturge's Trusts*, 5 Jur. N.S. 423; *Re Burke*, 2 De G. F. & J. 124; 6 Jur. N.S. 717; *Re Law*, 7 Jur. N.S. 410; *Re Perry's Trusts*, 31 L. T. N.S. 775; 23 W. R. 335. *Re Whitby's Trust*, W. N. 1877, p. 208; but see *Re Irby*, 17 Beav. 334.]

[(*b*) *Re Tuer's Will Trusts*, 32 Ch. D. (C.A.) 39; and see *Re Grimmett's Trusts*, 56 L. J. N.S. Ch. 419. And the Court, without requiring the appointment of a guardian in lunacy, directed the income to be paid to the lunatic's wife for his maintenance during his life or until further order; *Re Silva's Trusts*, 36 W. R. 366; 57 L. J. N.S. Ch. 281; 58 L. T. N.S. 46. Where a lunatic was entitled to a fund which had been paid into Court under the Act, the Court in lunacy, upon a petition presented in the Chancery Division under the Act and in lunacy, made an immediate order for the transfer of the fund to the account of the lunatic; *Re Tate*, 20 Ch. D. 135. But the rule of administration in lunacy, whereby the needs of the lunatic are considered before his obligations, is not applicable to funds in the High Court: *Re Brown*, (1900) 1 Ch. 489; and see *Re Hunt*, (1900) 2 Ch. (C.A.) 54n.]

[(*c*) *Wandsworth Union* v. *Worthington*, (1906) 1 K. B. 420.]

[(*d*) *Re Garnier*, 13 L. R. Eq. 532.]

[(*e*) *Re Barlow's Will*, 36 Ch. D. 287; and see *Re Carr's Trusts*, (1904) 1 Ch. 792, where the Court of Appeal, varying the decision of Joyce, J., (who thought that the matter might more properly be dealt with under the lunacy jurisdiction) directed that the income of a fund of about £4500 belonging to a lady who was of unsound mind not so found, and had been for some years resident in Germany, should be paid to her sister (who was one of the trustees), she undertaking to apply the same for the maintenance, comfort and benefit of the lunatic.]

recognise the authority thus conferred on the foreign Court, unless lunacy proceedings in this country prevent them from so doing (*a*); and where there has been a foreign judicial declaration of the status of lunacy of a lunatic resident and domiciled abroad, and a "tuteur" fully empowered has been appointed, the fund of the lunatic ought in general to be paid to such tuteur (*b*). Where, however, the fund in Court was the sole property of a German lady, whose only connection with this country arose from the fact that her mother was English, and who had been found lunatic by, and made a ward of the proper tribunal in Germany, the Court ordered a transfer of the fund to a commission of the German Court appointed for the purpose (*c*).

Although the foreign committee may not be entitled as of right to recover the property, the Court in its discretion may pay over the income, present and future, to the committee, even if it appears that the whole of such money is not needed for the maintenance of the lunatic (*d*).

[Infants' fund.]

The Court declined to pay out the fund of infant French subjects to their father and legal guardian as of right, but exercised its discretion, and considered whether the payment was properly required for the benefit of the infants (*e*).

[Fund of prodigal."]

A disqualification unknown to English law will be disregarded by the Court; thus a fund payable to a French subject of full age who had been adjudged a "prodigal" was paid to him on his sole receipt, notwithstanding the opposition of his "conseil judiciare" (*f*).

[Infant made ward of Court.]

25. An order made by the Court for maintenance of an infant out of a fund paid into Court, under the Trustee Relief Act, and to which the infant was entitled, constituted the infant a *ward of Court* (*g*); but not so the payment in of a legacy under the Legacy Duty Act, 1796 (36 Geo. 3. c. 52) (*h*).

[Costs of trustee.]

26. The trustee who is served with the petition is *primâ facie* entitled to his costs on payment out as between solicitor and

[(*a*) *Didisheim* v. *London and Westminster Bank*, (1900) 2 Ch. (C.A.) 15.]

[(*b*) *Thiery* v. *Chalmers Guthrie & Co.*, (1900) 1 Ch. 80.]

[(*c*) *Re De Linden*, (1897) 1 Ch. 453; and as to the like discretion of the Court in lunacy under s. 134 of the Lunacy Act, 1890, see *Re Brown*, (1895) 2 Ch. 666; *Re Knight*, (1898) 1 Ch. (C.A.) 257.]

[(*d*) *New York Trust and Securities Co.* v. *Keyser*, (1901) 1 Ch. 666.]

[(*e*) *Re Chatard's Settlement*, (1899) 1 Ch. 712.]

[(*f*) *Re Selot's Trust*, (1902) 1 Ch. 488.]

[(*g*) *Re Hodge's Settlement*, 3 K. & J. 213; and see *De Pereda* v. *De Mancha*, 19 Ch. D. 451; *Brown* v *Collins*, 25 Ch. D. 56.]

[(*h*) *Re Hillary*, 2 Dr. & Sm. 461, see *ante*, p. 424, note (*c*).]

client (*a*), and it is not thought desirable to hold too strict a hand over trustees paying in trust money (*b*), though it is not matter of course that they should have their costs (*c*). Thus, where a trustee, soon after accepting the trust, threw it up from caprice, and paid the money into Court, he was not allowed his costs of appearing on the tenant for life's petition (*d*). And where a trustee refused in a proper case to pay the fund into Court, and obliged the *cestuis que trust* to bring an action, the Court would not allow him all his costs of suit, but only such costs as he would have been entitled to if he had paid the money into Court, and then the plaintiff had presented a petition (*e*). So where a trustee filed a bill instead of paying into Court, he was allowed only such costs as he would have been entitled to if he had paid in under the Act (*f*); and a trustee who transferred the fund into Court without sufficient reason, though allowed his costs of the transfer, was not allowed the costs of appearing on the petition (*g*).

[Jurisdiction of Court as to costs.]

As the jurisdiction of the Court is limited to the fund paid into Court, if a trustee deducts his costs before paying in the fund, the Court has no jurisdiction as to the sum deducted (*h*); but where a trustee has deducted costs improperly, an action may be brought against him for recovery of the costs so improperly deducted, and the costs of the action will be thrown upon the trustee (*i*). Where

[(*a*) *Re Erskine's Trust*, 1 K. & J. 302; *Croyden's Trust*, 14 Jur. 54; *Re Wylly's Trusts*, 28 Beav. 458; *Re Wright's Trusts*, 3 K. & J. 419; *Re Headington's Trust*, 27 L. J. N.S. Ch. 175; *Re Robertson's Trust*, 6 W. R. 405; but not to his charges and expenses, *Re Haycock's Policy*, 1 Ch. D. 611; *Re Kerr*, 8 L. R. Eq. 331, 337; *Re Jenkins*, 8 Jur. N.S. 332, 333; *Re Webb*, 2 L. R. Eq. 456.]

[(*b*) *Re Wylly's Trust*, 6 Jur. N.S. 906; *Re Brocklesby*, 29 Beav. 652; *Re Bendyshe*, 3 Jur. N.S. 727; *Re Parker's Will*, 58 L. J. Ch. 23; 39 Ch. D. (C.A.) 303.]

[(*c*) *Re Elgar*, 11 L. T. N.S. 415; *Re Lane's Trust*, 24 L. T. 181; and see *Hankey* v. *Morley*, 4 Jur. N.S. 234; *Handley* v. *Davis*, 5 Jur. N.S. 190. A trustee is within Rule 27 (19) of Order 65 of the Rules of the Supreme Court, 1883, and if he has been tendered, and has accepted 30s. for his costs, he will not be allowed his costs of appearing on the petition, if he comes merely to ask for his costs, and his appearance is otherwise unnecessary; *Re Sutton*, 21 Ch. D. 855.]

[(*d*) *Re Leake's Trusts*, 32 Beav. 135. A trustee objected to act with a proposed new trustee of whom he disapproved, and on the appointment of such new trustee the old trustee paid the fund into Court, and was allowed his costs; *Re Williams' Trust*, 6 W. R. 218.]

[(*e*) *Weller* v. *Fitzhugh*, 22 L. T. N.S. 567; *Gunnell* v. *Whitear*, 10 L. R. Eq. 664.]

[(*f*) *Wells* v. *Malbon*, 31 Beav. 48; and see *Gunnell* v. *Whitear*, 10 L. R. Eq. 664.]

[(*g*) *Re Covington's Trust*, 1 Jur. N.S. 1157; *Re Heming's Trust*, 3 K. & J. 40; and see *Croyden's Trust*, 14 Jur. 54; *Re Leake's Trusts*, 32 Beav. 135; *Re Carington*, 1 Jur. N.S. 1157; *Re Pearson*, 17 W. R. 365.]

[(*h*) *Re Bloye's Trust*, 1 Mac. & G. 504; 2 Hall & Tw. 153; *Re Barber*, 9 Jur. N.S. 1098; *Re Fortune's Trusts*, 4 Ir. R. Eq. 351; *Re Parker's Will*, 39 Ch. D. (C.A.) 303; 58 L. J. Ch. 23.]

[(*i*) *Beaty* v. *Curson*, 7 L. R. Eq. 194; and see *Re Parker's Will*, 58 L. J. Ch. 23, 24.]

the trustee is allowed the costs of the petition, his costs will be taxed, including those deducted by him (*a*). In cases of gross misconduct in paying in the fund, the Court has jurisdiction to throw upon the trustee personally the costs of the petition (*b*), but this is an extreme measure, and the Court is in general reluctant to impose such a penalty on trustees (*c*), and if a trustee is without sufficient reason deprived of his costs, he may appeal for them (*d*).

[Costs of other parties.]

27. Where a person not appearing by the affidavit to have an interest, but who made a claim, was served with the petition and *disclaimed* at the bar, he was not allowed his costs (*e*); and where the petition was presented by an incumbrancer, whose debt would swallow up the whole fund, and served on a subsequent incumbrancer with notice that his costs of appearing would be resisted, such subsequent incumbrancer, if he appeared, would not have his costs (*f*).

[Costs out of what fund payable.]

28. The Court cannot direct the costs to be paid out of another fund, also paid in by the trustee, but standing to a different account, though it may form part of the testator's residuary estate, and therefore be, *per se*, liable to costs (*g*), nor out of the testator's residuary estate when it has not been paid in (*h*); but the payment of a legacy into Court does not relieve the residuary estate from bearing the cost of an inquiry to ascertain the persons entitled to the legacy (*i*). It seems that if the person who pays in is the personal representative of a testator whose will creates

[(*a*) *Re Hue's Trusts*, 27 Beav. 337. It has been held, though the policy of the decision may be doubtful, that the trustee who is served with a petition will not be allowed in taxation the costs of taking copies of the affidavits filed by the parties beneficially interested; *Re Lazarus*, 3 K. & J. 555; Dan. Ch. Pr. 7th ed. p. 1803.]

[(*b*) *Re Woodburn's Will*, 1 De G. & J. 333; *Re Cater's Trust*, 25 Beav. 361, 366; *Re Knight's Trusts*, 27 Beav. 45; *Re Foligno's Mortgage*, 32 Beav. 131; *Re Glendenning*, W. N. 1867, p. 191; *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708; *Re Wise's Trust*, 3 Ir. R. Eq. 599; *Re Elliott's Trusts*, 15 L. R. Eq. 194; *Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. (C.A.) 281.]

[(*c*) *Re Parker's Will*, 58 L. J. Ch. 24, *per* Cotton, L.J.; *S. C.* 39 Ch. D. 303.]

[(*d*) *Turner* v. *Hancock*, 20 Ch. D. (C.A.) 303, 307; and see *Re Beddoe*, (1893) 1 Ch. (C.A.) 547.]

[(*e*) *Re Parry's Trust*, 12 Jur. 615; *Re Smith*, 3 Jur. N.S. 659.]

[(*f*) *Roberts* v. *Ball*, 24 L. J. Ch. 471.]

[(*g*) *Re Hodgson*, 18 Jur. 786; *S. C.* 2 Eq. Rep. 1083.]

[(*h*) *Re Bartholomew's Will*, 13 Jur. 380; and see *Re Sharpe's Trust*, 15 Sim. 470; *Re Feltham's Trusts*, 1 K. & J. 534. See, however, *Re Trick's Trusts*, 5 L. R. Ch. App. 170.]

[(*i*) *Re Trick's Trusts*, 5 L. R. Ch. App. 170; *Re Birkett*, 9 Ch. D. 576; *Re Gibbon's Will*, 36 Ch. D. 486. Where five-sixteenths of a fund paid into Court had lapsed, the Court threw the whole costs on the lapsed shares as constituting part of the residue; *Re Ham's Trust*, 2 Sim. N. S. 106. By R. S. C. 1883, Ord. lxv., R. 14 B., the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, are to be paid out of such legacy, money, or share unless the judge otherwise directs.]

the difficulty, the executor should take his costs of paying in the fund out of the testator's estate, but the subsequent costs come out of the fund (*a*); but, if the trust fund has been severed from the testator's estate, and is paid in by the trustee and not by the executor, the whole of the costs should be borne by the fund (*b*).

[As between *corpus* and income.]

It appears to be now settled that upon a petition for payment of dividends only, while the costs, charges, and expenses properly incurred by the trustee in paying the money into Court will, where not previously deducted, be directed to be paid out of the *corpus*, the costs of the petitioners and of all persons appearing on the petition will fall upon the income, service on the remainder-man being dispensed with (*c*).

[Wrongful claimant.]

29. Where the money was paid into Court in consequence of the unreasonable claim of a person who was served with and appeared upon the petition for payment out, and opposed, the Court threw the costs on the wrongful claimant (*d*).]

Payment to official trustees of charities.

30. By the Charitable Trusts Act, 1855 (*e*), s. 22, any trustee or other person having stock or money in his hands for a *charity*, may, by an order of the Board of Charity Commissioners, transfer the stock or pay the money to the *Official trustees* of charitable funds, and such payment or transfer will be an indemnity to the person paying or transferring.

Lord St. Leonards' Act.

31. By the Law of Property Amendment Act, 1859 (*f*), it is, in substance, enacted that *executors* and *administrators*, after giving such notices for creditors and others (*g*) to send in their claims as would have been given by the Court of Chancery, may, at the expiration of the time named in the notices, proceed to distribute the estate, without being liable for any claim of which they *shall not have had notice* at the time of distribution (*h*).

[(*a*) *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679.]

[(*b*) *Re Lorimer*, 12 Beav. 521; *Ex parte Lucas*, V. C. Knight Bruce, 6 July, 1849.]

[(*c*) *Re Whitton's Trusts*, 8 L. R. Eq. 353; *Re Marner's Trusts*, 3 L. R. Eq. 432; 12 Jur. N.S. 959; *Re Cameron*, 1 I. R. Eq. 258; *Re Mason's Trusts*, 12 L. R. Eq. 111. It was held in some cases, that the *costs of the trustee's appearance* upon the petition were an exception, and ought to be borne by the *corpus* (*Re Gordon's Trusts*, 6 L. R. Eq. 335; *Re Wood's Trusts*, 11 L. R. Eq. 155), but this has since been determined otherwise; *Re Evans' Trusts*, 7 L. R. Ch. App. 609; *Re Smith's Trusts*, 9 L. R. Eq. 374.]

[(*d*) *Re Armston's Trusts*, 4 N. R. 450; *S. C.* 4 De G. J. & S. 454.]

(*e*) 18 & 19 Vict. c. 124.

(*f*) 22 & 23 Vict. c. 35, s. 29.

(*g*) This includes the claims of next of kin under an intestacy; *Newton* v. *Sherry*, 1 C. P. D. 246.

(*h*) Sums appropriated by executors and retained by them as trustees are moneys distributed, and cease to be assets; *Clegg* v. *Rowland*, 3 L. R. Eq. 368,[and a plaintiff claiming as unpaid legatee must bring the beneficiaries

32. [By the County Courts Act, 1888, (*a*), sect. 67, the County Courts have and can exercise all the powers and authority of the High Court in actions or matters relating to administration, or the execution of trusts, or arising under the Trustee Relief Acts (*b*), or the Trustee Acts, where the trust estate or fund to which the action or matter relates does not exceed in amount or value the sum of 500*l*. By sect. 69, where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a County Court, any of the parties may apply at chambers to the Judge to whom it is attached for a transfer of the action or matter to the County Court in which the same might have been commenced, and the Judge may, upon such application, or without any application, order the transfer. By sect. 70, trust funds vested in trustees upon trusts within the meaning of the Trustee Relief Acts, and not exceeding 500*l*. in amount or value, may, if *money*, be paid into the *Post Office Savings Bank* of any County Court town, in the name of the registrar of such Court, or, if *stock or securities*, be transferred into the joint names of the *treasurer and registrar* of such Court.]

[Jurisdiction of County Courts.]

[Payment into County Court.]

before the Court, *Re Frewen*, 60 L. T. N.S. 953. The protection applies although the executors or administrators have taken a charge from a devisee under the Land Transfer Act, 1897, s. 3, sub-s. 1 ; *Re Cary and Lott*, (1901) 2 Ch. 463]. Executors, to entitle themselves to the protection of the Act, must insert advertisements in the *London Gazette*, [but not necessarily in another London paper ; *Re Bracken*, 43 Ch. D. (C.A.) 1], as well as in local papers ; *Wood* v. *Weightman*, 13 L. R. Eq. 434 ; and executors after distribution are bound to give all proper information to unpaid creditors, or they will be deprived of their costs in suits by such creditors ; *Re Lindsay*, 8 Ir. R. Eq. 61. [In determining as to the sufficiency of the notices, the Court will have regard to all the circumstances, especially the place of residence of the testator or intestate and his position in life ; *Re Bracken*, 43 Ch. D. (C.A.) 1. The sending in of a claim by a creditor is not equivalent to bringing an action so as to keep his debt alive under the Statutes of Limitation ; *Re Stephens*, 43 Ch. D. 39. As to the continuing liability of an executor who has notice of a debt or claim, see *Wood* v. *Wood*, 21 W. R. 135 ; *Price* v. *Mayo*, 22 W. R. 401 ; Seton on Judgments, 6th ed. pp. 1658, 1659, 1660, 1661 ; *Scottish Equitable Life Association Society* v. *Beatty*, 29 L. R. Ir. 290 ; Williams on Executors, 9th ed. p. 1822 ; and see *Stuart* v. *Babington*, 27 L. R. Ir. 551.]

[(*a*) 51 & 52 Vict. c. 43.]

[(*b*) See *ante*, p. 424.]

CHAPTER XV

THE DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS

UPON this head we propose—I. To examine the preliminary question, in what cases the obligation to renew is imposed by the settlement. II. To enquire in what manner the trustees are to levy the fines payable upon the renewals.

I. In what cases the obligation to renew is imposed by the settlement.

Settlement of leaseholds does not *per se* imply a direction to renew.

1. It might naturally be supposed, that, from the very circumstance of the leaseholds being of a renewable character, a settlement of them to several persons in succession would *per se* imply a right in the remainderman to call upon the tenant for life to contribute to the fine (*a*); and indeed Lord Thurlow, in the instance of a lease which had not previously been treated as renewable, observed: "The cases in which the *nature of the estate* or the will of the testator compels a renewal, appear not to apply to the present: where there is *no such custom*, or direction, it is in the discretion of the tenant for life to renew or not" (*b*). However, it seems to be now established generally, that, in a devise of renewable leaseholds *without the interposition of a trustee*, the remainderman cannot oblige the tenant for life to contribute to the fine (*c*); and so it was determined, even where the devise was expressly made "subject to the payment of all *fines*, and as they became due yearly and for every year" (*d*). However, as the interest given is in its nature capable of renewal, the Court says: "If the tenant for life do renew, he shall not by converting the new acquisition to his own use derive an unconscientious benefit out of the estate" (*e*); but on the remainderman's contributing to the fine, shall be regarded as

(*a*) See *White* v. *White*, 4 Ves. 32.
(*b*) *Nightingale* v. *Lawson*, 1 B. C. C. 443.
(*c*) *White* v. *White*, 4 Ves. 32, *per* Lord Alvanley; *S. C.* 9 Ves. 561, *per* Lord Eldon; *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow.
(*d*) *Capel* v. *Wood*, 4 Russ. 500.
(*e*) *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow.

a trustee, and shall hold the renewed interest upon the trusts of the settlement (*a*).

Whether a direction to renew will be implied by the interposition of a trustee.

2. Will the *interposition of a trustee* sufficiently indicate an intention of obliging the tenant for life to renew? "In a *devise to trustees*," says Lord Hardwicke, "if *cestui que trust* for life be one of the lives, I should doubt whether such *cestui que trust* could be compellable to contribute; but here all these lives were strangers; *the intent of the testator certainly was, that the lease should continue, and be kept on foot, and something must be done for a renewal though nothing is mentioned*" (*b*). Lord Alvanley on one occasion alluded to the point, but said he was not called upon to decide it (*c*). In *Hulkes* v. *Barrow* (*d*), where the devise was to trustees upon trust to permit one to receive the rents for life, with remainders over, "subject to the payments of the rents and performance of the covenants reserved and contained, *or to be reserved and contained*, in the present or *future* leases, whereby such premises were or *should be* held, and also all taxes, *fines*, and expenses attending the premises," it was held that the obligation of renewing the lease was imposed by the will. And in *Lock* v. *Lock* (*e*), where a testator had devised a college lease of twenty-one years to his wife for life, remainder to her son, she paying 10*l.* per annum to her son *during her life*, it was ruled that, as the testator contemplated the continuance of the lease during the life of the wife, she was bound to renew. These, however, were cases accompanied with special circumstances. It has since been decided by Lord Plunket, in Ireland, that a settlement with the *mere interposition of a trustee* does *not* impose an obligation to renew (*f*).

Whether implied in a marriage settlement.

3. Where leaseholds of this kind are made the *subject of a marriage settlement*, it may be argued, that as the parents and issue who have any interest given them are *purchasers for value*, the enjoyment of the tenant for life should be consistent with that of the other subsequent takers. But in *Lawrence* v. *Maggs* (*g*),

(*a*) *Nightingale* v. *Lawson*, 1 B. C. C. 440; *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Fitzroy* v. *Howard*, 3 Russ. 225.

(*b*) *Verney* v. *Verney*, 1 Ves. 429.

(*c*) *White* v. *White*, 4 Ves. 33.

(*d*) Taml. 264.

(*e*) 2 Vern. 666.

(*f*) *O'Ferrall* v. *O'Ferrall*, Ll. & G. Rep. *temp.* Plunket, 79. In *Trench* v. *St George*, 1 Dru. & Walsh, 417, before the same Judge, it is not clear whether his Lordship did or not consider the will as creating an obligation to renew, but it would rather appear that he did. The remainderman was held not liable to contribute towards the renewal fines in favour of the tenant for life, except as respected certain fines paid subsequently to 1819, as to which the remainderman submitted to contribute. See Ib. p. 454 *et seq.*

(*g*) 1 Eden, 453. Search has been

the case of a marriage settlement with trustees interposed, but without any mention of renewals, Lord Northington was apparently of opinion that the tenant for life was *not* bound to renew.

Implied in articles for a settlement.

4. If renewable leaseholds upon marriage be *articled to be settled*, the Court will, in executing the settlement, insert the proper direction for renewals. This, it seems, was directly determined in *Graham* v. *Lord Londonderry* (*a*): and the case of *Lawrence* v. *Maggs*, before Lord Northington, was cited before Lord Thurlow in *Pickering* v. *Vowles* (*b*), as establishing the same doctrine; but it appears by the report taken from Lord Northington's own MS. that the Bar were mistaken in this (*c*). However, Lord Thurlow himself seems to have entertained that opinion, for in the same case of *Pickering* v. *Vowles*, where the property was articled to be settled, but there was no direction for renewals, his Lordship said: "It was *intended* the lease should be fully estated, and that the husband and wife should have life estates, and that so fully estated it should go to the children."

Of discretionary renewals.

5. A direction for renewals where successive estates are limited is sometimes in the form of a *discretionary* power. The instrument *may*, indeed, be so specially worded, that the power should be perfectly arbitrary; but if the proviso be simply that "it shall be lawful for the trustees to renew, from time to time, as occasion may require, and as they may think proper," the clause will be construed, not as conferring an option upon the trustees of renewing or not, but as a safeguard against any unreasonable demands on the part of the lessor (*d*).

23 & 24 Vict. c. 145, ss. 8, 9.

[6. By Lord Cranworth's Act, passed 28*th August*, 1860, provisions were made for the renewal of leases by trustees under instruments executed since the date of the Act. These provisions were repealed by the Settled Land Act, 1882 (*e*), but in substance re-enacted, and extended to all trusts, whatever the date of their creation, by the Trustee Act, 1888 (*f*); the provisions of which have now been replaced by sect. 19 of the Trustee Act, 1893 (*g*), by which it is enacted that (1) a trustee (*h*) of any leaseholds for

[Trustee Act, 1893.]

made for this case in R. L. through several years, but the decree has not been found. See *Lord Montfort* v. *Cadogan*, 17 Ves. 488; *S. C.* 19 Ves. 638; *Trench* v. *St George*, 1 Dru. & Walsh, 417.

(*a*) Cited *Stone* v. *Theed*, 2 B. C. C. 246.

(*b*) 1 B. C. C. 197. The cause does not appear in R. L.

(*c*) 1 Eden, 453.

(*d*) *Milsington* v. *Mulgrave*, 3 Mad. 491; 5 Mad. 472; *Mortimer* v. *Watts*, 14 Beav. 416; and see *Verney* v. *Verney*, 1 Ves. 430; *Harvey* v. *Harvey*, 5 Beav. 134; *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 203.

[(*e*) 45 & 46 Vict. c. 38, s. 64.]

[(*f*) 51 & 52 Vict. c. 59, ss. 10, 11.]

[(*g*) 56 & 57 Vict. c. 53.]

[(*h*) For the definition of trustee, see s. 50, *ante*, p. 366, and *post*, Chap.

lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite; provided that where, by the terms of the settlement or will, the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, the section is not to apply, unless the consent in writing of that person is obtained to the renewal on the part of the trustee (*a*). (2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power is to be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose.]

7. By the Ecclesiastical Commissioners Act, 1860, where any estate or interest under any lease or grant from an *ecclesiastical corporation* is vested in a person as trustee, whether expressly or by implication of law, with a power to raise money for procuring a renewal, or where such power is vested in any person, it is made lawful for such person to raise money for the purpose of purchasing the reversion or otherwise enfranchising the property (*b*); and it has been held that this enactment confers a power not only to raise the money, but also to effect the purchase or enfranchisement (*c*). But this will not authorise the trustees to make any arrangement with the reversioners which will

23 & 24 Vict. c. 124.

XXVI. The object of the section was to remove the liability of trustees and not to alter the law as between tenant for life and remainderman; *Re Baring*, (1893) 1 Ch. 61, 65, *per* Kekewich, J.]

[(*a*) The concluding words were not contained in 23 & 24 Vict. c. 145, s. 8.]

(*b*) 23 & 24 Vict. c. 124, s. 20.

(*c*) *Hayward* v. *Pile*, 5 L. R. Ch. App. 218, *per* Lord Hatherley.

disturb the relative rights of the tenant for life and the remaindermen under the settlement; and where it was proposed to surrender part of the leaseholds in consideration of a release of the reversion of the rest of the leaseholds, and the interests of the tenant for life would suffer by the arrangement, the Court had no power, without the consent of the tenant for life, to give effect to the proposal, though beneficial on the whole (*a*).

How fines on renewals to be levied.

II. We next proceed to inquire in what manner the fines for renewals are to be levied by the trustees.

Upon this subject we shall advert, *First*, to the case where the settlor himself has specifically marked out the fund from which the fines are to be raised; and *Secondly*, to the rules adopted by the Court, where the settlor himself has omitted to declare any intention.

First. Where the fund for the fines is pointed out.

How to be levied out of "rents, issues, and profits," where the leases are for years.

1. If there be an express trust to provide the fines for renewals out of the "*rents, issues, and profits,*" and the leaseholds are *for terms of years not determinable on lives*, so that the times of renewal can be certainly ascertained, it will be the duty of the trustees to lay by every year such a proportion of the annual income as against the period of renewal will constitute a fund sufficient for the purpose (*b*).

Fines to be levied out of rents and profits, or by mortgage.

2. If the trust be to levy the fines for renewal out of the "*rents, issues, and profits*, or *by mortgage*," it was held in a case before Sir J. Leach that the annual rents only would in the first instance be applicable, for he considered the authority to mortgage not as making it optional with the trustees whether they should or not affect the interests of the remainderman, by throwing the charge of the renewal upon the *corpus* of the property, but as given for the protection of the *cestuis que trust* in case the amount of the fine should not be otherwise forthcoming (*c*), and intimated that should the trustees be under the necessity of mortgaging, the Court would call back from the party in possession the amount of the incumbrance thus temporarily incurred (*d*). However, in the later case of *Jones* v. *Jones* (*e*),

(*a*) *Hayward* v. *Pile*, 5 L. R. Ch. App. 214. But in another special case where there was an absolute trust for renewal, overriding the interest of the tenant for life, the Court made the order; *Hollier* v. *Burne*, 16 L. R. Eq. 163; [see *Maddy* v. *Hale*, 3 Ch. D. (C.A.) 327; *Re Lord Ranelagh's Will*, 26 Ch. D. 591].

(*b*) *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; *S. C.* 19 Ves. 635; see *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 121; *Blake* v. *Peters*, 1 De G. J. & S. 345.

(*c*) *Milsington* v. *Earl of Portmore*, 5 Mad. 471; and see *Milles* v. *Milles*, 6 Ves. 761.

(*d*) 5 Mad. 472; and see *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 121, 123.

(*e*) 5 Hare, 440.

where the trustees were empowered to levy the fines "*by and out of the rents, issues, and profits,* or *by mortgage,* or by such other ways and means as should be advisable," the Court, after observing that to levy the fines from the rents would throw them on the tenant for life, while a mortgage would be oppressive to the remainderman, declined to give any opinion whether the trustees might not, had they exercised their discretion, have determined upon whom the burthen should fall; but as the trustees had not exercised their discretion, it was held that the Court could adjust the *onus* amongst the parties according to the equitable rule, viz. in proportion to their actual emjoyment, as soon as it could be ascertained (*a*). And in *Greenwood* v. *Evans* (*b*), *Reeves* v. *Creswick* (*c*), and *Ainslie* v. *Harcourt* (*d*), where the fines were to be raised out of the *rents, issues, and profits,* or *by mortgage,* the Court in like manner adopted the principle of throwing the *onus* on the successive tenants of the estate, in proportion to their enjoyment (*e*). In the first two cases the *leaseholds were for lives,* and in the last the leaseholds were partly for *lives* and partly for years, but no distinction was taken on that account. The present leaning of the Courts would appear, therefore, to be, to consider the language of the instrument as directing only the temporary mode of raising the fines, without prejudice to the ultimate equitable adjustment according to the principles now acted upon in equity in ordinary cases. But if the trusts be to pay the renewal fines by and out of "the *annual* rents, issues, and profits," with a *power*, if the money wanted for renewal be not produced, to raise it by mortgage, the *onus* will fall upon the tenant for life (*f*).

How to be levied when the leases are for lives.

3. If the leaseholds be either for *lives* or *for years determinable on lives,* and the trust is to raise the fines for renewal out of the "*rents, issues, and profits,*" the expenses of renewal must still be cast upon the *annual* rents if it *clearly appear* that such were meant, though from the *uncertainty of the time,* the trustees cannot be sure they shall have accumulated an adequate fund.

Whether rents and profits mean annual rents.

4. But the expression "rents, issues, and profits," often stands by itself, without any sufficient indication *aliunde* that *annual* rents are intended, and then the question arises, and is attended

(*a*) *Jones* v. *Jones*, 5 Hare, 440.
(*b*) 4 Beav. 44.
(*c*) 3 Y. & C. 715, as corrected from Reg. Lib.; see *post*, note (*j*), p. 444.
(*d*) 28 Beav. 313.
[(*e*) See *Isaac* v. *Wall*, 6 Ch. D. 706; *Re Marquess of Bute*, 27 Ch. D. 196.]
(*f*) *Solley* v. *Wood*, 29 Beav. 482.

with great difficulty, whether the fines shall be raised out of the annual rents or the *corpus*.

Stone v. Theed.

In *Stone* v. *Theed* (*a*), Lord Thurlow held that the *annual* rents only were applicable. In *Allan* v. *Backhouse* (*b*), Sir T. Plumer considered that the trustees might sell or mortgage, and that the tenant for life and remainderman must contribute in the usual proportions, and this decision was affirmed on appeal by Lord Eldon (*c*). In *Shaftesbury* v. *Marlborough* (*d*), Sir J. Leach observed upon the conflict between the preceding cases, and followed the authority of Lord Thurlow. [In *Re Barber's Settled Estates* (*e*), the authority of *Allan* v. *Backhouse* was conceded without argument.]

The decisions in *Playters* v. *Abbott* (*f*), and *Townley* v. *Bond* (*g*), must be viewed as resting only upon the special wording of the instruments which were under consideration.

Greenwood v. Evans, &c.

In *Greenwood* v. *Evans* (*h*), *Jones* v. *Jones* (*i*), *Reeves* v. *Creswick* (*j*), and *Ainslie* v. *Harcourt* (*k*), the trustees were empowered to levy the fines from the *rents, issues,* and *profits,* or by *mortgage,* and the Court, as we have seen, apportioned the burthen amongst the successive tenants, according to their enjoyment.

Result of the cases.

The result appears to be that where the direction is to raise the fines out of "the rents, issues, and profits," simply, the Court may be compelled, by the express language of the instrument, to throw the fines upon the *annual* rents, but will lean strongly

(*a*) 2 B. C. C. 243; see the case stated from Reg. Lib. with some remarks, in *Jones* v. *Jones*, 5 Hare, 451, note (*a*); and see *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; [*Re Green*, 40 Ch. D. 610].

(*b*) 2 V. & B. 65.

(*c*) Jac. 631. [A full copy of Lord Eldon's judgment will be found in the Law Magazine, Vol. XXVI. p. 112.]

(*d*) 2 M. & K. 111, 121.

[(*e*) 18 Ch. D. 624.]

(*f*) 2 M. & K. 97.

(*g*) 2 Conn. & Laws. 393.

(*h*) 4 Beav. 44.

(*i*) 5 Hare, 440.

(*j*) 3 Y. & C. 715. It is stated in the report that "there were no funds provided for the purpose of renewal by the testator's will"; from which it might be supposed that the will was altogether silent upon the subject, but Mr Shapter, Q.C., who had occasion to consult the Reg. Lib., obligingly furnished the author with the following extract from the will: "It shall be lawful for my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns respectively of such survivor to renew, or use their or his endeavours to renew, the leases for the time being of such part of my said estates as shall be accustomably renewable from time to time, and as often as occasion shall require, and for that purpose to make such surrenders of the then leases, or any renewed leases, as shall be requisite and necessary in that behalf, and *by and out of the rents, issues and profits,* of the premises, the leases whereof may be so renewed, or by *mortgage thereof,* to raise so much moneys as shall be sufficient for paying the several renewal fines and other necessary charges for such renewals."

(*k*) 28 Beav. 313.

against such a construction, and where the trustees are empowered to raise the fines out of "the rents, issues, and profits, *or* by mortgage," it will hold the discretion to apply only to the temporary means of raising the fund, and will apportion the burthen according to the general rule (*a*).

Of raising the fines by way of insurance.

5. On a reference to the Master in Chancery by Sir J. Leach, how a fund for payment of fines on the renewal of leaseholds for *lives*, where the fines were to be paid from the *annual* rents, could best be secured, the Master proposed in his report, that each of the lives, upon which the leases were held, should be insured *against the life of the tenant for life* in a sum sufficient to cover the amount of the fine, and that the premiums upon the policies should be paid out of the annual rents and profits (*b*). Upon this arrangement we must remark that the lives of the *cestuis que vie* ought to have been insured *unconditionally*, and not against the life of the tenant for life, for the estate was continually deteriorating as the lives wore out, and the remainderman was entitled to have good lives or equivalent insurances. In leaseholds for years, the remainderman has a right to a proportional accumulation towards the payment of the next fine, and why is not the same principle to prevail in the case of leaseholds for lives? Subject to this observation, a more convenient mode of raising the fines could not perhaps be suggested, and a trustee under similar circumstances would scarcely incur a risk in acting upon it at his own discretion.

Power to charge freeholds for raising fines.

6. Where freeholds and leaseholds for lives are limited to the same uses, it is usual, from the difficulty of mortgaging leaseholds vested in trustees (who will not covenant beyond their own acts), to insert a power to charge the *freeholds* for raising the fines; and it would be well to provide that the freeholds and leaseholds might be joined together in the security, and that the loan should precede other charges created by the settlement, and that the *corpus* of the property should be subject to the mortgage, so as to shut out the question of apportionment between the tenant for life and the remainderman.

Who shall have the accumulations where renewal cannot be had.

7. [Where there is an absolute trust for renewal of leaseholds out of the rents and profits overriding the interest of the tenant for life, but from the unwillingness or incapacity of the lessor no renewal can be obtained, it is the duty of the trustees to make

[(*a*) See *Re Marquess of Bute*, 27 Ch. D. 196.]

(*b*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 124; and see *Greenwood* v. *Evans*, 4 Beav. 44.

the best arrangement which is practicable for rendering the property permanent for the benefit of the persons successively entitled, either by purchasing the reversion where this can be done on advantageous terms, and with a due regard to the interests of the successive *cestuis que trust*, or by converting the leaseholds and investing the proceeds, allowing the tenant for life only the income of the investments during his life (*a*); but where no absolute trust for renewal exists, although] a portion of the annual rents and profits may have been destined by the settlor to defray the expenses of renewals, if no renewal can be obtained, the sums which would have been raised will be regarded as a charge which fails of taking effect, and will merge for the benefit of the tenant for life (*b*).

Who must compensate the remainderman where no renewal has been made.

8. If a trustee (*c*), or tenant for life in the situation of a trustee (*d*), fail in his duty to apply the given fund, the remainderman may call for a compensation from such trustee, or tenant for life, or their assets. But when, by the permission of the trustee, the tenant for life has been in the full enjoyment of the rents and profits without deduction for renewals, though the trustee is primarily answerable to the remainderman, yet the tenant for life, who has had the actual pernancy, must to that extent make it good to the trustee (*e*).

Of fines on underleases.

9. And where the leaseholds were annually renewable for twenty-one years, and the custom had been for the lessee annually to grant under-leases for twenty years, the tenant for life, as bound to pay the fines to the lessor out of the annual rents and profits, was declared entitled to the fines paid annually by the under-lessees (*f*).

How fines to be levied where no direction by the settlor.

Secondly. It often happens that renewable leaseholds are devised to trustees with a direction, either expressed or implied, to keep the leases continually renewed, but *without any declaration*

[(*a*) *Maddy* v. *Hale*, 3 Ch. D. (C.A.) 327; *Re Wood's Estate*, 10 L. R. Eq. 572; *Hollier* v. *Burne*, 16 L. R. Eq. 163; *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590.]

(*b*) *Morres* v. *Hodges*, 27 Beav. 625; *Richardson* v. *Moore*, and *Tardiff* v. *Robinson*, cited *Colegrave* v. *Manby*, 6 Mad. 82, 83, and reported 27 Beav. 629; *Re Money's Trusts*, 2 Dr. & Sm. 94. See *Colegrave* v. *Manby*, 6 Mad. 86, 87; 2 Russ. 252; *Bennett* v. *Colley*, 5 Sim. 181; 2 M. & K. 231; *Browne* v. *Browne*, 2 Giff. 304.

(*c*) *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; *S. C.* 19 Ves. 635; and see *Wadley* v. *Wadley*, 2 Coll. 11.

(*d*) *Colegrave* v. *Manby*, 6 Mad. 72; *S. C.* 2 Russ. 238.

(*e*) *Lord Montfort* v. *Lord Cadogan*, *ubi sup.*; *Townley* v. *Bond*, 2 Conn. & Laws. 403, 406, *per* Sir E. Sugden; and see *Wadley* v. *Wadley*, 2 Coll. 11; *Marsh* v. *Wells*, 2 S. & St. 87; [*Brigstocke* v. *Brigstocke*, 8 Ch. D. (C.A.) 357].

(*f*) *Milles* v. *Milles*, 6 Ves. 761; and see *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656; *S. C.* 35 Beav. 640.

of intention out of what fund the settlor meant the expenses to be levied.

1. Where this is the case, the tenant for life and remainderman may possibly agree to contribute towards the fine out of their own pockets, at the time of the renewal; or if the tenant for life and remainderman cannot agree to *join* in raising the fine, one of them may be willing to advance the whole amount *pro tempore* out of his own pocket, and then an apportionment on the principles adopted by the Court may be compelled between the tenant for life's estate and the remainderman at the tenant for life's decease, and either party advancing the fine will have a *lien* on the renewed lease for the amount expended beyond his proportional part. If the tenant for life and remainderman will neither jointly, nor will either of them singly advance the fine, then it is said the trustees must raise the expenses out of the estate by way of mortgage (*a*); and at the tenant for life's decease the apportionment must be made in like manner. However, a mortgage, where neither the tenant for life nor remainderman will make the advance, is more easily to be suggested than to be carried into effect, for few persons would be disposed to lend their money on such a security, in the absence of any express power to mortgage. In such a case, therefore, it seems necessary to have recourse to the Court, except where the difficulty is met by the provisions of the Trustee Act, 1893, before referred to (*b*).

Where paid by tenant for life or remainderman.

Mortgage by trustees.

2. The old rule of contribution was, that the tenant for life should advance one-third, and the remainderman two-thirds (*c*); but the question was put by Lord Thurlow: "Is a tenant for life at the age of ninety-nine, whose title accrued in possession when he was ninety-eight, to pay one-third—a great deal more than any possible enjoyment? According to that rule, a man of the age of ninety-nine, who has the enjoyment only of ten days, pays as much as a man of twenty-five" (*d*).

Old rule of contribution.

3. Lord Alvanley adopted the rule (*e*) (and from the case of *Lawrence* v. *Maggs*, it would seem that Lord Northington had

Rule of keeping down the interest on the fine.

(*a*) See *Buckeridge* v. *Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 121; *Allan* v. *Backhouse*, 2 V. & B. 72.

[(*b*) 56 & 57 Vict. c. 53, s. 19, *ante*, pp. 440, 441.]

(*c*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 118, *per* Sir J. Leach; *Lock* v. *Lock*, 2 Vern. 666; R. L. 1710, B. fol. 120; *Verney* v. *Verney*, 1 Ves. 428; *Limbroso* v. *Francia*, cited Ib.; *Graham* v. *Lord Londonderry*, cited *Stone* v. *Theed*, 3 B. C. C. 246; and see *Rowel* v. *Walley*, 1 Ch. Rep. 218; *Ballet* v. *Sprainger*, Pr. Ch. 62; *Cornish* v. *Mew*, 1 Ch. Ca. 271.

(*d*) See *White* v. *White*, 9 Ves. 555.

(*e*) *Buckeridge* v. *Ingram*, 2 Ves. jun. 652, see 666; *White* v *White*, 4 Ves. 24, see 33.

before acted upon the same principle (*a*)), that the tenant for life should merely *keep down the interest* of the fine. But Lord Eldon said, "he could not agree to that: in the case of tenant for life and remainderman in *tail* or in *fee*, the *inheritance* being charged with the mortgage, it was fair the tenant for life should only keep down the interest, for the natural division was, that he who had the *corpus* should take the burthen, and he who had only the fruit should payto the extent of the fruit of the debt: but leases, whether for lives or years, were in their nature temporary, and therefore the position that the tenant for life was bound to pay the interest was to be understood with this qualification, that he was further bound to contribute a due proportion of the principal according to the benefit he derived from the renewed interest" (*b*).

Court will not act on speculative calculations.

4. It might be thought reasonable that the proportion of the expense to fall upon the tenant for life should be regulated by his actual age and *probable* duration of life; but it has been said that accident might render such a course unjust to the one party or the other, according as the tenant for life happened to live a longer or shorter period than was allowed by the calculation (*c*).

Present rule of contribution.

5. The rule now in operation was first clearly laid down by Lord Thurlow in *Nightingale* v. *Lawson* (*d*), a case, said Lord Eldon (who was one of the counsel in it), to which, from the intricacy of the subject, the reports have failed to do justice (*e*).

Nightingale *v.* Lawson.

The circumstances may be briefly stated as follows: A widow, tenant for life of a term which had twelve years to run, renewed for a further term of twenty-eight years, to commence from the expiration of the twelve years, and afterwards renewed for the additional term of fourteen years to commence from the expiration of the twenty-eight years. The widow lived through the original term of twelve years, and through nine of the renewed term of twenty-eight years. The question was raised after the death of the widow, in what proportions the tenant for life and the remainderman should contribute to the fines. The following points were resolved by Lord Thurlow, after very anxious, frequent, and grave consideration of the subject (*f*), and have ever since been acquiesced in by the Courts.

(*a*) 1 Eden, 453, see 455.
(*b*) *White* v. *White*, 9 Ves. 560.
(*c*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 119, *per* Sir J. Leach; and see *Bennett* v. *Colley*, 2 M. & K. 234.
(*d*) 1 B. C. C. 440.
(*e*) *White* v. *White*, 9 Ves. 556.
(*f*) See *White* v. *White*, 9 Ves. 560.

(A) "That, as the widow had lived nine years after the expiration of the twelve, leaving nineteen years to run of the twenty-eight, the Master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased—that is, of the term of twenty-eight years, to commence at the expiration of the twelve years; he should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter was the proportion to be paid by the remainderman" (*a*). (Upon which resolution Lord Eldon thus comments: "It was first considered," he said, "what the interest of the tenant for life was in that term which had to run out at the time of the renewal, and then what benefit the tenant for life had received by the enjoyment of the renewed term from the period when the old term would have expired; and Lord Thurlow determined that the remainderman took that interest in the renewed term which was *ultra* so much of the renewed term as expired in the lifetime of the person who renewed, and the value of that interest he made the remainderman pay" (*b*).) Proportions to be paid by the tenant for life and remainderman.

(B) "That as to the *kind of interest* to be allowed, *simple* interest would not be a satisfaction, as the widow had laid out her money totally, and the value of the lease was calculated upon the ground of compound interest; compound interest was therefore to be computed upon the proportional value of the nineteen years' term to the whole expense of renewal" (*c*). Kind of interest.

(C) "That as to the *rate of interest*, in computing compound interest, you go upon the idea that the interest is paid upon the exact day and immediately laid out; but as this was impossible, it would be sufficient to compute interest at 4 per cent." (*d*). Rate of interest.

(D) "That such interest was only to be paid till the widow's death, for after that her executors had the demand upon the remainderman, and it became a common debt, and must carry simple interest only" (*e*). Rate after the death of the tenant for life.

(E) "With respect to the second renewal, as the widow had not lived to enjoy any part of that term, her executors were entitled to the whole of the expenses, with interest to be computed on the same principle as before" (*f*). Case of tenant for life having had no enjoyment.

(*a*) See *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Barnard* v. *Heaton*, cited *White* v. *White*, 4 Ves. 29; *Playters* v. *Abbott*, 2 M. & K. 108; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 118; *Lanauze* v. *Malone*, 3 Ir. Ch. Rep. 354.

(*b*) *White* v. *White*, 9 Ves. 558.

(*c*) See *White* v. *White*, 4 Ves. 35, 36; *S. C.* 9 Ves. 557, 558; *Bradford* v. *Brownjohn*, 3 L. R. Ch. App. 711.

(*d*) See *Giddings* v. *Giddings*, 3 Russ. 260.

(*e*) See *Giddings* v. *Giddings*, 3 Russ. 260; *Bradford* v. *Brownjohn*, 3 L. R. Ch. App. 711.

(*f*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

Risk of losing the contribution.

6. In this case, it will be observed, the *tenant for life* had disbursed the fine and, the payment being a charge upon the property, the widow was in no danger of eventually losing her demand. But where the tenant for life has not the means of renewing, but the remainderman comes forward with the money, if the contribution is to be suspended till the death of the tenant for life, it may happen that, when the proportions can at last be ascertained, the estate of the tenant for life may be insolvent, and so the contribution be lost. "I admit," says Lord Eldon, "there is this difficulty in the case; but perhaps from the nature of the thing it cannot be helped: the utmost extent you can go to is to make the tenant for life give security for the sum which may eventually be due" (*a*).

How the rule is to be applied to leaseholds for lives.

7. There occurs, also, this further difficulty, viz. how to apply the principle to the case of leaseholds for *lives*. The new *cestui que vie* may die in the lifetime of the original *cestui que vie*, and then no actual benefit accrues either to the tenant for life or to the remainderman. If the tenant for life paid the fine, is the remainderman to contribute nothing, because he took no benefit? If the remainderman paid the fine, is the tenant for life to contribute nothing, because he can excuse himself under the same plea?

8. From the nature of leaseholds for *lives* it seems difficult to discover any other principle of adjustment than one of the following:—

First, That the tenant for life and the remainderman should contribute according to their *chance of benefit at the time of the renewal*, in which case the proportions would be settled thus:—The chance of benefit to the tenant for life is the value of the new life commencing from the death of the last surviving original *cestui que vie*, and determining on the death of the tenant for life. The chance of benefit to the remainderman is the value of the new life commencing on the death of the original *cestuis que vie* after the death of the tenant for life. In the proportion of these two values would be the respective contributions.

Secondly, That the *remainderman's* proportion should be regulated by the *actual benefit* derived. Thus, if the new *cestui que vie* die in the lifetime of any of the original *cestuis que vie*, or of the tenant for life, the remainderman takes no benefit and has nothing to pay. In this case the tenant for life is the *loser*. Should the new *cestui que vie* survive the original *cestuis que vie* and also the

(*a*) See *White* v. *White*, 9 Ves. 558, 559; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 122.

tenant for life, the value of the new life should be taken at the tenant for life's death, and that interest be paid for by the remainderman. It might happen that the original *cestuis que vie* and the tenant for life might die soon after the renewal, and then the estimated value of the new life would be greater than the whole fine; and in such a case the tenant for life would be a *gainer*. Thus the tenant for life might sometimes be a gainer, sometimes a loser: the remainderman would never either gain or lose, but would pay the exact value of the interest which he actually took (*a*).

Thirdly, That, *vice versâ*, the *tenant for life's* proportion should be regulated by the actual benefit derived, and that the contingent loss or gain, as the case might be, should fall upon the *corpus* of the property, that is, upon the remainderman. [The leading cases on this subject are *Reeves* v. *Creswick* (*b*), where the question was as to leaseholds for lives, and *Jones* v. *Jones* (*c*), which involved leaseholds for years as well as leaseholds for lives; and in accordance with the principles enunciated in the latter case,] the tenant for life, where the fine has been paid out of the trust fund, has been ordered to give security for his contribution to the fine in proportion to the benefit which he should ultimately derive from the new life (*d*). *Jones* v. *Jones*, however, leaves untouched the case which creates the greatest difficulty, viz. where by the death of the new *cestui que vie* in the lifetime of the tenant for life no benefit from the renewal accrues either to the tenant for life or to the remainderman. Nor does it appear to have been distinctly perceived by the Court that the renewal of leaseholds for lives being essentially matter of *speculation*, it is impossible to regulate the contribution of either tenant for life or remainderman according to the *value* of his actual enjoyment, without *e converso* making the remainderman or the tenant for life take upon himself the risk of the renewal proving profitable or unprofitable in its ultimate results; and further, that in order to make each party bear the burden of the renewal in the *proportion* of his actual enjoyment, it would be necessary to await the deaths, not merely of the tenant for life, but also of the *cestuis que vie*, a course which would be extremely inconvenient, and, it is conceived, contrary to the general practice of the Court.

(*a*) See Lord Eldon's remarks in *White* v. *White*, 9 Ves. 559, which, however, are very obscurely worded.

[(*b*) 3 Y. & C. 715. See as to this case, *ante*, p. 444, note (*j*).]

[(*c*) 5 Hare, 440. For a fuller statement of these cases see the last edition of this work, pp. 444 *et seq.*]

(*d*) *Hudleston* v. *Whelpdale*, 9 Hare, 775.

In *Harris* v. *Harris* (*a*), copyholds held for three *lives* were settled on A. for life, with remainders over, and two of the *cestuis que vie* having died, A. put in two new lives at his own expense. A. died in the lifetime of the original *cestui que vie*, so that A. in event had no benefit from the renewal, and the whole fine was ordered to be repaid to A.'s personal representative. But it might happen that the two new lives would also die in the lifetime of the original *cestui que vie*, and then the remaindermen also would have no benefit from the renewal. It would seem, therefore, that the Court must have assumed that the speculative gain or loss was to fall on the remainderman.

Tenant for life regarded as a trustee.

9. Where the legal estate of renewable leaseholds is devised without the interposition of a trustee, but the testator at the same time directs, either expressly or by implication, that the leases shall be renewed, the tenant for life is then himself a trustee (*b*), and as such is compellable to apply for renewals (*c*), but ought before applying for a renewal to consult the remainderman (*d*).

Tenant for life refusing to renew.

10. It has been said, that if from the threats or acts of the tenant for life there appears the intention of suffering the lease to expire, the Court would appoint a receiver of the estate to provide a fund for the renewal (*e*); and that if the tenant for life has already allowed the period for renewal to pass, the rents and profits may be impounded for either procuring a renewal (*f*), or finding the remainderman a compensation (*g*). But no suit *for damages* can be effectually prosecuted before the tenant for life's decease; for so long as it remains uncertain how much of the renewed term will survive to the remainderman, the amount of the injury done to him cannot be ascertained (*h*). It follows that the mere forbearance of the remainderman to bring a suit during the continuance of the life estate cannot be construed into *laches* or acquiescence (*i*).

[Covenant for renewal.]

[11. Where in a lease for lives there is a covenant by the lessor to renew lives on the lessee nominating a new life within six

(*a*) *Harris* v. *Harris*, (No. 3), 32 Beav. 333.

(*b*) *White* v. *White*, 5 Ves. 555.

(*c*) *Lock* v. *Lock*, 2 Vern. 666; and see *White* v. *White*, 4 Ves. 24.

(*d*) *White* v. *White*, 5 Ves. 555. [The tenant for life on renewal ought not to put in his own life; *Hudleston* v. *Whelpdale*, 9 Ha. 775, 788, distinguishing *White* v. *White*, 9 Ves. 554, 561, as having been decided upon the special terms of the will.]

(*e*) See *Bennett* v. *Colley*, 2 M. & K. 233.

(*f*) See *S. C.* 5 Sim. 192.

(*g*) *S. C.* 5 Sim. 181; 2 M. & K. 225; and see *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 490.

(*h*) *Bennett* v. *Colley*, 5 Sim. 181; *S. C.* 2 M. & K. 225; *Harris* v. *Harris*, (No. 3), 32 Beav. 333.

(*i*) *Bennett* v. *Colley*, 5 Sim. 181; 2 M. & K. 225.

months after the death of the *cestui que vie*, and the time has been allowed to expire, there is no ground for compelling a renewal on the general doctrine of Courts of Equity, in the absence of fraud or surprise, or inevitable accident, or some personal equity against the lessor (*a*).]

Admission fines in respect of copyholds.

12. The fines, fees, and expenses of the *admission* of new trustees to *copyholds* must be borne by the tenant for life and remaindermen in proportion to their respective interests, according to the principles which regulate the renewal of leaseholds. Thus a testator devises copyholds to A. and his heirs upon trust for B. for life, with remainder to C. in fee. A. pays a fine on his admission and dies. His heir is admitted and pays a fine and dies, and his heir again is admitted and pays a fine. Thus the fine for the admission of the trustee is a kind of purchase-money for an estate for life of that trustee. The burthen must be borne by the *cestuis que trust* of the estate, and they contribute to the fines in proportion to their actual enjoyment, as in the case of leaseholds (*b*). These observations are on the assumption that the will or settlement contains no express directions how the fines are to be raised.

[(*a*) *Hussey* v. *Domville*, (1900) 1 I. R. (C.A.) 417, 444.]

(*b*) *Carter* v. *Sebright*, 26 Beav. 374; and see *Playters* v. *Abbott*, 2 M. & K. 108; *Bull* v. *Birkbeck*, 2 Y. & C. C. C. 447; *Jones* v. *Jones*, 5 Hare, 461.

CHAPTER XVI

DUTIES OF TRUSTEES TO PRESERVE CONTINGENT REMAINDERS

1. TRUSTS of this description are at present of much less frequent occurrence than they were formerly, and the reason is easily explained.

Object of the settlement under the old law, liable to be defeated.

2. As the law stood before the recent Acts, which will be noticed presently, the objects of a strict settlement (where there was no limitation to trustees to preserve contingent remainders), were liable to be defeated in the two following ways:—

In the first place, as a contingent remainder was formerly extinguishable by the *surrender* or *merger* of the particular estate in the inheritance (*a*), if lands were limited to A. for life, with remainder to his unborn children, with remainder to B., A. might surrender his life estate to B., or B. might release to A., or A. and B. might join in a conveyance of the fee simple to C., and in each case the contingent remainder was squeezed out, and if issue were afterwards born, they had no remedy at law or in equity.

Again, the intention of the settlor was that the estate should remain in the family as long as the law permitted, and that on the death of the tenant for life it should devolve on the person who happened at the time to stand next in the series of limitations, but in fact when the eldest son attained twenty-one he was enabled, with the concurrence of his father in making a tenant to the *præcipe*, to bar all the subsequent remainders; and thus, on the majority of the eldest son, the estate became the absolute property of the father and son, and the interests of those in remainder were sacrificed, except so far as the father and son might choose to give them effect.

3. To obviate these results settlements were usually penned in one of the two following modes: either, *First*, The legal estate was limited to the use of the parent for 99 years if he should

(*a*) Also by forfeiture of the particular estate. But see now the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 8.

so long live, with remainder to the use of trustees and their heirs during the life of the parent upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs during the life of the parent in trust for him, and on his death to other uses in remainder; or, *Secondly*, The settlement was to the use of the parent for life, with remainder to trustees and their heirs during the life of the parent upon trust to preserve the contingent remainders, and on his death to other uses in remainder.

Case of the legal estate for life in the trustee.

4. In the *first* form of settlement the object in view, by vesting the freehold in the trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been practicable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorised by the spirit of the settlement.

Case of the legal estate in the tenant for life.

5. In the *second* form it was the duty of the trustees as before to preserve the contingent limitations, but as the freehold in possession was vested in the parent, the trustees had no power to prevent a recovery by the father and son as soon as the latter came of age, but if the tenant for life committed a forfeiture (as by feoffment in fee in order to defeat the contingent remainders), it was then the duty of the trustees to enter and so vest the freehold in possession in themselves, and it was then their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper (*a*).

Effect of the Fines and Recoveries Act upon trusts to preserve contingent remainders.

6. The law upon the duties of trustees to preserve contingent remainders has in later times undergone great alteration.

By the 15th section of the Fines and Recoveries Act (*b*) it is declared, that every tenant in tail, whether *in possession*, *remainder*, *contingency*, or *otherwise*, shall have power to dispose of the lands entailed for an estate in fee simple absolute; but by the 40th and two following sections, the disposition must be by *deed inrolled*, and must be made with the *consent of the protector of the settlement* (*c*).

Operation of the old law.

7. Under the old law the key of the settlement was in the

(*a*) The duties of trustees to preserve contingent remainders with reference to the old law have been omitted in this edition, but will be found in the early editions.

(*b*) 3 & 4 Will. 4. c. 74.

[(*c*) When the deed is duly enrolled, the consent of the protector will be effectual though given after the execution of the deed and the death of the tenant in tail: *Whitmore-Searle* v. *Whitmore-Searle*, (1907) 2 Ch. 332.]

hands of the person who was the owner of the freehold in possession; but now, by the 32nd section of the Act, any settlor entailing lands may *appoint* one or more persons *in esse*, not exceeding three and not being *aliens*, to be protector or protectors of the settlement during the period therein specified, and may perpetuate the protectorship by means of a power of appointment of new protectors (*a*). If the settlor has not taken advantage of this permission, then, by the 22nd section, if there be subsisting under the settlement any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or of the first of such prior estates if more than one, or *the person who would have been owner had he not disposed of his interest*, is constituted the protector of the settlement. But, by the 27th section, no dowress, *bare trustee*, heir, executor, or administrator shall be protector. However, by the 31st section, it is enacted that, "where, *under a settlement made before the passing of the Act*, the person who under the old law should have made the tenant to the *præcipe*, shall be a *bare trustee*, such trustee during the continuance of the estate conferring the right to make the tenant to the *præcipe* shall be the protector"; but, by the 36th section, the protector of a settlement shall not be deemed to be a *trustee* in respect of his power of consent, and a Court of Equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving his consent as a breach of trust.

Operation of the new law.

8. Under the provisions, therefore, of this Act, as regards settlements made *since* the passing of the Act, a *bare trustee* cannot be protector in any case (*b*). As regards settlements made *before* the passing of the Act, though the trustee may become protector by the operation of the 31st section, he is not accountable in a Court of Equity for the exercise of his discretion. But a bare trustee who is protector under that section can insist on retaining the legal estate only so long as the purposes of the trusts exist—that is, so long as, according to the rules of a Court of Equity, he is required to be a trustee. Therefore, where there was a devise of lands to trustees upon trust for testator's daughter

[(*a*) Where a testatrix appointed three persons protectors, and made provisions for the appointment of other persons to be protectors in case they should die, and the protectors all died, but no new protectors were appointed in their place, it was held by V. C. Malins that the tenant for life was the protector; *Clarke* v. *Chamberlin*, 16 Ch. D. 176.]

[(*b*) See *Re Dudson's Contract*, 8 Ch. D. (C.A.) 628; *Re Ainslie*, 51 L. T. N.S. 780.]

during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail with remainders over, it was held that the testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of the legal estate vested in them during her life (*a*).

[Survivorship of office of protector.]

[Where a settlor appointed three protectors with a provision for filling up vacancies, and two died and their places were not filled up, it not being clear that the testator intended to negative survivorship, the surviving protector was held competent to exercise the office (*b*).]

7 & 8 Vict. c. 76.

9. By 7 & 8 Vict. c. 76, sect. 8, it was declared that no estate should be created by way of *contingent remainder;* but that every estate which before that time would have taken effect as a contingent remainder, should take effect as an executory devise, or, if in a deed, as an estate having the same properties as an executory devise, and that *contingent remainders* already created should not be defeated by the destruction or merger of the preceding estate.

8 & 9 Vict. c. 106.

10. But this sweeping provision was repealed by the Real Property Act, 1845, sect. 1; and in lieu thereof it was enacted (by sect. 8), that a *contingent remainder* should be deemed capable of taking effect, notwithstanding the determination by *forfeiture*, *surrender*, or *merger* of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

Remarks upon the limitation to preserve contingent remainders.

11. In consequence of this enactment it is now unnecessary to make use of any machinery for preserving contingent remainders from destruction by the *forfeiture*, *surrender*, or *merger* of the preceding estate; and therefore, if an estate be limited to the use of A. for life, with remainder to his unborn children, the contingent limitations cannot be defeated. But limitations to trustees, during the lives of the tenants for life, are still frequently introduced in settlements for the purpose of creating a check upon the tenants for life, as, in cases of waste by the tenants for life, it would be the duty of the trustees to interfere as protectors of the remaindermen's interest (*c*).

(*a*) *Buttanshaw* v. *Martin*, Johns. 89, 93.

[(*b*) *Cohen* v. *Bayley-Worthington*, (1908) A. C. (H.L.) 97, affirming C.A. (1908) 1 Ch. 26 nom. *Re Bayley-Worthington and Cohen's Contract*, and following *Bell* v. *Holtby*, L. R. 15 Eq. 178.]

(*c*) *Perrot* v. *Perrot*, 3 Atk. 94, *per* Lord Hardwicke; *Garth* v. *Cotton*, 1 Ves. sen. 555, *per eundem*.

Contingent remainders may still be defeated by determination of life estate in due course.

12. Contingent remainders, however, [created before 2nd August, 1877], still remain liable to be defeated, should the preceding life estate determine, *in due course*, before they become vested, and the limitation of an estate *pur autre vie* adequate to support the contingent remainders is accordingly in many cases a matter of considerable importance. Thus if an estate be limited to A. for life, with remainder to the unborn children of B., or to the children of B. who should attain twenty-one, here the contingent remainders, if B. survives A., would require support by a limitation of the estate to trustees after the death of A. until the children of B. should come into existence in the one case, or until a child should attain twenty-one in the other.

[40 & 41 Vict. c. 33.]

[But now by the Contingent Remainders Act, 1877 (*a*), every contingent remainder created by any instrument executed after the passing of the Act (2nd August, 1877), or by any will or codicil revived or published by any will or codicil executed after that date, which would have been valid as a springing or shifting use or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, is, in the event of the particular estate determining before the contingent remainder vests, to take effect as if it were a springing or shifting use, or executory devise or other executory limitation.

The effect of this enactment is to render contingent remainders independent of the determination of the particular estate in all cases in which the limitation would have been valid had it been a springing or shifting use, or an executory devise or other limitation; but where the limitation would have been void, as, for instance, for remoteness, had it been a springing or shifting use or an executory devise or other limitation, the remainder will still be liable to be defeated by the determination of the particular estate before it has become vested.

[Legal limitations not construed as equitable in order to protect contingent remainders.]

13. If an estate be devised to trustees and their heirs to certain uses, showing a clear intention on the part of the testator to create a succession of *legal* limitations, the Court will not hold the legal estate to be in the trustees merely because a different construction would leave the contingent remainders created by the devise unprotected by any particular estate (*b*).]

[(*a*) 40 & 41 Vict. c. 33.]

[(*b*) *Cunliffe* v. *Brancker*, 3 Ch. D. (C.A.) 393; *Festing* v. *Allen*, 12 M. & W. 279; 5 Hare, 573; see *Marshall* v. *Gingell*, 21 Ch. D. 790; but an equitable limitation created by a will or settlement, will not be deprived of protection by reason of its being converted into a legal limitation upon a reconveyance by a mortgagee to the uses of the will or settlement; *Re Freme*, (1891) 3 Ch. 167.]

CHAPTER XVII

DUTIES OF TRUSTEES FOR RAISING PORTIONS

THE subject of portions is of so extensive a character, that to exhaust it would require a treatise by itself. All that can be attempted in a single chapter is a brief summary of the law upon the points of most usual occurrence in practice.

Who are portionists.

We propose in the *first* section to inform trustees *who* are their *cestuis que trust*, or in other words who are to be regarded as portionists—a question that appears simple enough in itself, and yet involves a multitude of cases which can only be reconciled by the most refined distinctions. The principal struggle has been where and under what circumstances an *eldest* son is to be included amongst or excluded from the designated class. But further, the question *who* are portionists, involves the inquiry when or at what time portions, which are regulated by peculiar principles, are vested; and again, even if portions may have become vested, it remains to be asked whether they may not have become divested on the doctrines of ademption and satisfaction—doctrines which open a wide field of controversy, and are to some extent left still in an unsatisfactory state.

Amount to be raised.

In the *second* section we shall explain (and this may be compressed within much narrower bounds) what is the *amount* to be raised, both as regards the principal sum and interest, and also as to costs; [and in what cases maintenance will be allowed, even though the corpus be not vested].

When to be raised.

In the *third* section we shall have to consider at *what time* the portions ought to be raised, and more particularly when portions are charged on *reversionary* interests, for then either the estate must suffer by raising the portions at a sacrifice in *præsenti* out of an interest to take effect in future, or else the portionists must be left destitute until the reversion falls into possession.

Mode of raising.

Lastly, in the *fourth* section we shall offer some practical remarks as to the best *mode* of raising the portions, as whether by sale or mortgage, or a fall of timber, or out of mines, or in what other manner.

SECTION I

WHO ARE TO BE REGARDED AS PORTIONISTS

UNDER this head we shall inquire: *First. Who* are meant by younger children where the estate charged is settled on an "*eldest*" child. *Secondly. Who* are meant by younger children, where the estate charged is *not* settled on an "*eldest*" child. *Thirdly.* At *what time* the portions vest. *Fourthly.* Of *ademption* and *satisfaction.*

Settlement on eldest son.

First. Who are meant by younger children where the estate charged is settled on an "eldest" child.

1. "The Court in the case of portions," observed Sir G. Turner, "seems to have regarded rather the *purpose* than the *words* of the instrument. In some of the cases, indeed, the Court seems almost to have carried into effect the purpose of the instrument in opposition to the words, and although in the late cases more weight has been given to the terms of the instrument, there can be no doubt that in cases of this nature, very great attention must be given to the purpose of the instrument" (*a*).

General rule.

2. In the first place, then, let us see in what cases an eldest child actually will be regarded as a younger child constructively, or (which is the same thing), in what cases a younger child will be deemed the eldest child.

"Every child," said Lord Hardwicke, "except the *heir*" (*i.e.* except the one who takes the estate), "is considered in equity as a younger, and eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude," viz. from sharing in the portions provided for younger children. "It would be hard, that the right of eldership should be taken away, and yet not have the benefit of a younger child" (*b*).

Time of distribution.

3. If, therefore, before the period fixed for *distribution of the portions,* the estate shifts either by the original limitations, or

(*a*) *Remnant* v. *Hood*, 2 De G. F. & J. 413; approved by V. C. Wood, *Davies* v. *Huguenin*, 1 H. & M. 743.

(*b*) *Duke* v. *Doidge*, 2 Ves. sen. 203, note.

by appointment under a power contained in the settlement, from the eldest child to a younger child, the younger child so taking the estate is treated as the eldest (*a*), and the eldest child losing the estate is deemed a younger child (*b*).

Thus, in the leading case of *Chadwick* v. *Doleman* (*c*), a father on his marriage settled an estate to the use of himself for life, with remainder (subject to a jointure) to the use of trustees upon trust, within six months after his decease, to raise 4000*l.* for younger children's portions as the father should appoint, or in default of appointment to be divided amongst the younger children, with remainder to the use of the first and other sons in tail. There were several children of the marriage, viz. *Humphrey* the eldest, and *Thomas*, *John*, *Lewis*, *Ann* and *Dorothy*. By a deed, dated in 1686, the father appointed the 4000*l.*, giving 2600*l.* part thereof to Thomas the *second* son on the occasion of his marriage, and after this Humphrey the eldest son died in his father's lifetime without issue, and thereupon the father appointed the 2600*l.* amongst his younger children other than Thomas. On the death of the father the estate devolved on the second son Thomas, and then the question arose whether the first or the second appointment was good, or in other words whether Thomas was entitled to the 2600*l.* as well as the estate. The Lord Keeper said he admitted that Thomas at the time of the appointment was a person capable of taking, and was a younger child within the power, but that this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was capable of taking at the time of the appointment made, but that was *sub modo* and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir, so that he had, as it were, only a defeasible capacity. And

Chadwick *v.* Doleman.

(*a*) *Davies* v. *Huguenin*, 1 H. & M. 730; *Re Bayley's Settlement*, 9 L. R. Eq. 491; *Teynham* v. *Webb*, 2 Ves. sen. 198; *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *S. C.* nom. *Collingwood* v. *Stanhope*, 4 L. R. H. L. 43; *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 B. & B. 265; *Simpson* v. *Frew*, 5 Ir. Ch. Rep. 517; [*Re Flemyng*, 15 L. R. Ir. 363 (where, upon the construction of the settlement, two daughters, there being no son, were held not to fall within the description of "children other than and besides an eldest or only son"); *Reid* v. *Hoare*, 26 Ch. D. 363; *Re Smith's Estate*, 27 L. R. Ir. 121; *Rooke* v. *Plunkett*, (1902) 1 I. R. 277; *Re Morton's Trusts*, (1902) 1 I. R. 310 n. (children other than son "becoming entitled" to estate under settlement)]. *Jermyn* v. *Fellows*, For. 93, was a case of special circumstances. In *Leake* v. *Leake*, 10 Ves. 477, the doctrine of *Chadwick* v. *Doleman*, 2 Vern. 528, would seem to have been applicable, though it was not applied. The question was not discussed.

(*b*) *Duke* v. *Doidge*, 2 Ves. sen. 203, note.

(*c*) 2 Vern. 528.

it was, therefore, adjudged that Thomas, who took the estate, was not entitled to the 2600*l.*

Eldest son taking place of younger son.

4. In this case the second son by succeeding to the estate and so becoming the eldest was deprived of any share in the portions for younger children, and no claim appears to have been put forward on behalf of Humphrey the eldest son to stand in the place of a younger son. But it has since been settled that under such circumstances the eldest son, even though he died in his father's lifetime, and sustained up to his own decease the character of eldest son, but never eventually came into possession of the estate, is entitled to be treated as a younger son, and to share with the other portionists. Thus in *Davies* v. *Huguenin* (*a*), the estate was settled on J. Davies and his wife successively for life, remainder to the children as he should appoint, and subject as aforesaid to the use of a trustee for 500 years for raising portions for younger children; remainder to the first and other sons in tail. J. Davies had two sons, William the elder, and John Stanley the younger. William attained twenty-one and died in his father's lifetime, [and it was held that his personal representative thereupon became entitled to a portion, but subject to the exercise of the power of appointment]. Again, in *Ellison* v. *Thomas* (*b*), the eldest son of R. E. C. was not tenant in tail but tenant for life only, with remainder to his first and other sons in tail; and yet it was held that the personal representative of this eldest son, who died without issue male before coming into possession of the estate, was entitled to share in the portions provided for the younger children of R. E. C.

[But where the eldest son concurred with his father in disentailing and resettling the estate, and, on the occasion of such resettlement, a sum of money was raised out of which the equivalent of a younger child's portion was paid to him, and he subsequently died in the lifetime of the father, his representative was held not to be entitled to the share of a younger child (*c*).

If the estate is sold for payment of charges, and it is insufficient for payment of all the charges, so that the eldest son gets

(*a*) 1 H. & M. 730. See *Broadmead* v. *Wood*, 1 B. C. C. 77; but see *Re Bayley's Settlement*, 9 L. R. Eq. 491.

(*b*) 1 De G. J. & S. 18; 2 Dr. & Sm. 111; and see *Collingwood* v. *Stanhope*, 4 L. R. H. L. 55; [explained in *Shuttleworth* v. *Murray*, (1901) 1 Ch. (C.A.) 819; *S. C.* nom. *Law Union and Crown Insurance Co.* v. *Hill*, (1902) A. C. (H.L.) 263]; but see *Gray* v. *Earl of Limerick*, 2 De G. & Sm. 371.

[(*c*) *Re Fitzgerald's Estate*, (1891) 3 Ch. 394, where it was said that the case might be doubtful if a trifling sum only were raised.]

nothing under the limitation to him, he must still be treated as an eldest child taking the estate subject to the charges, and is not entitled to share in the portions provided for the younger children (*a*).]

Eldest daughter a younger child.

5. If an estate be settled on the first and other sons with a provision for younger children, an *eldest daughter*, though the firstborn, is regarded as a *younger child* (*b*). So, if an estate be settled on the first and other *sons* of A. with remainder to B., and there is a trust for raising portions for A.'s younger children, and A. has two *daughters* only, so that the estate shifts over to B., both the daughters of A. are younger children, and entitled to share the portions between them (*c*).

Eldest son may be a younger son.

6. The rule that a younger son who at the time of distribution takes the estate and so becomes the eldest son, is excluded from sharing in the portions, must be qualified by the condition that he takes the estate under the same settlement, or under some settlement incorporated into the portions' settlement, for otherwise he retains his rights as a younger son. Thus an estate was settled to the use of A. for life, with remainder (subject to A.'s wife's annuity) to the use of his first and other sons in tail, with a trust for raising portions on the death of the wife for younger children, to be vested at twenty-one or marriage. A. had two sons, Henry the eldest, and George, and after the death of A. in 1842, but during the lifetime of A.'s widow, and therefore before the portions were raisable, Henry barred the entail and devised the estate to his brother George; and it was held that on the death of A.'s widow in 1857, when the portions became raisable, George was entitled to share in the portions, though he was then the eldest son and was the owner of the estate, because he derived his title to it, not as eldest son under the settlement, but as devisee of his brother (*d*).

Eldest son parting with the estate.

7. If at the time of distribution the eldest son *has not* the estate, but except for his own act (as in joining with his father in defeating the entail and resettling the property) he *would have had* the estate, he is not allowed to plead the want of the estate and to claim as a portionist (*e*). [But this was a case of

[(*a*) *Reid* v. *Hoare*, 26 Ch. D. 363.]

(*b*) *Beale* v. *Beale*, 1 P. W. 245, *per Cur.*

(*c*) *Beale* v. *Beale*, 1 P. W. 244; and see *Butler* v. *Duncomb*, 1 P. W. 448; *Hall* v. *Luckup*, 4 Sim. 5; *Emery* v. *England*, 3 Ves. 232.

(*d*) *Adams* v. *Beck*, 27 Beav. 648; *Sandeman* v. *Mackenzie*, 1 J. & H. 613; *Sing* v. *Leslie*, 10 Jur. N.S. 794; *Macoubrey* v. *Jones*, 2 K. & J. 685; *Spencer* v. *Spencer*, 8 Sim. 87; *Wandesford* v. *Carrick*, 5 I. R. Eq. 486; [*Domvile* v. *Winnington*, 26 Ch. D. 382;] *Peacocke* v. *Pares*, 2 Keen, 689, must be considered as overruled.

(*e*) *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *Collingwood* v. *Stanhope*, 4

a family settlement, in respect of which a certain latitude of construction prevails, and a clause in the will of a person not *in loco parentis* excepting "an eldest or only son for the time being entitled to the possession or receipt of the rents," was held not to extend to an eldest son who, being tenant in tail in remainder, had joined with his father, the tenant for life, in disentailing and selling the estate (*a*).]

Whether the rule applies only to parents or persons *in loco parentis*.

8. The doctrine of portions as laid down in *Chadwick* v. *Doleman* has been said to apply only where the settlor is the parent or stands *in loco parentis* (*b*); [and this proposition is supported by the case in the House of Lords and Court of Appeal, above

L. R. H. L. 43; [and see *Re Fitzgerald's Estate*, (1891) 3 Ch. 394; *ante*, p. 462].

[(*a*) *Law Union and Crown Insurance Co.* v. *Hill*, (1902) A. C. (H. L.) 263; S. C. nom. *Shuttleworth* v. *Murray*, (1901) 1 Ch. (C.A.) 819.]

(*b*) If this proposition were accepted literally, then if a testator devised an estate to A., a perfect stranger, for life, with remainder to his first and other sons in tail, and created a term in the same estate for raising portions for the younger children of A., the second son of A., though, by the death of his elder brother without issue in A.'s lifetime, he succeeded to the estate, would also be entitled to share in the portions. Upon examination of the several authorities it will be found that at the most there are only a few dicta in support of [this view]; *Hall* v. *Hewer*, Amb. 203; *Matthews* v. *Paul*, 3 Sw. 328; *Adams* v. *Adams*, 25 Beav. 652; *Adams* v. *Robarts*, Ib. 658; [*Re Theed's Settlement*, 3 K. & J. 375, 378;] *Lincoln* v. *Pelham*, 10 Ves. 166; *Bowles* v. *Bowles*, Ib. 177; *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. 116; *Sandeman* v. *Mackenzie*, 1 J. & H. 613; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 813. [For an examination of these cases see the 9th edition of this work, p. 432, note (*a*).] Lord Hardwicke not only applied the doctrine of *Chadwick* v. *Doleman* to the case where a *grandmother*, having a power over the settled estate, appointed portions to her younger grandchildren: *Lord Teynham* v. *Webb*, 2 Ves. sen. 198; but also applied it where the settlor was an *uncle*, and this not because he considered the uncle as standing *in loco parentis*, but on general principles: *Duke* v. *Doidge*, 2 Ves. sen. 203, note. "Where," he said, "a provision is made by a *father* either by will or settlement for younger children, an elder unprovided for shall be deemed a younger, and the ground is that every branch of the family should be provided for, the Court not considering the words elder or younger. The question then is, whether there exists any difference where the settlement is made by a father's brother to a *collateral* relation, a nephew," &c., and he laid it down broadly that "every child except the *heir* is considered a younger, and that *eldership* which does not carry the *estate* along with it is not such an eldership as will exclude from sharing in the portions." From this judgment may be inferred the principle that where the settlor (whether a parent, or standing *in loco parentis*, or a *stranger*) settles an estate upon a particular family, and means to provide for all the family by limiting the estate to one, and portions to the others, there no one of them shall under the same settlement take the estate and a portion also, but in such cases the Court will, if necessary, disregard the strictly literal meaning of the words eldest and younger, and carry out the substantial intention. [See, however, the case in the House of Lords and Court of Appeal referred to *sup.*, note (*a*).] As to a grandfather standing *in loco parentis*, see *Farrer* v. *Barker*, 9 Ha. 737; *Swallow* v. *Binns*, 1 K. & J. 147; [*Domvile* v. *Winnington*, 26 Ch. D. 382, 387].

referred to (*a*); but of course the question is one of the intention of the settlor, depending upon the construction of the particular instrument].

General rule.

9. The only general rule which can be laid down is that where the settlor is the parent or stands *in loco parentis*, and portions are provided for younger children, and the estate upon which the portions are charged devolves (before the time for distribution of the portions) on one of the children, under the same settlement or under a settlement incorporated into it (*b*), there the words "eldest child" and "younger children" are capable of what has been called "a prodigious latitude of construction," viz. an eldest may be treated as a younger, and a younger as an eldest; but that where portions are provided for younger children, and the estate either does not devolve before the time for distribution of the portions on any of the children, or does not so devolve under the settlement creating the charge or a settlement incorporated in it by recital or otherwise, there the words "eldest child" and "younger children" receive their ordinary and natural interpretation.

[Exception.]

[10. The rule, however, being only a rule of construction and not an absolute rule of law, must give way to the expressed language of the will or settlement. Thus where a testator, having devised his real estate on trusts for his wife for life, and then for his sons successively in strict settlement, gave a legacy (which was charged on the real estate, if his personalty was insufficient) equally amongst his "younger children," and then proceeded to give the names of all his children other than the eldest son, with a direction that the share of each of his "younger children" should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not, it was held that a younger son, who attained twenty-one in the lifetime of the widow, and, on her death, became entitled under the settlement of the real estate, by reason of the deaths of his elder brothers without issue male, was entitled to share in the legacy (*c*).]

Secondly. Who are meant by younger children where the estate charged is not settled on an "eldest" son.

Where no one is made an eldest son.

1. We now proceed to the cases where a settlor provides portions for younger children generally, without the ingredient that one is to take the estate, and the other to have the charge.

[(*a*) See *ante*, p. 464, note (*a*).]

(*b*) See *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *Collingwood* v. *Stanhope*, 4 L. R. H. L. 43; [*Domvile* v. *Winnington*, 26 Ch. D. 382].

[(*c*) *Re Pryterch*, 42 Ch. D. 590.]

Here the ordinary rules of construction apply, and "eldest" is taken to mean the eldest actually, and "younger" to mean the younger actually (*a*), and the time for ascertaining who is eldest and who are younger is not the period of *distribution*, but the period of *vesting*.

Thus in *Adams* v. *Adams* (*b*) Sir W. Curtis, the father of Emma Adams, bequeathed 6000*l.* to trustees in trust for Emma Adams for life, and after her decease "in trust for the children born or to be born of Emma Adams, who not being an eldest or only son for the time being," should as to sons attain twenty-one, or as to daughters attain twenty-one or marry, in equal shares. Emma Adams died in 1857, and there were eight children. Henry William, the eldest son, attained the age of twenty-one in 1826, and died in 1854, in the lifetime of his mother. George, the second son, attained twenty-one in 1828, and at the death of his mother was the eldest son. The question was whether the words "eldest son" meant eldest at the time of the first portion vesting, or eldest at the time of its falling into possession; that is, whether George was or not entitled to a share. The M.R. adopted the principle laid down by Sir T. Plumer, viz. that there cannot be two periods, one for ascertaining who compose the class to take, and the other for ascertaining who are to be excluded (*c*); and that as George was not the eldest son when he attained twenty-one, he took a vested interest, and that the interest being once vested there was nothing to divest it, except to a limited extent by the attainment of vested interests by the other younger children.

Exceptions.

2. To the general rule that the eldest son in these cases is to be ascertained not at the time of *distribution* but at the time of *vesting*, there may be exceptions as in *Livesey* v. *Livesey* (*d*), with reference to which the M.R. observed, "a testator *may* say, 'I do not intend any child to take a share unless at the period of distribution he shall fulfil the condition of not being an eldest son.' In *Livesey* v. *Livesey* the class was to be ascertained when the youngest child attained twenty-one, and there was a direction that the son who was or should become an eldest son should not take anything under the devise or bequest, and consequently the person who filled the character of eldest son at that period could

[(*a*) *Domvile* v. *Winnington*, 26 Ch. D. 382.]

(*b*) 25 Beav. 652; *Matthews* v. *Paul*, 3 Sw. 328; *Lyddon* v. *Ellison*, 19 Beav. 565; [*Domvile* v. *Winnington*, 26 Ch. D. 382; *Longfield* v. *Bantry*, 15 L. R. Ir. 101]. But see *Re Rivers' Settlement*, 40 L. J. N.S. Ch. 87.

(*c*) *Matthews* v. *Paul*, 3 Sw. 328.

(*d*) 13 Sim. 33; 2 H. L. Ca. 419.

not take. Unless the testator has said, 'I do not intend a person to take any interest who, at the time of *distribution*, fills the character of eldest son,' I think the character of eldest son is to be ascertained when the interest becomes vested" (*a*).

Thirdly. At what time the portions vest.

General rule as to vesting.

1. In every well-drawn settlement, whether by deed or will, the period of vesting is clearly expressed upon the face of the instrument itself, and the usual period is as to sons at twenty-one, and as to daughters at twenty-one or marriage, with a declaration that the portions are not to be payable until after the death of the tenants for life, unless with the consent of the tenants for life. It often happens, however, that the language of the instrument is contradictory or inconsistent, or in some way ambiguous, and, in order not to defeat the probable intention, a peculiar and important canon of construction has been established; and it is this—Where a parent or a person standing *in loco parentis* provides portions for children, the strong presumption is that he means to provide portions for all such children as may live to require them, *i.e.* for sons who attain twenty-one, and daughters who attain twenty-one or marry. If, therefore, the language of the instrument be uncertain (*b*), but is capable of the construction that sons at twenty-one, and daughters at twenty-one or marriage, shall take a vested interest, the Court will so decide it by force of the presumption.

Thus, in *Howgrave* v. *Cartier* (*c*), a fund was vested in trustees upon trust for Peter for life, subject to 200*l.* pin-money to Elizabeth his intended wife, and if Elizabeth should die before Peter "without *leaving* any child or children, or leaving such they should all die under twenty-one," then to pay any sum not exceeding 3000*l.* as Elizabeth should appoint. But in case Elizabeth survived Peter, then in trust for Elizabeth for life, and after the decease of the survivor in case there should happen to be any child or children of their two bodies *living*, who should attain twenty-one, then in trust for such child or children attaining twenty-one as Elizabeth should appoint, or in default as Peter should appoint, and in default among such children equally. Peter died leaving Elizabeth his widow and two children, John

(*a*) *Adams* v. *Adams*, 25 Beav. 655.

[(*b*) The "rule is only to be applied as a guide in construing an expression which is in itself ambiguous, or which the Court sees not to be framed in accordance with the intention of the settlor or testator as shown by other parts of the instrument"; *per* Cotton, L.J., in *Re Hamlet*, 39 Ch. D. (C.A.) 426, 433.]

(*c*) 3 V. & B. 79.

and Mary. Elizabeth appointed the fund between John and Mary, and then John, having attained twenty-one, died in the lifetime of his mother, and then Elizabeth died, leaving Mary her only child. The question was whether Mary, as the only child who survived her mother, was not absolutely entitled to the whole fund, to the exclusion of John who had died in her lifetime. Sir W. Grant observed: "If the settlement clearly and unequivocally makes the right of a child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage." And after commenting upon the various clauses contained in the settlement he came to the conclusion that John was entitled to the share appointed to him.

So in *Swallow* v. *Binns* (*a*), Nathaniel Binns made a voluntary settlement by which a trust fund was limited to himself for life, with remainder to his son George Binns for life, and after his decease in trust "for all and every of the children of the said George Binns, *which might be living at the time of his decease,*" to be equally divided, and the shares of sons to vest at twenty-one and of daughters at twenty-one or marriage. Had the settlement stopped there, those children only who survived George would have taken, but then followed other inconsistent limitations, namely, If *any* child being a son died under twenty-one, or being a daughter died under twenty-one unmarried, the share of such child was to survive to the other or others; "and in case all such of the children of the said George Binns as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married," then the trust fund was to be held in trust for other persons. Nathaniel died in 1822, and George in 1851, having had six children, all of whom attained twenty-one, but two of them died in his lifetime, and the question was whether such two were entitled to share with the four who survived George. Vice-Chancellor Wood observed: "The rule applies not only to settlements, but also to

(*a*) 1 K. & J. 417.

the case of a will, so far as it provides for children towards whom the testator places himself *in loco parentis*. In this case the grandfather is providing for his children and grandchildren in such a manner, as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing what are expressly stated to be portions in one part of the settlement, and what, without that expression, would, I apprehend, be regarded as portions for his several grandchildren. The canon of construction to which I have referred may be thus stated: That whereas in the case of ordinary instruments an express estate thereby limited cannot be enlarged, except by necessary inference, yet, upon instruments of this description, there is an implication of law arising upon the instrument itself, subject of course to any expressions to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one years, or (as is usually provided in the case of daughters) upon their attaining twenty-one or marriage; and that such portions shall then vest whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents, should have been contemplated as depriving them of the whole of the portion intended for their benefit. What the Court has said is this, that you do not require a *necessary* implication to arrive at the conclusion, that all children, who being sons attain twenty-one, or being daughters attain that age or marry, were intended to take, irrespectively of the question whether they survive their parents or not, and that if you find upon the face of the settlement a clause which renders it *doubtful* whether it was intended that all such children should take, or that those only should take who might survive their parents, the Court leans strongly in favour of the previous supposition, namely, that the probable intention of a person making a settlement would be in favour of the vesting at such fixed period, independently of the question of survivorship. On the other hand the rule is not one of arbitrary construction; the Court does not go out of its way by a forced construction to raise this implication; it must find an implication upon the natural and plain construction of the words in the settlement." And the Vice-Chancellor, applying these principles to the case before him,

came to the conclusion that the two children who predeceased George their father were entitled to shares. The general principles laid down in the two foregoing examples have been approved and acted upon in numerous other cases (*a*); [and the rule applies as well to portions created by will as to those created by deed (*b*)].

Presumption overcome by the language.

2. But strong as the presumption is in favour of portions vesting in children at an age when they require them, yet if the language of the instrument be clear and unambiguous, that the vesting of portions in sons who attain twenty-one or in daughters who attain twenty-one or marry is to depend on some contingency, as the event of their surviving their parents, the Courts cannot contradict the written instrument (*c*).

Where portional fund has to be created.

3. A distinction must also be made between those cases where the portional fund exists, or is to be raised at all events, so that the question relates only to the distribution of the fund, and those cases where the fund itself is to be called into existence upon a contingency, so that the latter contingency leavens all the portions and makes them all contingent.

Thus in *Hotchkin* v. *Humfrey* (*d*) a term of 500 years was created in trust that "*in case* the husband should *leave* one or more younger children *that should be living* at the decease of the survivor of the husband and wife," the trustees were to *raise* portions for "*such* younger children," the same to be paid to daughters at the age of eighteen or marriage, and to sons at twenty-one; and should there be no such son or daughter then

(*a*) *Emperor* v. *Rolfe*, 1 Ves. sen. 208; *Powis* v. *Burdett*, 9 Ves. 428; *Remnant* v. *Hood*, 27 Beav. 74; *Perfect* v. *Curzon*, 5 Mad. 442; *Torres* v. *Franco*, 1 R. & M. 649; *Woodcock* v. *Dorset*, 3 B. C. C. 569; *Hope* v. *Lord Clifden*, 6 Ves. 499; *Bythesea* v. *Bythesea*, 23 L. J. N.S. Ch. 1004; *Re Goddard's Trusts*, 5 Ir. R. Eq. 14; [*Rye* v. *Rye*, 1 L. R. Ir. 413; *Wakefield* v. *Richardson*, 13 L. R. Ir. 17; *Cobden* v. *Bagwell*, 19 L. R. Ir. 150; *Haverty* v. *Curtis*, (1895) 1 I. R. 23].

[(*b*) *Jackson* v. *Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806; *Re Hamlet*, 38 Ch. D. 183; 39 Ch. D. (C.A.) 426.]

(*c*) *Re Wollaston's Settlement*, 27 Beav. 642; *Jeffery* v. *Jeffery*, 17 Sim. 26; *Bradley* v. *Powell*, Cas. *t.* Talb. 193, but doubted by Lord Hardwicke, in *Tunstal* v. *Bracken*, 1 B. C. C. 124, note; *Fitzgerald* v. *Field*, 1 Russ. 430; *Bright* v. *Rowe*, 3 M. & K. 316; *Skipper* v. *King*, 12 Beav. 29; *Whatford* v. *Moore*, 7 Sim. 574; *Farrer* v. *Barker*, 9 Hare, 737; [*Re Willmott's Trusts*, 7 L. R. Eq. 532; *Jeyes* v. *Savage*, 10 L. R. Ch. 555;] and see *Worsley* v. *Granville*, 2 Ves. sen. 333. [*Re Leader's Estate*, 17 L. R. Ir. 279. In this case Palles, C.B., said that the rule of construction, established by *Emperor* v. *Rolfe*, 1 Ves. sen. 208, and *Woodcock* v. *Dorset*, 3 B. C. C. 569, applies to all cases of settlement, irrespective of the question whether or not provision is made thereby for the children of a deceased child, and that the cases of *Re Willmott's Trusts*, and *Jeyes* v. *Savage*, *sup.*, do not engraft any exception on this rule.]

(*d*) 2 Mad. 65; and see *Swallow* v. *Binns*, 1 K. & J. 426; *Fitzgerald* v. *Field*, 1 Russ. 430.

the term to cease. There were four children of the marriage who attained twenty-one, but two only survived both parents. Was the portional fund to be divided between the four or given to the two who survived? Sir T. Plumer said: "If the children who died before the surviving parent are to be considered as having taken vested interests, it must follow that a vested interest was given on a contingency. Can that be? When a fund is contingent the shares to be paid out of it must be contingent. If all the children had died before the surviving parent, the fund would not have been raisable, and therefore till such parent's death it was uncertain and contingent whether it could be raised. The intention appears to me, therefore, to have been to provide only for such children as should survive the surviving parent."

Where vesting not provided for by the settlement.

4. Where the settlement is silent as to the vesting of the portions, the Court has to fall back upon general principles, and *Remnant* v. *Hood* (*a*) is an important case upon this head. A testator devised his estate to Samuel Thorold for life, with remainder to his first and other sons successively in tail, with remainder to his first and other daughters successively in tail, and enabled the tenant for life to charge 2000*l.* for the portions of his younger children. S. Thorold accordingly, upon his marriage, charged 2000*l.* to be raised within three months from his decease in favour of his younger children, but gave no directions as to the time of vesting. There were issue of the marriage a son and six daughters; the son died an infant in the father's lifetime, so that on the death of the father the eldest daughter became tenant in tail in possession. Two others of the daughters died infants in the father's lifetime, and the three remaining daughters married and attained twenty-one, and two of them survived the father, but the other died in his lifetime. It was conceded by the counsel that the infants who died in the father's lifetime would take nothing, though L. J. Knight Bruce entertained a doubt (*b*). But as to the one who attained twenty-one and died in the father's lifetime, it was contended that the portion, as a charge upon land, had by the death of the portionist before the time for raising it, sunk for the benefit of the estate. It was ruled, however, to the contrary, and the deceased child who had attained twenty-one and married, was held entitled to participate. Lord Justice Turner, who applied himself to the points raised with his usual care, observed: "There are three periods at which the portions may have been intended to vest;

(*a*) 2 De G. F. & J. 396. (*b*) See 2 De G. F. & J. 403.

the period of the birth of the children, the period at which they would require their portions (which, according to the ordinary habit in such cases, as evidenced by the usual course of settlement, would be at twenty-one, or as to the daughters on marriage), and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I see nothing which in any way imports that the portions were not intended to vest during the lives of the parents, and to adopt the period of the death as the time of vesting would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled and successfully struggled in many cases, and I think therefore that we should not be justified in adopting this period as the time of vesting, in the absence of anything on the face of the instrument indicating that it was so intended. Between the other two periods it is not, as I have said, necessary for us to decide, but I think it right to state that I lean to the opinion, that in this particular case the true period of vesting was at twenty-one, or as to the daughters on marriage. The consequence of holding the portions to vest at the birth would be that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement by giving to the father what was intended for the children, and the Court in these cases seems to have regarded rather the purpose than the words of the settlement" (*a*).

General rule.

5. Upon the authority of these and other cases, it may be considered as established, that unless there be something special in the instrument (*b*), the portions of the younger children, whether they survive the tenant for life or not, will not vest in sons unless they attain twenty-one, or in daughters unless they attain twenty-one or marry (*c*); and that the shares of sons who attain twenty-one and of daughters who attain twenty-one or marry, will vest

(*a*) The whole of the judgment well deserves a perusal.

(*b*) See *Earl Rivers* v. *Earl Derby*, 2 Vern. 72.

(*c*) *Bruen* v. *Bruen*, 2 Vern. 439; *S. C.* Pr. Ch. 195; *Edgeworth* v. *Edgeworth*, Beat. 328; *Warr* v. *Warr*, Pr. Ch. 213; *Hinchinbroke* v. *Seymour*, 1 B. C. C. 395; *Teynham* v. *Webb*, 2 Ves. sen. 209; *Davies* v. *Huguenin*, 1 H. & M. 730, see 743; [*Henty* v. *Wrey*, 19 Ch. D. 492;] and see *Evelyn* v. *Evelyn*, 2 P. W. 659, and the cases there cited; *Tunstal* v. *Bracken*, 1 B. C. C. 124, note; *Mayhew* v. *Middleditch*, 1 B. C. C. 162,

absolutely, so as not to be divested by subsequent death in the lifetime of the tenant for life (*a*).

Vesting of portions.

6. Where portions are expressly made to vest in sons at twenty-one, and in daughters at twenty-one or marriage, if any son or daughter die before that period the share sinks into the estate (*b*), even though the instrument direct the interest on the portion to be applied during minority towards that child's maintenance (*c*).

Where raisable out of rents.

7. Several cases, however, seem to have made good the exception that where no time is named in the settlement for vesting, and the portions are to be raised, not out of the *corpus*, but out of the annual *rents and profits*, and the rents and profits have begun to be available for the purpose, then the portionist takes a vested interest, though he dies in infancy (*d*). The portion must, as a whole, be either vested or not vested, and cannot be intermittent, and therefore as the trust to raise the portion has commenced, it must go on.

[Appointment to infant.]

[8. The question arose in the recent case of *Henty* v. *Wrey* (*e*), whether a power to appoint portions could be so exercised as to vest portions absolutely in children of tender years, and Kay, J., relying on *Lord Hinchinbroke* v. *Seymour* as reported by Brown (*f*), held that it could not, but that such an appointment would be so improper that the Court would control it by refusing to allow the portions to be raised, if the children did not live to want them. But this view was overruled on appeal, when Sir G. Jessel, M.R., after careful consideration of the case of *Lord Hinchinbroke* v. *Seymour*, came to the conclusion that it was really decided on the ground of fraud on the power, and was no authority in support of the view that the power could not be exercised in favour of infants; and Lindley, L.J., stated the following propositions as the result of his examination of the authorities (*g*):—

"1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them—that is, before they attain twenty-one (or if daughters) marry.

(*a*) *Davies* v. *Huguenin*, 1 H. & M. 730; *Macoubrey* v. *Jones*, 2 K. & J. 684.

(*b*) *Jennings* v. *Looks*, 2 P. W. 276; *Boycot* v. *Cotton*, 1 Atk. 552.

(*c*) *Hubert* v. *Parsons*, 2 Ves. sen. 261.

(*d*) *Evelyn* v. *Evelyn*, 2 P. W. 659; *Cowper* v. *Scott*, 3 P. W. 119; *Earl of Rivers* v. *Earl of Derby*, 2 Vern. 72.

[(*e*) 19 Ch. D. 492; 21 Ch. D. (C.A.) 332; and see *Re De Hoghton*, (1896) 2 Ch. 385, applying the principle of *Henty* v. *Wrey* to an appointment of interests on portions.]

[(*f*) 1 B. C. C. 395.]

[(*g*) 21 Ch. D. (C.A.) 359.]

"2. That where the language of the power is clear and unambiguous, effect must be given to it.

"3. That where, upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

"4. That where, upon the true construction of both instruments, the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.

"5. That appointments vesting portions charged on land in children of tender years, who die soon afterwards, are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence, the Court cannot do so" (*a*).]

Fourthly. Of Ademption and Satisfaction.—The question who are portionists involves the doctrine of Ademption and Satisfaction, and we propose briefly to state the leading principles.

Ademption and Satisfaction.

1. The nature of Ademption and Satisfaction may be best illustrated by instances. A father by his will bequeaths 1000*l.* to a daughter, and after the date of the will he settles 1000*l.* upon the same daughter upon the occasion of her marriage, and dies without having altered his will. Here the father, owing a debt of nature to his daughter (*b*), had originally intended to satisfy the obligation by a bequest in his will, but before the will takes effect the marriage occurs, and he makes the like provision for her by act *inter vivos*. In such a case the Court presumes that the father did not mean to bestow *two* portions upon the daughter at the expense, perhaps, of his other children, but to substitute the one portion for the other. Equity therefore holds that the subsequent (*c*) advance is an *ademption* of the legacy. "Where," said Lord Eldon, "a parent or person standing *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the child, that will

[(*a*) As to the distinction for this purpose between an appointment and a release of a power, see *Re Somes*, (1896) 1 Ch. 250; *Re Radcliffe*, (1892) 1 Ch. (C.A.) 227, and *post*, Chap. XXIV. s. 2.]

(*b*) See *Watson* v. *Earl of Lincoln*, Amb. 326; *Pym* v. *Lockyer*, 5 M. & Cr. 34; *Powel* v. *Cleaver*, 2 B. C. C. 516; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 813.

(*c*) A gift prior to the will is no ademption, unless it be specially contracted for, see *Taylor* v. *Cartwright*, 14 L. R. Eq. 176.

amount to an *ademption* of the gift by the will, and this Court will presume he meant to satisfy the one by the other" (*a*). Ademption, therefore, is where the will precedes, and the settlement follows.

If, again, a father by act *inter vivos* covenant to settle 1000*l.* on the marriage of his daughter, and afterwards either by act *inter vivos* (*b*) or by will gives 1000*l.* to the same daughter, here the Court, leaning against double portions, precludes the daughter (in the absence of evidence to the contrary), from taking both the marriage portion and also the subsequent gift or legacy, and puts her to her election which one of the two she will prefer (*c*). *Satisfaction*, therefore, is where the settlement precedes and the gift or legacy follows. It might have been wise, as observed by V. C. Wood, if the rule had never been applied where the settlement is anterior to the gift or will, as the testator or donor might well be said to know what had been previously done (*d*). But the law is established otherwise, and in general terms Satisfaction may be defined to be the donation of a thing with the intention that it is to be taken either wholly or in part, in extinguishment of some prior (legal) claim of the donee (*e*).

Persons *in loco parentis*.

2. The doctrine of Ademption and Satisfaction applies only as between parents (whether father or mother) (*f*) or persons *in loco parentis* on the one hand and children on the other. The doctrine does not hold as between strangers (*g*), or as between

(*a*) *Trimmer* v. *Bayne*, 7 Ves. 515; [*Re Furness*, (1901) 2 Ch. 346].

(*b*) *Jesson* v. *Jesson*, 2 Vern. 255; *Thomas* v. *Kemeys*, 2 Vern. 348; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290.

(*c*) *Copley* v. *Copley*, 1 P. W. 147; *Papillon* v. *Papillon*, 11 Sim. 642; *Warren* v. *Warren*, 1 B. C. C. 305, &c.; *Byde* v. *Byde*, 2 Eden, 19; *Sparkes* v. *Cator*, 3 Ves. 530, &c.; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Weall* v. *Rice*, 2 R. & M. 251; *Bruen* v. *Bruen*, 2 Vern. 439. [As to the effect of a direction by codicil that advances subsequent to the will should be brought into hotchpot, see *Chamier* v. *Tyrell*, (1894) 1 I. R. 268.]

(*d*) *Dawson* v. *Dawson*, 4 L. R. Eq. 513, *per* V. C. Wood.

(*e*) *Chichester* v. *Coventry*, 2 L. R. H. L. 95, *per* Lord Romilly.

(*f*) *Finch* v. *Finch*, 1 Ves. jun. 534; [but in the case of a mother the burden of proof lies on those who assert that the duty of making a provision for a child falls on her, *per* Stirling, J.; *Re Ashton*, (1897) 2 Ch. 574; *S. C.* (1898) 1 Ch. (C.A.) 142].

(*g*) *Powel* v. *Cleaver*, 2 B. C. C. 499. [But even as between strangers "if a legacy appears on the face of the will to be bequeathed for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is made *primâ facie* in favour of ademption," *per* Lord Selborne, L. C.; *Re Pollock*, 28 Ch. D. (C.A.) 552, 556; a legacy, however, to a trustee for the benefit of an infant to whom the testator is not *in loco parentis*, is not given for a particular purpose so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose; *Re Smythies*, (1903) 1 Ch. 259. In *Re Corbett*, (1903) 2 Ch. 326, a legacy to the trustees of the endowment fund of a hospital was held to be for a particular purpose, and therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime.]

husband and wife (*a*), or as between brothers, or as between grandfather and grandchild, or as between uncle and nephew, or as between any other relatives than as above. But a brother may by his conduct place himself *in loco parentis* to a brother (*b*), and a grandfather (*c*), uncle (*d*), or other relative or connection, as a stepfather (*e*), may place himself *loco parentis* to a grandchild, nephew, or other relative or connection; and this though the person *in loco parentis* has children of his own (*f*), and though the actual father be living and the child be resident with him and is maintained by him (*g*). So a *putative* father is not in law the parent of the illegitimate child (*h*), but he may place himself *loco parentis* by a course of conduct. And Lord Thurlow, in speaking of a parent's provision for a child, observed generally, "as to its being considered as the payment of a debt, the law does not compel the parent to give the legacy; the Court can only mean a moral obligation, a laudable affection which may exist in *others* besides *a parent*" (*i*).

How persons constituted *loco parentis*.

3. By what acts a person will place himself *loco parentis* is a question upon which parol evidence is admissible (*j*), and is often in practice a question of extreme difficulty (*k*). According to Sir W. Grant, "A person *loco parentis* is one who assumes the parental character or discharges parental duties" (*l*). Sir L. Shadwell said: "The legal sense of the term is that the party has so acted towards the children, as that he has thereby imposed upon himself a moral obligation to provide for them" (*m*); and Lord Eldon speaks of him as "a person *meaning* to put himself *in loco parentis*, in the situation of the person described as the lawful father of the child" (*n*); and Lord Cottenham attached great force in this description to the word "meaning," as referring

(*a*) *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Haynes* v. *Mico*, 1 B. C. C. 129; *Couch* v. *Stratton*, 4 Ves. 391.
(*b*) *Monck* v. *Monck*, 1 B. & B. 298.
(*c*) *Powys* v. *Mansfield*, 3 M. & Cr. 359; 6 Sim. 528; *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Pym* v. *Lockyer*, 5 M. & Cr. 29; and see *Roome* v. *Roome*, 3 Atk. 183.
(*d*) *Shudal* v. *Jekyll*, 2 Atk. 518.
(*e*) *Curtin* v. *Evans*, 9 Ir. R. Eq. 553.
(*f*) *Monck* v. *Monck*, 1 B. & B. 298.
(*g*) *Powys* v. *Mansfield*, 3 M. & Cr. 359 (see 368), reversing *S. C.* 6 Sim. 528; *Pym* v. *Lockyer*, 5 M. & Cr. 29; *Shudal* v. *Jekyll*, 2 Atk. 518.
(*h*) *Ex parte Pye*, 18 Ves. 140; *Grave* v. *Earl of Salisbury*, 1 B. C. C. 425; *Wetherby* v. *Dixon*, 19 Ves. 412, *per Cur.*; *Smith* v. *Strong*, 4 B. C. C. 493; *Jeacock* v. *Falkener*, 1 B. C. C. 295.
(*i*) *Powel* v. *Cleaver*, 2 B. C. C. 516.
(*j*) *Powys* v. *Mansfield*, 6 Sim. 528; 3 M. & Cr. 359.
(*k*) See *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 350; [*Re Ashton*, (1897) 2 Ch. 574; reversed on other grounds, (1898) 1 Ch. (C.A.) 142].
(*l*) *Wetherby* v. *Dixon*, 19 Ves. 412.
(*m*) *Powys* v. *Mansfield*, 6 Sim. 556.
(*n*) *Ex parte Pye*, 18 Ves. 154.

to the *intention* rather than *the act* of the party (*a*), and added, that the definition was to be considered as applicable, not to all the parental offices and duties (for they were infinitely various), but to such offices and duties as related to the making provision for a child (*b*). If a person has contributed to the maintenance of a female relative from the time of her father's death, and has been treated as one whose consent was necessary upon her marriage, and has taken upon himself the obligation of making a provision for her upon marriage, he must under such circumstances be regarded as having placed himself *loco parentis* (*c*).

Presumption.

4. Ademption and Satisfaction are both *Presumptions* only— that is, where there is no intrinsic evidence one way or another, the Court presumes that double portions were not meant. But if the Court collects from the *written instrument* that double portions were intended, no presumption arises, and therefore parol evidence cannot be let in to contradict the written instrument (*d*). Where there is no *intrinsic* evidence to the contrary the presumption arises, and then this presumption like any other, may be rebutted by *extrinsic* or *parol* evidence (*e*), and of course counter evidence may be given to support and fortify the original presumption (*f*). There is no doubt that sometimes this presumption of law defeats the real intention, but as a general rule it effectuates the intention, and were it not for the doctrine under consideration, the provisions for families would often be most unjust, and the farthest from the settlor's actual wishes (*g*).

Subjects must be *ejusdem generis*.

5. Ademption and Satisfaction are held to apply only where the properties which are the subject of the two gifts are *ejusdem*

(*a*) *Powys* v. *Mansfield*, 3 M. & Cr. 367; [and see *Re Ashton*, *ante*, p. 476, note (*k*)].

(*b*) *Powys* v. *Mansfield*, *ubi sup.*

(*c*) *Booker* v. *Allen*, 2 R. & M. 270; *Pym* v. *Lockyer*, 5 M. & Cr. 29.

(*d*) *Hall* v. *Hill*, 1 Dr. & W. 94; 1 Conn. & Laws. 120, in which all the previous cases are reviewed.

(*e*) Such is the result of the numerous authorities. The principal cases are *Kirk* v. *Eddowes*, 3 Hare, 509; *Booker* v. *Allen*, 2 R. & M. 270; *Weall* v. *Rice*, 2 R. & M. 251; *Trimmer* v. *Bayne*, 7 Ves. 508; *Rosewell* v. *Bennett*, 3 Atk. 77; *Powys* v. *Mansfield*, 3 M. & Cr. 374, 378, *per* Lord Cottenham; *Hartopp* v. *Hartopp*, 17 Ves. 184; *Ellison* v. *Cookson*, 1 Ves. jun. 100; *Shudal* v. *Jekyll*, 2 Atk. 516; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 819; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; [*Tussaud* v. *Tussaud*, 9 Ch. D. (C.A.) 363]; and see *Lloyd* v. *Harvey*, 2 R. & M. 310; *Dawson* v. *Dawson*, 4 L. R. Eq. 511, *per* V. C. Wood; *Monck* v. *Lord Monck*, 1 B. & B. 298; *Robinson* v. *Whitley*, 9 Ves. 577; *Pole* v. *Lord Somers*, 6 Ves. 309; *Wallace* v. *Pomfret*, 11 Ves. 542; *Thellusson* v. *Woodford*, 4 Mad. 420; *Bell* v. *Coleman*, 5 Mad. 22; *Biggleston* v. *Grubb*, 2 Atk. 48; *Hoskins* v. *Hoskins*, Pr. Ch. 263; *Chapman* v. *Salt*, 2 Vern. 646; *Hale* v. *Acton*, 2 Ch. Rep. 35; [*Re Pollock*, 28 Ch. D. (C.A.) 552; *Re Turner*, 55 L. T. N.S. 379; *Griffith* v. *Bourke*, 21 L. R. Ir. 92].

(*f*) *Kirk* v. *Eddowes*, *ubi sup.*

(*g*) *Montefiore* v. *Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner.

generis (*a*). A legacy of *money* will not be adeemed by a subsequent settlement of *land;* and a covenant to settle specific lands will not be satisfied by a subsequent settlement of money (*b*). A bequest of 10,000*l.* was not adeemed by a subsequent settlement of a beneficial lease (*c*), and a legacy of 500*l.* was not adeemed by a subsequent gift of stock in trade upon the father's taking the son into partnership (*d*). But where a father covenanted upon the marriage of his son to pay 2000*l.* by way of portion, and afterwards by his will bequeathed to his son certain powder works *and so much money* as when added to the powder works would make up the sum of 10,000*l.*, the amount in money required to make up the sum of 10,000*l.* was in fact an ordinary legacy, and was therefore applied in satisfaction of the marriage portion (*e*). ["Where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest, but where he does refer to value the presumption of satisfaction may arise" (*f*), and accordingly, where a father gave a bond for the payment of a sum of 10,000*l.* to his reputed son on a future day, and shortly before the day of payment took the son into partnership with him, and the articles provided that 19,000*l.* of the capital brought in by the father should belong to the son, it was held that the bond was satisfied (*g*). And a covenant by a father on the marriage of his son to pay him an annuity for his life has been deemed satisfied by a legacy subsequently given by the father's will (*h*); but a covenant to settle after acquired property upon the trusts of a marriage settlement, which was of the usual character, was not satisfied by the effecting of policies by the settlor "for the benefit of his wife and children" under s. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93) (*i*); and where by a will an absolute legacy and a

(*a*) *Holmes* v. *Holmes*, 1 Bro. C. C. 555; [*Re Jaques*, (1903) 1 Ch. (C.A.) 267].

(*b*) *Bellasis* v. *Uthwatt*, 1 Atk. 428, *per Cur.*; *Bengough* v. *Walker*, 15 Ves. 512, *per Cur.*; *Chichester* v. *Coventry*, 2 L. R. H. L. 96, *per Cur.*; and see *Barret* v. *Beckford*, 1 Ves. sen. 520; *Masters* v. *Masters*, 1 P. W. 423; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 819; [*Lewis* v. *Lewis*, 11 I. R. Eq. 340.]

(*c*) *Grave* v. *Lord Salisbury*, 1 Bro. C. C. 425.

(*d*) *Holmes* v. *Holmes*, 1 Bro. C. C. 555; [and see *Re Lawes*, 20 Ch. D. (C.A.) 81.]

(*e*) *Bengough* v. *Walker*, 15 Ves. 507.

[(*f*) *Re Lawes*, 20 Ch. D. (C.A.) 81, 88, *per* Jessel, M.R.; and see *Re Jaques*, (1903) 1 Ch. (C.A.) 267, where *Re Lawes* is explained and shown not to have departed from the law as laid down in earlier cases, and the criticism of North, J., on *Re Lawes* in *Re Vickers*, 37 Ch. D. 525, 534 is dissented from.]

[(*g*) *Re Lawes*, *sup.*]

[(*h*) *Montagu* v. *Earl of Sandwich*, 32 Ch. D. (C.A.) 525.]

[(*i*) *Cartwright* v. *Cartwright*, (1903) 2 Ch. 306.]

settled legacy were given to a daughter, a subsequent settlement on her with somewhat different ultimate trusts was held to be in satisfaction of the settled, and not of the absolute legacy (*a*). Where shares in a partnership business were bequeathed to the testator's sons, and subsequently the testator assigned a share to one on his being admitted a partner, it was held that, the intention of the father being to give his son an increased payment for his services in the business, the presumption of a partial ademption was rebutted (*b*).]

Intention expressed.

6. A legacy will not be adeemed by a subsequent advance if the latter be *expressed* to be in satisfaction of some other and quite different claim, as in satisfaction of a legacy under the will of a former testator (*c*), or if the subsequent advance be for a particular purpose, as to buy furniture (*d*).

Legacies and advances.

7. Legacies to a child are always regarded as *portions* unless it be otherwise expressed (*e*), and so are all advances *inter vivos* by a father to a child unless the instrument itself show (as sometimes happens) that the second gift was *alio intuitu*, and not meant as a portion (*f*); [and a distinction is to be drawn between sums in the nature of temporary assistance and advances of a permanent character; "thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement; but a sum given merely to assist him temporarily would not" (*g*)].

Advance of less amount.

8. Where the subsequent advance is of *less* amount than the previous legacy, it was for some time doubtful what would be the effect—whether the advance would adeem the *whole* legacy (*h*) or whether the doctrine of ademption would be excluded

[(*a*) *Re Furness*, (1901) 2 Ch. 346.]
[(*b*) *Re Lacon*, (1891) 2 Ch. 482.]
(*c*) *Baugh* v. *Reed*, 3 B. C. C. 192.
(*d*) *Robinson* v. *Whitley*, 9 Ves. 577.
(*e*) *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Shudal* v. *Jekyll*, 2 Atk. 518, *per* Lord Hardwicke; *Pym* v. *Lockyer*, 5 M. & Cr. 35; *Ellison* v. *Cookson*, 1 Ves. jun. 107, *per* Lord Thurlow; *Leighton* v. *Leighton*, 18 L. R. Eq. 458.
(*f*) *Baugh* v. *Reed*, 3 B. C. C. 192; *Monck* v. *Monck*, 1 B. & B. 298; *Leighton* v. *Leighton*, 18 L. R. Eq. 458; [*Re Lacon*, (1891) 2 Ch. 482; but it is to be noted that the meaning of the word "advance" here used, *i.e.* advance by way of portion, is not the primary meaning of the word, which refers to advances of money: *Re Jaques*, (1903) 1 Ch. (C.A.) 267, 275, *per* Stirling, J.].
[(*g*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155, 159, *per* Jessel, M.R.; *Re Scott*, (1903) 1 Ch. (C.A.) 1. Thus sums paid by a father to relieve his sons from indebtedness were held not to be in the nature of advancements; *Taylor* v. *Taylor*, *sup.*; *Re Scott*, *sup.*; the C.A. in the last mentioned case preferring the view taken by Jessel, M.R., in *Taylor* v. *Taylor*, to that taken by Wood, V.C., in *Boyd* v. *Boyd*, L. R. 4 Eq. 305, and by Pearson, J., in *Re Blockley*, 29 Ch. D. 250. In *Re Wedmore*, (1907) 2 Ch. 277, forgiveness by a testator of debts owing to him by his sons was held to constitute specific legacies to them which were not liable to abatement.]
(*h*) *Hartop* v. *Whitmore*, 1 P. W. 681; *Ex parte Pye*, 18 Ves. 151; *Platt* v. *Platt*, 3 Sim. 512.

altogether, or whether it would be an ademption *pro tanto* or to the extent of the advance. It has now been settled that under such circumstances the subsequent advance will be an ademption *pro tanto*, so that the child can claim only the balance of the legacy (*a*).

Residue.

9. A *share* of a testator's *residuary estate* is regarded as a legacy to the amount of the share, and, therefore, if a testator bequeaths his residuary estate amongst his children, and afterwards makes an advance in favour of a child, such advance, if it equal or exceed the amount of the share, will be an ademption of the whole share, and, if it be of less amount, will be an *ademption* of that child's share of the residue *pro tanto* (*b*). So if a parent make a provision for one of his children in his lifetime, and afterwards bequeaths a residue to the same child, the amount of the residue will be an absolute or partial *satisfaction* (*c*). [The doctrine of ademption by subsequent portion will not be applied, in favour of a stranger, against a child, or person to whom the testator stands *in loco parentis*, taking a share of residue as well as a legacy (*d*).]

Codicil.

10. It has been argued that where a testator gives a legacy to a child, and then makes an advance, and then by a codicil *republishes* the will, the original legacy shall be restored. But the Court has held the true construction of the codicil to be that the will is to have the effect which it would have had if the codicil had not been made, except as altered by the codicil, and that as the double provision would not have taken place had the codicil not been made, it will not be set up by the codicil (*e*).

Husband and issue.

11. As a child's portion is commonly settled upon the child for life with remainder to the *issue*, with a limitation in the case of a daughter to her *husband* for life, the Court regards the limita-

(*a*) *Pym* v. *Lockyer*, 5 M. & Cr. 29; *Kirk* v. *Eddowes*, 3 Hare, 509; *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 100, *per* Campbell, C.; [*Re Pollock*, 28 Ch. D. (C.A.) 552. If a father stands in the position of a mere debtor to his child, advances by him of sums less than the amount of the indebtedness are not *pro tanto* a satisfaction of the debt; *Reade* v. *Reade*, 9 L. R. Ir. 409.]

(*b*) *Dawson* v. *Dawson*, 4 L. R. Eq. 504; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; *Stevenson* v. *Masson*, 17 L. R. Eq. 78; and see *Smith* v. *Strong*, 4 B. C. C. 493; *Freemantle* v. *Bankes*, 5 Ves. 79; *Smyth* v. *Johnston*, 31 L. T. N.S. 876.

(*c*) *Thynne* v. *Glengall*, 2 H. L. Ca. 131; *Earl of Glengall* v. *Barnard*, 1 Keen, 769; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner; *Rickman* v. *Morgan*, 2 B. C. C. 394.

[(*d*) *Re Heather*, (1906) 2 Ch. 230.]

(*e*) *Booker* v. *Allen*, 2 R. & M. 270; see 300; *Lloyd* v. *Harvey*, Ib. 310; *Monck* v. *Monck*, 1 B. & B. 298; and see *Roome* v. *Roome*, 3 Atk. 181.

tions to the issue, and in the case of a daughter the limitation of the life estate to the husband as parts of the provision for the child, so that not only the life estate of the child, but also the interests of the children and husband are brought into the account as parts of the advance to the child (*a*).

If a father covenant to settle on his daughter and her children, and then makes a bequest to her *children*, this is a satisfaction of the covenant as regards the children of the daughter (*b*). [So where under the father's covenant the children of a daughter became entitled as tenants in common, and the father gave legacies to one of the children of the daughter, and to two children of a deceased child of the daughter, it was held that the legacies were *pro tanto* a satisfaction of the covenant as to the interests of the legatees (*c*).] But if a father upon the marriage of his son covenant to settle a fund upon him and his wife and children, and in consideration thereof the *father of the wife* makes a settlement at the same time, and then the father of the son bequeaths a share of his estate to the *son*, the legacy to the son, though operating in satisfaction of the son's interest under the father's settlement, is not a satisfaction of the interest of the son's *children* (*d*). [A bequest of residue to a daughter absolutely may be a satisfaction of her life interest in a sum secured by the testator's covenant, but not of the interests of other *cestuis que trust* not mentioned in the will, and only taking derivatively under a clause providing for settlement of the daughter's after acquired property (*e*).]

Slight differences.

12. The Court from its leaning against double portions will not allow *slight differences* in the limitations to rebut the presumption, and by slight differences are meant such as, in the opinion of the Judge, leave the two provisions substantially of the same nature (*f*). The cases upon the subject have generally arisen with reference to *ademption* (*g*), but the rule applies also

(*a*) *Kirk* v. *Eddowes*, 3 Hare, 509. Read the important observations of V. C. p. 521; *Platt* v. *Platt*, 3 Sim. 503; and see *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Russell* v. *St Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899.

(*b*) *Campbell* v. *Campbell*, 1 L. R. Eq. 383; [*Bennett* v. *Houldsworth*, 6 Ch. D. 671].

[(*c*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671.]

(*d*) *M'Carogher* v. *Whieldon*, 3 L. R. Eq. 236.

[(*e*) *Re Blundell*, (1906) 2 Ch. 222.]

(*f*) *Weall* v. *Rice*, 2 R. & M. 268, *per* Sir J. Leach; [*Tussaud* v. *Tussaud*, 9 Ch. D. (C.A.) 363].

(*g*) *Earl of Durham* v. *Wharton*, 3 Cl. & Fin. 146; 3 M. & K. 472; 5 Sim. 297; *Twisden* v. *Twisden*, 9 Ves. 427, *per* Lord Eldon; *Trimmer* v. *Bayne*, 7 Ves. 515, *per* Lord Eldon; cited with approbation, *Powys* v. *Mansfield*, 6 Sim. 561; *Powys* v. *Mansfield*, 3 M. & Cr. 374, *per* Lord Cottenham; *Weall* v. *Rice*, 2 R. & M. 251; *Platt* v. *Platt*, 3 Sim. 503;

to *satisfaction* (*a*). In the case of a *debt* (as distinct from a portion), said Lord Cottenham, small circumstances of difference between the debt and the legacy are held to negative the presumption of satisfaction (*b*), but in the case of *portions* small circumstances are disregarded. Thus it is, that a smaller legacy is not held to be in satisfaction of part of a larger *debt*, but it may be satisfaction *pro tanto* of a *portion* (*c*); [and where the legacy was of larger amount, it was held to be a satisfaction, notwithstanding that it was not payable until one year after the death of the testator, and that the creditor was appointed executrix (*d*)]. However, the differences in the limitations may be so great as to negative the presumption of satisfaction in case even of portions (*e*). If a father covenant on the marriage of his daughter to pay a sum by way of portion, and then by his will bequeaths to her a share of his residuary estate, but by the same will gives directions for payment of his debts, the presumption of *satisfaction* is negatived by the direction for payment of debts, and then the portion is raised as a debt, while the daughter is also allowed to claim a share of the residue (*f*). But if a testator direct payment of his debts and gives a share of his residuary estate to a daughter, and then by bond makes an advance to her upon her marriage, the presumption of *ademption* is not negatived by the direction for payment of debts in the previous will (*g*). Where a father is a debtor, not morally, but actually to his child, as for money advanced by the child or on any other account, a bequest by the father to the child is no satisfaction, where it would not be a satisfaction as between the father and a stranger (*h*), but what would be a satisfaction as between strangers, will also be a satisfaction as between father and child (*i*).

Monck v. *Lord Monck*, 1 B. & B. 304, *per Cur.*; *Lloyd* v. *Harvey*, 2 R. & M. 310; *Sheffield* v. *Coventry*, 2 R. & M. 317; *Hartopp* v. *Hartopp*, 17 Ves. 184; *Stevenson* v. *Masson*, 17 L. R. Eq. 78; [*Edgeworth* v. *Johnston*, 11 Ir. R. Eq. 326].

(*a*) *Clark* v. *Sewell*, 3 Atk. 98, *per* Lord Hardwicke; *Thynne* v. *Glengall*, 2 H. L. Ca. 131; *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Sparkes* v. *Cator*, 3 Ves. 530; *Russell* v. *St Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899; [*Mayd* v. *Field*, 3 Ch. D. 587;] and see *Hartopp* v. *Hartopp*, 17 Ves. 191.

[(*b*) See also *Re Dowse*, 50 L. J. N.S. Ch. 285; *Re Horlock*, (1895) 1 Ch. 516; *Crichton* v. *Crichton*, (1895) 2 Ch. 853, 857, 858, *per* North, J.]

(*c*) *Thynne* v. *Glengall*, 2 H. L. Ca. 131.

[(*d*) *Re Ruttenberry*, (1906) 1 Ch. 667.]

(*e*) *Coventry* v. *Chichester*, 2 De G. J. & S. 336; 2 L. R. H. L. 71; 2 H. & M. 149; [*Tussaud* v. *Tussaud*, 9 Ch. D. (C.A.) 363].

(*f*) *Chichester* v. *Coventry*, 2 L. R. H. L. 71; 2 De G. J. & S. 336; 2 H. & M. 149; *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Paget* v. *Grenfell*, 5 L. R. Eq. 7; *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; [and see *Re Huish*, 43 Ch. D. 260].

(*g*) *Trimmer* v. *Bayne*, 7 Ves. 508; *Dawson* v. *Dawson*, 4 L. R. Eq. 504.

(*h*) *Tolson* v. *Collins*, 4 Ves. 483; *Fairer* v. *Park*, 3 Ch. D. 309.

(*i*) *Edmunds* v. *Low*, 3 K. & J. 318.

13. A *contingent* legacy bequeathed by a father will not be a satisfaction of a *vested* interest in the child under a previous settlement (*a*). Contingent legacy.

14. A *stranger* may indirectly derive advantage from the doctrine of ademption, as where a testator gives a legacy to the child, and the residue to strangers, and then in his lifetime advances the child beyond the amount of the legacy. Here the ademption of the legacy swells the *quantum* of the residue for the benefit of the residuary legatees. This arises not from the application of the doctrine, but in spite of it, and therefore, where a testator bequeaths his residue equally between his wife or a stranger, and his child, and then advances the child in his lifetime, here the advance is not brought into account so as to augment the residue for the benefit of the wife or stranger, but the wife or stranger can claim only the moiety of the actual residue (*b*). Strangers may be benefited.

15. Ademption and satisfaction are often confounded, but one broad distinction between them must not be lost sight of. Where the will precedes and the settlement follows, the settlement is an actual *extinguishment* of the claim under the will. But where the settlement precedes and the will or gift follows, here, as the settlement created a legal obligation or vested a legal right by act *inter vivos*, the subsequent testamentary disposition cannot annul it, but all that equity can do is to put the parties entitled under the legal obligation or legal gift to their *election*. Thus a testator bequeaths 1000*l*. to his daughter, and afterwards on the daughter's marriage settles 1000*l*. upon her. Here the will is considered as revoked, and the claims under the will are actually extinguished. If, on the other hand, a father covenants on the daughter's marriage to settle 1000*l*. upon her, and afterwards by will bequeaths 1000*l*. to the daughter, here the legal obligation under the settlement remains, and the daughter if she chooses may insist on her claims under the settlement. But if she does so, the Court will not also allow her to claim under the will, or, in other words, the Court puts her to her election (*c*). Ademption and satisfaction distinguished.

(*a*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 B. C. C. 352; *Chichester* v. *Coventry*, 2 L. R. H. L. 96, *per* Lord Romilly.

(*b*) *Meinertzhagen* v. *Walters*, 7 L. R. Ch. App. 670; [and see *Stewart* v. *Stewart*, 15 Ch. D. 539; *Re Heather*, (1906) 2 Ch. 230, *ante*, p. 480].

(*c*) *Chichester* v. *Coventry*, 2 L. R. H. L. 90, *per* Lord Romilly; *Russell* v. *St Aubyn*, 2 Ch. D. 398; *Thomas* v. *Kemeys*, 2 Vern. 348; *Copley* v. *Copley*, 1 P. W. 147; *Byde* v. *Byde*, 2 Eden, 19. As to interest on the advance made after the date of the will, see the decree in *Beckton* v. *Barton*, 27 Beav. 106.

[Contemporaneous instruments.] [16. Where two instruments are contemporaneous, so that both must be present to the donor's mind when he is executing them, that circumstance affords a strong reason against holding a gift in the one to be a satisfaction of an obligation under the other (*a*).]

SECTION II

WHAT AMOUNT IS RAISABLE UNDER THE HEAD OF PORTIONS

This question arises as to capital and interest, and maintenance money and costs.

Capital. 1. As to the amount of *capital* to be raised, the instrument itself generally prescribes the sum with sufficient exactness, and according to the common form now adopted in settlements, the amount graduates according to the number of children, *i.e.* a certain sum if there be only one younger child who takes a vested interest, an increased sum if there be two such children, and a larger sum still if there be three or more such children.

Ambiguity. 2. Occasionally the settlement has been so ambiguously expressed with reference to the events contemplated, that recourse to the Court has become necessary. Thus, in *Hemming* v. *Griffith* (*b*), the trust was that if there should be one younger child the trustee should raise 8000*l.*, and if two younger children 12,000*l.*, and if three or more younger children 15,000*l.*, the said portions to be paid as the husband and wife or the survivor should appoint, and in default of appointment the portions to vest in sons at twenty-one, and in daughters at twenty-one or marriage, and the settlement contained powers of maintenance and advancement out of the portions after the death of the parents, or in their lifetime with their consent. There were three younger children, but two of them died in infancy; and the question was whether the one who attained twenty-one was entitled to the 8000*l.* or the 15,000*l.* Sir J. Stuart said: "It seems clear enough that if there should be three or more younger children, during the infancy of the three children the trusts for raising the 15,000*l.* were to have an operation and might be resorted to for the purposes of advancement and maintenance. If so, how can anything which has happened since the three

[(*a*) *Horlock* v. *Wiggins*, 39 Ch. D. (C.A.) 142. (*b*) 2 Giff. 403.]

younger children were born, reduce the trust for raising 15,000*l.* to a trust for raising 8000*l.* only which was to be raised expressly, and in terms, in the event of there being only one younger child?" and the surviving portionist was declared entitled to the 15,000*l.*

Interest.

3. The right to interest and the rate of it, and the time from which it is to be calculated, should all be specified in the settlement, but in the absence of any express direction, a portion, like any other sum of money charged on land, will carry interest with it by implication from the time when the capital ought to have been raised (*a*), and this interest has in England been at 4 per cent. (*b*), and in Ireland at 5 per cent. (*c*). But if the settlement while it is silent as to the interest on the portions, expressly and carefully and with all necessary circumstantiality provides for the interest on all the other charges, the presumption arises that interest on the portions was intentionally excluded, and the Court considers the general rule as inapplicable (*d*).

Out of rents.

4. In the rare case where the portions are to be raised not by sale or mortgage out of the corpus of the estate, but out of the annual rents and profits, the Court looking to the hardship of allowing the interest to accumulate for years against the income, raises the capital only and gives no interest (*e*).

Interest given, though portion not vested.

5. Where there is the relation of father and child, or of a person standing *in loco parentis* and a child, the natural duty, and therefore the presumed intention, of providing for the child is so strong as to have led to the establishment of peculiar principles. Some of these have already passed under review, and another is this:

Maintenance.

A *legacy* given to a *stranger* and payable at the age of twenty-one carries no interest in the meantime, but a legacy to a child, being an infant (*f*), payable at twenty-one, if maintenance be not otherwise provided for the child (*g*), carries interest with

(*a*) *Evelyn* v. *Evelyn*, 2 P. W. 669, *per Cur.*; *Hall* v. *Carter*, 2 Atk. 358, *per Cur.*; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 487, *per Cur.*; [and where there is a trust for sale after the death of a tenant for life a legacy payable out of the proceeds of sale will carry interest from the death of the tenant for life; *Re Waters*, 42 Ch. D. 517].

(*b*) *Young* v. *Waterpark*, 13 Sim. 199; affirmed 15 L. J. N.S. Ch. 63; [*Balfour* v. *Cooper*, 23 Ch. D. (C.A.) 472; *Re Drax*, (1903) 1 Ch. (C.A.) 781, 794, 796].

(*c*) *Purcell* v. *Purcell*, 1 Conn. & Laws. 371; [*Balfour* v. *Cooper*, 23 Ch. D. (C.A.) 472;] and see *Young* v. *Waterpark*, 13 Sim. 199; *Denny* v. *Denny*, 14 L. T. N.S. 854.

(*d*) *Clayton* v. *Earl of Glengall*, 1 Dr. & W. 1; *S. C.* 1 Conn. & Laws. 311.

(*e*) *Ivy* v. *Gilbert*, 2 P. W. 13; *Evelyn* v. *Evelyn*, 2 P. W. 659. But see *Ravenhill* v. *Dansey*, 2 P. W. 179.

(*f*) *Raven* v. *Waite*, 1 Sw. 553.

(*g*) *Mitchell* v. *Bower*, 3 Ves. 287; *Long* v. *Long*, Ib. 286, note; *Wynch* v. *Wynch*, 1 Cox, 433; *Donovan* v. *Needham*, 9 Beav. 164; [and as to

it (*a*) from the death of the testator, and not, as in ordinary legacies, from the expiration of one year from the testator's death (*b*). So a *portion* charged on land in favour of a child, whether made payable at a particular age or without any direction as to payment, will carry interest with it from the death of the testator; [and so where the portions are given contingently under a settlement, and secured by a subsisting term (*c*)]. But as the rate of interest is discretionary, the Court has not considered itself bound by the general rule, but has regulated itself by the circumstances of each particular case. The application of these principles will be best understood by the following instances:—

Rate of interest.

In *Warr* v. *Warr* (*d*) a father charged the estate with portions for younger children, "to be paid at *such time* as the trustees should *appoint* for their better maintenance and preferment." There were three younger children, a son and two daughters. The son was apprenticed to a sea captain, and a sum was paid by the trustees for his outfit; the two daughters attained twenty-one and received their portions. The son died under age before the trustees had named any day for payment of his portion. It was ruled that the son's portion was not to be raised, as he had not lived to want it; but it was "agreed that all the children were to be maintained out of the trust estate, they having no maintenance in the meantime, and what had been employed for putting out the younger son was to come out of the trust estate."

In *Staniforth* v. *Staniforth* (*e*) an estate was settled on the father and mother successively for life, with remainder in default of issue male to trustees for a term of five hundred years in trust to raise 1000*l.* for the daughters' portions, but *no time* was appointed for payment. The father died without issue male, leaving a daughter who filed her bill, living the mother, to have the 1000*l.* raised. The M.R. held: 1. That by the failure of issue male the term had arisen, though not to take effect in possession until the death of the mother. 2. That the portion vested in the daughter in the lifetime of the mother (the

what amounts to such a provision, see *Re Moody*, (1895) 1 Ch. 101].

(*a*) See *Crickett* v. *Dolby*, 3 Ves. 16; *Raven* v. *Waite*, 1 Sw. 557; *Beckford* v. *Tobin*, 1 Ves. sen. 308; *Hill* v. *Hill*, 3 V. & B. 183; *Tyrell* v. *Tyrell*, 4 Ves. 1; *Chambers* v. *Goldwin*, 11 Ves. 1; *Lowndes* v. *Lowndes*, 15 Ves. 301.

(*b*) *Cary* v. *Askew*, 1 Cox, 241; *Mole* v. *Mole*, 1 Dick. 310. [But a legacy to a child on attaining twenty-one, though bearing interest from the testator's death, is not the less contingent, and the infant does not acquire an immediate vested interest in the income, and, if he dies under twenty-one, the surplus income not applied for maintenance does not pass to the infant's representatives; *Re Bowlby*, (1904) 2 Ch. (C.A.) 685].

[(*c*) *Re Greaves Settled Estates*, (1900) 2 Ch. 683.]

(*d*) Pr. Ch. 213.

(*e*) 2 Vern. 460.

daughter it is presumed having attained twenty-one); and 3. That no time being appointed for the payment of any portion, nor any maintenance in the meantime, she was entitled to a *reasonable maintenance not exceeding the interest of the portion from the death of the father*, or at the least, from such time as the portion might have been raised by sale.

Beal v. *Beal* (*a*) was this: An estate was settled on the father and mother successively for life, with remainder to the father's brother in tail, &c., and a power to charge portions was given to the father. He appointed the sum of 2000*l.* for his two daughters, payable at eighteen or marriage, but without saying after the death of his wife, and then died. The two daughters, who were under eighteen, filed their bill in the lifetime of the mother, to have interest for their portions until raisable. Lord Harcourt decreed that they should have interest at 3 per cent. until they were twelve years old, and then 4 per cent. until the portions were raisable. Being dissatisfied with the rate of interest, they had the case reheard before Lord Cowper, who said he thought the former decree very tender in the provision thereby made, and that it was rather a recommendation to the mother to make them that allowance than a decree to charge her jointure therewith, but that since they were not satisfied, he must now give them no more than what in strict justice they could demand, and that since the portions were not payable till eighteen or marriage, he could not charge the jointress with interest thereof in the meantime, but that as the reason for postponing the payment till eighteen was in favour of the jointress, she *ought to maintain them* out of the profits of her jointure lands.

In *Harvey* v. *Harvey* (*b*) a testator charged all his real and personal estate with 1000*l.* a-piece to all his younger children, payable at twenty-one, but gave *no directions as to maintenance* in the meantime. The younger children, during their infancy, filed their bill to be allowed interest or maintenance. The M.R. said "that in this case the Court would do what in common presumption a father if living would, nay, ought to have done, which was to provide necessaries for his children, but a Court of Equity would make hard shifts for the provision of children, as where the younger children were left destitute and the eldest an infant, the Court would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children. And for the same reason the Court would

(*a*) Pr. Ch. 405. (*b*) 2 P. W. 21.

likewise take a latitude in this case, and that since interest was pretty much in the breast of the Court, though the will was silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry interest if the estate would bear it, for every one must suppose it to have been the intention of the father that his children should not want bread during their infancy, but that where the estate appeared to be small, the Court, in whose discretion it always lay to determine the quantum of interest, had ordered the lower interest."

General rule.

6. It will be collected from the preceding cases that portions provided for children have this peculiar quality, that whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions—that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that on the other hand portions are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children (*a*).

Costs.

7. As regards the *costs* of raising portions the general rule as to charges applies, that is, the costs must be thrown on the estate, and the portions bear no part of them (*b*), and of course under the head of costs will be included all charges and expenses properly incurred.

SECTION III

AT WHAT PERIOD THE PORTIONS ARE RAISABLE

Portions out of reversions.

1. We have next to inquire at what *period* the portions are to be raised, and upon this subject the great contest has been whether they shall or not be raised while the security created for the purpose is still *reversionary*. The cases are unusually numerous and extremely conflicting, and the only result to be obtained is that the question must be decided by the "penning of the trust," or in other words, that if the instrument be unequivocal in itself as to the actual intention of the parties,

[(*a*) See *Re Greave's Settled Estates*, (1900) 2 Ch. 683.]

(*b*) *Armstrong* v. *Armstrong*, 18 L. R. Eq. 541; *Michell* v. *Michell*, 4 Beav. 549; *Trafford* v. *Ashton*, 1 P. W. 415; [and see *Sewell* v. *Bishop*, 62 L. J. Ch. 615, 985].

the Court must carry out the intention whatever may be the consequential inconvenience. A sale or mortgage must necessarily be made at a disadvantage when the security is reversionary, but if the meaning be clear it must be done. We cannot better explain the principles by which the Court is now regulated, than by a statement of the two leading authorities.

Codrington v. Foley.

2. In *Codrington* v. *Foley* (*a*) a testator devised an estate to trustees for ninety-nine years from the testator's decease, remainder to Lord Foley for life, remainder to other trustees for 1000 years, to commence from the death of Lord Foley, for raising 30,000*l.* for portions of younger children at twenty-one or marriage, remainder to the first and other sons of Lord Foley in tail. The trusts of the term of ninety-nine years were for applying the rents with the proceeds of the timber in discharge of certain incumbrances. Lord Foley died in 1793, leaving an only son, and a daughter who became Mrs Codrington. Mr and Mrs Codrington filed their bill to have the 30,000*l.* raised, and it was objected that the trusts of the term of ninety-nine years were still in operation and unsatisfied, and that the 1000 years term was consequently reversionary both at law and in equity, and while so reversionary it could not be sold or mortgaged, to the great injury of the tenant in tail. Lord Eldon came to the conclusion that the 30,000*l.* must be raised, though the term for raising it was reversionary, and after reviewing the opinions of Lord Cowper, Lord Macclesfield, Lord Hardwicke, Lord Talbot, Lord Thurlow, and Lord Alvanley upon the subject (*b*), he proceeded: "Upon this general state of the doctrine of the Court, it appears to me that the proper rule is what Lord Talbot states—that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind whilst construing the instrument, and I cannot agree with what is stated in *Stanley* v. *Stanley* (*c*), that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds. If they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient, thereby disappointing the true intention of the instrument. The rule upon the whole depends upon this, whether it was the intention, attending to the whole of it, that the portion

(*a*) 6 Ves. 364.
(*b*) The whole judgment well deserves a perusal.
(*c*) 1 Atk. 549.

should or should not be raised in this manner. If there be nothing more than a limitation to the parent for life, with a (reversionary) term to raise portions at the age of twenty-one or marriage, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest *is* payable and the portions *must be raised*, in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term" (*a*).

3. In *Codrington* v. *Foley* the term for raising the portions was reversionary upon another term, the trusts of which were unsatisfied: but in the case of *Smyth* v. *Foley* (*b*) it was reversionary upon the life estate of the father, and yet the same result followed.

Smyth *v.* Foley.

Thus an estate was limited by settlement upon marriage to R. Chambers for life, remainder to M. E. his wife for life in bar of dower, remainder to trustees for 500 years, remainder to the first and other sons successively in tail, and the trusts of the term were declared to be by sale or mortgage or other means to raise 4000*l.* for the younger children, the portions "to be paid" at their respective ages of twenty-one years, and of daughters at those ages or marriage; and upon further trust "until the same portions should become payable as aforsaid, to raise a competent yearly sum out of the rents and profits," for maintenance and education, with a power "after the decease of Richard Chambers, or in his lifetime with his consent," to raise moneys for advancement. There were six children of the marriage, three sons and three daughters, all of whom attained twenty-one. After the death of M. E. Chambers the wife, but in the lifetime of R. Chambers, the younger children filed their bill to have the 4000*l.* raised. Baron Alderson in giving judgment laid down the following rules: That *First*, where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term (*c*). *Secondly*. Where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens (*d*). *Thirdly*. Where not only the

(*a*) 6 Ves. 379.

(*b*) 3 Y. & C. 142.

(*c*) *Sandys* v. *Sandys*, 1 P. W. 707; *Hellier* v. *Jones*, 1 Eq. Ca. Ab. 337; *Bacon* v. *Clerk*, Pr. Ch. 500; *Stanley* v. *Stanley*, 1 Atk. 549; *Conway* v. *Conway*, 3 B. C. C. 267; *Brome* v. *Berkley*, 2 P. W. 486, *per Cur.*; *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

(*d*) As where the portions are to vest at such times as the father shall appoint, and he has not yet appointed.

period but the class of children, in favour of whom the portions are to be raised, depends on a contingency (as when it is limited to take effect in case the father dies without issue male by his wife), there also, on the contingency happening by the death of the wife without issue male, the portions are raisable immediately, and the term is saleable in the lifetime of the father (*a*). The Judge then expressed his entire concurrence in the principles laid down by Lord Eldon (viz. that the intention must be collected from the whole settlement taken together), and finding an express direction that the portions were to be paid at twenty-one or marriage, and that the settlement contained nothing at variance with that construction, he decreed the portions to be raised by sale or mortgage of the reversionary term.

General rule and exceptions.

4. Such are the general rules by which the Courts now profess to be governed. We must, however, add the caution that when the grounds upon which the Court acted in any case are not sufficient to warrant the decision upon a fair construction of the *instrument* itself, and independently of and apart from any arguments based on the *inconvenience* of burdening the estate, such case cannot at the present day be relied upon as an authority.

And *particular* and *special* cases have occurred in which the Court has refused to raise the portions out of a reversionary term.

Thus, in *Corbett* v. *Maidwell* (*b*), the estate was settled upon marriage on Thomas for life, remainder to trustees for 500 years, remainder to the heirs male of the body of Thomas by his intended wife, "and if he died without issue male by his intended wife, and there should be one or more daughters which should be *unmarried or unprovided for at the time of his death*," then to raise portions for the daughter or daughters payable at eighteen or marriage with maintenance in the meantime. The wife died without issue male, but leaving a daughter who married, and she and her husband filed their bill to have the portions raised during the father's life. The Court refused the relief asked, on the ground that the portion was contingent on the daughter being unmarried and unprovided for at the father's death, a contingency which had not yet happened.

In *Butler* v. *Duncomb* (*c*), the marriage settlement limited the

(*a*) *Hebblethwaite* v. *Cartwright*, For. 30; *Greaves* v. *Mattison*, 1 Eq. Ca. Ab. 336; *Ravenhill* v. *Dansey*, 2 P. W. 180; *Smith* v. *Evans*, Amb. 633; *Staniforth* v. *Staniforth*, 2 Vern. 460. In other cases the contingency did not occur. See *Worsley* v. *Granville*, 2 Ves. sen. 331; *Hall* v. *Hewer*, Amb. 203; *Corbett* v. *Maidwell*, 1 Salk. 159.

(*b*) 1 Salk. 159.

(*c*) 1 P. W. 448; and see *Churchman* v. *Harvey*, Amb. 335.

estate to George for life, remainder to Mary for life, remainder to the first and other sons in tail male, remainder to trustees for 500 years upon trust that the trustees should, "from and after the *commencement of the term*," raise portions for the younger children payable at twenty-one or marriage; remainder to George in fee. George died, leaving a daughter, the only issue, who married, and then she and her husband filed their bill to have the portion raised in the lifetime of the mother. But the Court declined to make any such order, as the trust was to raise the portion from and after the commencement of the term, which meant the commencement *in possession*, and that this implied a negative, viz. that it was not to be raised before.

In *Brome* v. *Berkley* (*a*), the marriage settlement was to George for life, remainder to the wife for life for her jointure, remainder to the first and other sons in tail, remainder to trustees and their heirs to raise portions for daughters, payable at twenty-one or marriage with *maintenance in the meantime*, "the first payment of the maintenance money to be made at such half-yearly feast as should next happen after the *estate limited to the trustees should take effect in possession*." The husband died leaving no issue but a daughter, who attained twenty-one, and filed her bill in the mother's lifetime, to have the portion raised. Lord King dismissed the bill, on the ground that the maintenance was not to be raised until the estate of the trustees came into possession, and "it was absurd to say that the portion should be raised first, and the maintenance money paid afterwards."

In *Stevens* v. *Dethick* (*b*), the estate was limited to Dethick for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to trustees for 500 years, to raise portions for daughters payable at twenty-one or marriage, with a direction that the daughters should have maintenance out of the premises comprised in the term, "and that the residue of the rents, issues, and profits above such yearly maintenance should in the meantime, *till the portions became payable*, be received by such persons as should be *entitled to the reversion* expectant upon the determination of the said term." Lord Hardwicke considered the latter clause to show an intention that the maintenance money, and therefore also the portion itself, was not to be raised until the term fell into possession. He therefore dismissed the bill

(*a*) 2 P. W. 484. But see *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

(*b*) 3 Atk. 39; and see *Reynolds* v. *Meyrick*, 1 Eden, 48. But see *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

filed by the only daughter after the death of her mother, but in the lifetime of her father.

In *Massy* v. *Lloyd* (*a*), the estate was limited to trustees for 999 years upon trust for the wife for her life, and after her decease upon trust to pay an annuity to the husband, and to apply the *residue* of the rents during the husband's life, as the wife should appoint (a power which was executed), and on the death of the survivor of the husband and wife to raise 15,000*l.* for younger children's portions, and subject as above the estate was settled on the first and other sons in tail. The wife died, and it was held that the portions were not raisable during the life of the husband. The case was a very special one, but the argument that chiefly prevailed was based upon the fact that all the *rents, issues, and profits* during the lifetime of the husband had been *expressly disposed of otherwise.*

5. Hitherto we have adverted only to the question whether portions shall be raised, while the term charged with them is still *reversionary.* But there are also other circumstances affecting the portionists *personally,* which have a material bearing upon the inquiry at what time the portions are to be raised.

Time of raising portions in special cases.

6. If a specific sum be given to A., payable at her age of twenty-one, or day of marriage, the money cannot be raised until the interest has become vested; for should the fund on which the money raised is invested prove deficient, the portionist might still have recourse to the estate (*b*). And so where the trust of a term was to raise 3000*l.* for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held that the trustees were not authorised, when one child had attained his age of twenty-one years, to raise the entire sum, for the infant children could not be deprived of the real security for their shares (*c*). But from the manifest convenience of raising the portions at once, it seems the Court will lean to that construction where anything appears upon the instrument to warrant such a course. Thus the trustees of a marriage settlement were directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in, and payable to

(*a*) 10 H. L. Cas. 248; 11 Ir. Eq. Rep. 429; 12 Ir. Eq. Rep. 298.
(*b*) *Dickinson* v. *Dickinson*, 3 B. C. C. 19.
(*c*) *Wynter* v. *Bold*, 1 S. & S. 507.

them at the age of twenty-one, and the shares of the daughters at twenty-one or marriage; and it was provided that *no mortgage should be made until some one of the portions should become payable.* Four of the children had attained twenty-one and three were under age; and the Vice-Chancellor said: "In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The whole 10,000*l.* must therefore be raised at once. It is objected that some of the shares may become diminished in amount: the answer to that is, that the Court considers the investment in the 3 per cent. Consols as equivalent to payment. If there is any rise in the funds the children under age will have the benefit of it" (*a*).

SECTION IV

IN WHAT MODE THE PORTIONS ARE TO BE RAISED

Where an estate is settled subject to portions, the presumed intention is that the portions should impede as little as possible the devolution of the property in the main channel of the limitations. Moral duty requires that some support should be secured for the younger children, but this should be done at as little sacrifice as circumstances will allow to the family consequence as represented by the eldest son.

Modes of raising portions.

1. In raising portions, therefore, it is *primâ facie* undesirable to *sell* any part of the estate. So recourse should rather be had to levying the required amount by a side wind, as by the produce of *mines* or a fall of *timber;* or, if this cannot be done, then by *a mortgage* rather than by an absolute disposition, for though a mortgage is usually accompanied with a power of sale, so that eventually the property may pass into the hands of a stranger, yet until actual sale the owner under the settlement has the opportunity of paying off the charge from his private means. In every case, however, the language of the instrument must govern. If portions be simply *charged* on an estate, either expressly or by implication, as where a charge is implied from a power

(*a*) *Gillibrand* v. *Gould*, 5 Sim. 149. [In *Peareth* v. *Greenwood*, 28 W. R. 417, the portions of those children who had not attained twenty-one were provided for by carrying over a sum of stock sufficient at the present price to satisfy them, with a margin for depreciation.]

limited to the portionist of distraining for non-payment (*a*), the money may be raised by mortgage or sale as in the case of any other charge.

2. A trust to raise the portions by *mortgage* will not authorise a *sale*, but if the trust be to levy the amount by mortgage or *otherwise* a power of sale is implied (*b*). If the trust be to raise the charge by and out of the rents or by such other ways and means *except a sale* as the trustees may think proper, not only a sale is prohibited, but a mortgage also, which may lead to an absolute disposition, as it enables the mortgagee by foreclosure to get possession of the estate (*c*). Where a sale is excluded.

3. If the portions be raisable by and out of the *rents and profits or* by *mortgage*, here the words are ambiguous, and are capable of the construction that the trustees have an option of levying the portions either out of the income or out of the corpus, and so of throwing the onus at their discretion either upon the tenant for life or upon the remainderman (*d*). But the Court will lean strongly against such a construction (*e*). In some cases the meaning is that the annual rents should be primarily charged, and that the deficit only should be raised out of the corpus. Thus where the trustees were to hold an estate during the minority of the devisee, and to raise portions *by and out of the rents and profits or by sale or mortgage*, and on the devisee attaining the age of twenty-one to pay the rents to him after payment of the portions, the Court said that as the devisee on attaining twenty-one was to take such accumulated rents and profits only as should remain after satisfying the portions, the testator intended that the rents and profits should be first applied, and that the balance only could be raised by sale or mortgage (*f*). Out of income or corpus.

[Where the portions were raisable "by mortgaging or otherwise disposing of the lands, or out of the rents and profits, or by any other ways or means," and unsuccessful efforts had been made to raise the portions by mortgage of the property, it was held that the trustees were at liberty to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital of the portions (*g*).]

4. A more common case is where the portions are directed to Out of rents.

(*a*) *Meynell* v. *Massey*, 2 Vern. 1.
(*b*) *Tasker* v. *Small*, 6 Sim. 625.
(*c*) *Bennet* v. *Wyndham*, 23 Beav. 521.
(*d*) See *Hall* v. *Carter*, 2 Atk. 354.
(*e*) See the cases referred to, *ante*, p. 442.
(*f*) *Warter* v. *Hutchinson* 1 S. & S. 276; and see *Okeden* v. *Okeden*, 1 Atk. 550.
[(*g*) *Balfour* v. *Cooper*, 23 Ch. D. (C.A.) 472.]

be raised out of the rents and profits simply, and nothing more is said. Here if a definite time be fixed for payment of the portions, the ordinary and *primâ facie* meaning of rents and profits is taken to be inconsistent with the direction for payment at a time certain, and recourse is therefore had to the corpus by sale or mortgage. But even if a definite time of payment be not an ingredient in the case, yet from the very nature of portions, as rents and profits without stint represent the whole estate, the Court assumes the jurisdiction of ordering a sale or mortgage (*a*); and where there is no suit pending the trustees of an estate subject to such a charge may sell or mortgage, if they can find a purchaser or mortgagee, without the intervention of the Court (*b*).

Out of annual rents only.

5. If, however, the clear intention be that *annual* rents and profits only are meant, the Court cannot break in upon the corpus; and such is the case where the portions are directed to be raised *expressly* out of the *annual* rents (*c*); or where it is evident from the whole context that by rents and profits were intended the *annual* rents (*d*).

Out of rents or otherwise, except a sale.

6. In *Bennet* v. *Wyndham* (*e*), where the trust was to raise the charge out of the rents and profits, or by *such other ways and means* except a sale as the trustees should think proper, the Court on the one hand collected an intention that annual rents and profits were meant, and on the other hand that the tenants for life were not to be deprived of all usufructuary enjoyment, and the Court adopted a middle course by holding that part of the rents should be impounded and part be handed over to the tenants for life, and referred it to chambers to inquire what proportion of the rents ought to be impounded, and what to be paid to the tenant for life.

Mines and timber.

7. In *Offley* v. *Offley* (*f*), a term was created for raising 10,000*l.* for a daughter's portion, but the term was so short that the

(*a*) *Warburton* v. *Warburton*, 2 Vern. 420; *Sheldon* v. *Dormer*, 2 Vern. 310; *Baines* v. *Dickson*, 1 Ves. sen. 41; *Hall* v. *Carter*, 2 Atk. 358, *per* Lord Hardwicke; *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *Green* v. *Belcher*, 1 Atk. 505; *Trafford* v. *Ashton*, 1 P. W. 415; *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. jun. 233, *per Cur.*; *Okeden* v. *Okeden*, 1 Atk. 550; and see *Allan* v. *Backhouse*, 2 V. & B. 65; [*Re Barber's Settled Estates*, 18 Ch. D. 624;] *Bootle* v. *Blundell*, 1 Mer. 233; *Anon.* 1 Vern. 104, in which it was said that rents and profits could not receive this enlarged construction in a deed; *Garmstone* v. *Gaunt*, 1 Coll. 577; *Lingon* v. *Foley*, 2 Ch. Ca. 205; *Mills* v. *Banks*, 3 P. W. 1.

(*b*) *Backhouse* v. *Middleton*, 1 Ch. Ca. 176, *per Cur.*

(*c*) *Anon.* 1 Vern. 104; *Solley* v. *Wood*, 29 Beav. 482.

(*d*) *Mills* v. *Banks*, 3 P. W. 1; *Wilson* v. *Halliley*, 1 R. & M. 590; *Ivy* v. *Gilbert*, 2 P. W. 13; *Evelyn* v. *Evelyn*, 2 P. W. 659, see 666; *Earl of Rivers* v. *Earl of Derby*, 2 Vern. 72; *Okeden* v. *Okeden*, 1 Atk. 550.

(*e*) 23 Beav. 521.

(*f*) Pr. Ch. 26.

ordinary *profits* of the land would not raise above half the sum. There was an open coal mine in the land which the Court ordered to be wrought, with powers to the trustees to make soughs and drains as need should require, and Lord Commissioner Hutchins said that in such a case where the *usual profits* of the land would not *raise the money appointed within the time*, the Court might order *timber* to be felled off the land to make up the amount.

Out of rents by fixed annual payments.

8. If the trusts of a term be to "raise and levy *from time to time* a sum certain, by, with, and out of the rents and profits, by certain annual payments or sums in each year *and not otherwise*," the portional sum to be raised is a charge on the annual rents and profits generally, and the estate is not discharged at the expiration of six years, though the rents and profits during that period were sufficient to raise it (*a*).

[Mortgage by direction of Court to raise portions.]

9. [Where under the direction of the Court some only of several portions, ranking *pari passu*, are raised and secured by a mortgage, the presumption is that it was not the intention of the Court that the other portions should be postponed; the onus of proof lies on the mortgagee claiming priority, and it will not be sufficient for him to show that the forms of the orders of the Court, and of the mortgage deed settled by the Court, are consistent with his contention (*b*).]

Mortgage of undivided shares of the estate.

10. Where portions are raisable at different times as they are wanted, it has been usual, as each portion is raised, not to mortgage the *entire* estate charged, but a proportional part only. Thus, if the portional sum be 6000*l.* divisible among three younger children, and secured by a term of 1000 years, when the first 2000*l.* is raised, the trustee of the term mortgages an *undivided third part* of the hereditaments comprised in the term, and when the second 2000*l.* is raised, another undivided third part, and when the remaining 2000*l.* is raised, the other undivided third part. The result of this is, that each mortgagee takes the *legal estate* in the subject of the mortgage, whereas if the entire estate had been comprised in the first mortgage, the two other securities would have been equitable, and exposed to all the consequent risks (*c*).

(*a*) *Re Forster's Estate*, 4 Ir. R. Eq. 152. [Where a rent charge is charged on the fee, but a term is vested in trustees on trust to raise it, the owner of the rent charge must in general resort to the term: *Blackburne* v. *Hope Edwards*, (1901) 1 Ch. 419, following *Hall* v. *Hurt*, 2 J. & H. 76.]

[(*b*) *Nightingale* v. *Reynolds*, (1903) 2 Ch. (C.A.) 236; (1902) 2 Ch. 117.]

[(*c*) When the value of landed estates in this country was continually rising, this method might have been practicable, but it would rarely be so at the present time.]

Custody of title-deeds.

11. Trustees of a term of years for raising portions, as between them and the freeholder, are not entitled to the custody of the title-deeds, and cannot deliver them to a mortgagee. But they and their mortgagees have a right in equity to the production of them for all necessary purposes (*a*).

Judicature Act, 1873.

12. By 36 & 37 Vict. c. 66, sect. 34, sub-sect. 3, all causes and matters for raising portions are to be assigned to the Chancery Division of the High Court of Justice.

(*a*) *Churchill* v. *Small*, 8 Ves. 322, note (*b*); *Harper* v. *Faulder*, 4 Mad. 129, 138; *Wiseman* v. *Westland*, 1 Y. & J. 117; *Hotham* v. *Somerville*, 5 Beav. 360.

CHAPTER XVIII

DUTIES OF TRUSTEES FOR SALE (1)

THE subject of trusts for sale may be conveniently distributed under three heads: *First*, The general duties of trustees for sale; *Secondly*, The power of trustees to sign discharges for the purchase-money; and *Thirdly*, The disability of trustees to become purchasers of the trust property.

SECTION I

THE GENERAL DUTIES OF TRUSTEES FOR SALE

Trustees may sell without applying to the Court.

1. It need scarcely be observed that trustees for sale where they are not parties to a suit, are authorised to enter into contracts without the previous sanction of the Court (*a*); but where a suit has been instituted for the execution of the trust, *that* attracts the jurisdiction of the Court, and the trustees would not be justified in proceeding to a sale without the Court's sanction (*b*). Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of

(*a*) *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 590, *per* Lord Hardwicke.
(*b*) *Walker* v. *Smalwood*, Amb. 676; and see *Raymond* v. *Webb*, Lofft, 66; *Drayson* v. *Pocock*, 4 Sim. 283; *Culpepper* v. *Aston*, 2 Ch. Ca. 116, 223; and see *post*, p. 532.

[(1) It should be borne in mind that under the Settled Land Acts, restrictions are placed on the powers of trustees to sell settled land. This subject is dealt with in Chap. XXIV. sect. 2, v., to which the reader is referred.]

the purchaser the contract has dropped to the ground, and the representatives of the purchaser have not felt themselves justified in renewing it. The better mode would be to give *liberty* to the purchaser at any time after the expiration of the limited period, but before any confirmation by the Court, to determine the contract (*a*).

Must consult the interests of the *cestuis que trust.*

2. A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestuis que trust* (*b*), and in the case of several successive *cestuis que trust*, with a fair and impartial attention to the interests of all the parties concerned (*c*). Trustees, if they or those who act by their authority, fail in reasonable diligence in inviting competition (*d*), or in the management of the sale, as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another, [or make a misstatement as to the condition of the property, whereby a reduction of the contract price is necessitated (*e*)], will be personally responsible for the loss to the suffering party (*f*); and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement (*g*). But if a trustee has once contracted to sell *bonâ fide*, a Court of Equity will not allow the contract to be invalidated because another person comes forward and is willing to give a higher price (*h*); and where there are two offers equally advantageous, one of which is preferred by a *cestui que trust*, it is not the duty of the trustees, against their own opinion, to accept the offer preferred by such *cestui que trust* (*i*).

Where sale is a breach of trust.

3. In no case will the Court enforce the specific performance of a contract which amounts to a *breach of trust* (*j*).

[(*a*) The form adopted in David., 4th ed. Vol. II. p. 90, and Byth., 4th ed. p. 427, is that in case the sanction of the Court is not obtained before a specified day, the agreement shall be void.]

(*b*) *Downes* v. *Grazebrook*, 3 Mer. 208, *per* Lord Eldon; and see *Matthie* v. *Edwards*, 2 Coll. 480; *Orme* v. *Wright*, 3 Jur. 19; [*Edge* v. *Kavanagh*, 24 L. R. Ir. 1].

(*c*) *Ord* v. *Noel*, 5 Mad. 440, *per* Sir J. Leach; and see *Anon. case*, 6 Mad. 11.

(*d*) *Ord* v. *Noel*, 5 Mad. 440, *per* Sir J. Leach; and see *Harper* v. *Hayes*, 2 Giff. 217.

[(*e*) *Tomlin* v. *Luce*, 41 Ch. D. 573; 43 Ch. D. (C.A.) 191.]

(*f*) See *Pechel* v. *Fowler*, 2 Anst. 550.

(*g*) *Ord* v. *Noel*, 5 Mad. 440, *per* Sir J. Leach; *Turner* v. *Harvey*, Jac. 178, *per* Lord Eldon; *Bridger* v. *Rice*, 1. J. & W. 74; *Mortlock* v. *Buller*, 10 Ves. 292; and see *Hill* v. *Buckley*, 17 Ves. 394; *White* v. *Cuddon*, 8 Cl. & Fin. 766.

(*h*) *Harper* v. *Hayes*, 2 Giff. 210; reversed 2 De G. F. & J. 542.

(*i*) *Selby* v. *Bowie*, 4 Giff. 300.

(*j*) *Wood* v. *Richardson*, 4 Beav. 176, *per* Lord Langdale; *Fuller* v. *Knight*, 6 Beav. 205; *Thompson* v. *Blackstone*, 6 Beav. 470; *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; *Mucholland* v. *Belfast*, 9 Ir. Ch. Rep. 204;

Cestuis que trust may contract conditionally.

4. The usual course is said to be for the *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motives for obtaining the highest possible price, to enter into a conditional contract, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed is the value of the property, sanctions a sale which is beneficial to his *cestuis que trust* (*a*).

Valuation of the property.

5. A trustee for sale must inform himself of the real value of the property, and for that purpose, will, if necessary, employ some experienced person to furnish him with an estimate (*b*). If the property be sold at a grossly inadequate value, it is a breach of trust, which may affect the title in the hands of the purchaser (*c*).

Each trustee responsible for the sale.

6. A trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit the entire administration of their trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted (*d*).

What time allowed for disposing of the estate.

7. The trustees will be allowed a reasonable time for disposing of an estate, and though the instrument creating the trust direct them to sell "*with all convenient speed*," that is no more than is implied by law, and does not render an immediate sale imperative (*e*). On the other hand, if the trust be to sell "at such time and in such manner as the trustees shall think fit," this will not authorise the trustees, as between them and their *cestuis que trust*, to postpone the sale arbitrarily to an indefinite period. The trustees cannot by such postponement vary the relative rights of the tenant for life and remainderman, and so interfere with the settlor's intention (*f*). If trustees for a length of time, as for

Saunders v. *Mackeson*, W. N. 1866, p. 400; [*Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. D. (C.A.) 236; *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. (C.A.) 586. As to sales on depreciatory conditions, *vide post*, p. 516].

(*a*) *Palairet* v. *Carew*, 32 Beav. 568.

(*b*) See *Oliver* v. *Court*, 8 Price, 165; *Campbell* v. *Walker*, 5 Ves. 680; *Conolly* v. *Parsons*, 3 Ves. 628, note; Sugd. Vend. & Purch. 55, 11th ed.

(*c*) *Stevens* v. *Austen*, 7 Jur. N.S. 873; 3 E. & E. 685, 700 [referring to Sugd. V. & P. 13th ed. p. 50].

(*d*) *Oliver* v. *Court*, 8 Price, 166, *per* Lord Chief Baron Richards; *Re Chertsey Market*, 6 Price, 285, *per eundem*.

(*e*) *Buxton* v. *Buxton*, 1 M. & Cr. 80; *Garrett* v. *Noble*, 6 Sim. 504; *Fry* v. *Fry*, 27 Beav. 144; and see *Fitzgerald* v. *Jervoise*, 5 Mad. 25; *Vickers* v. *Scott*, 3 M. & K. 500; *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232; *Turner* v. *Buck*, 18 L. R. Eq. 301; [and see *Re Chapman*, (1896) 2 Ch. (C.A.) 763].

(*f*) See *Walker* v. *Shore*, 19 Ves. 391; *Hawkins* v. *Chappel*, 1 Atk. 623; [and see *Re Smith*, (1896) 1 Ch. 171; *Re Hamilton*, (1896) 2 Ch. (C.A.) 617, 622].

twenty years, neglect without any sufficient reason to sell, they will be answerable for any depreciation, and be decreed to account for interest instead of rents (*a*).

Trust to sell within a limited period.

8. If the trust be "with all convenient speed and *within five years*," to sell the estate and apply the funds in payment of debts, &c., the proviso as to the five years is considered as directory only, and the trustees can sell and make a good title after the lapse of that period. The Court could scarcely impute to the settlor the intention that the sale at the end of the five years should be made by the Court, which would be the case if the power in the trustees were extinguished (*b*).

[*Cestuis que trust* all *sui juris*.]

[9. A trust for sale of real estate is not put an end to by reason of all the persons beneficially interested becoming *sui juris*, for any one of the *cestuis que trust* has a right to insist on the trust being carried out, but if they all agree to take the property as realty, the trust for sale is extinguished (*c*).]

Trustees for sale may not grant leases.

10. In a case where the trustees had endeavoured for some time to sell, and not having succeeded, they agreed to execute a *lease*, the Court on a bill filed by the trustees, to compel specific performance, refused to decree the lease, as the trust for sale did not *primâ facie* imply a power to grant leases (*d*). And so *executors* who are *quasi* trustees for sale, would, under special circumstances only, be justified in granting a lease (*e*); for such an act is not regularly within their province, and it is incumbent on the persons taking a lease from them to show that it was called for by the interests of the parties entitled to the property (*f*). [But trustees for sale of leaseholds in a proper case are at liberty to sell by way of underlease, notwithstanding that, by their so doing, their liability to the lessor may continue (*g*).

[May not give option to purchase.]

11. And executors and administrators equally with trustees cannot bind the trust estate by a proviso in a lease that the lessee shall during the term have an option of purchasing the property at a fixed price (*h*); for it is the duty of the trustees

(*a*) *Fry* v. *Fry*, 27 Beav. 144; *Pattenden* v. *Hobson*, 1 Eq. Rep. 28.

(*b*) *Pearce* v. *Gardner*, 18 Hare, 287; and see *Cuff* v. *Hall*, 1 Jur. N.S. 973; *De la Salle* v. *Moorat*, 11 L. R. Eq. 8; [*Edwards* v. *Edmunds*, 34 L. T. N.S. 522].

[(*c*) *Biggs* v. *Peacock*, 22 Ch. D. (C.A.) 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, (1902) 2 Ch. 296.]

(*d*) *Evans* v. *Jackson*, 8 Sim. 217.

(*e*) *Hackett* v. *M'Namara*, Ll. & G. Rep. *t.* Plunket, 283.

(*f*) *Keating* v. *Keating*, Ll. & G. Rep. *t.* Sugden, 133; [*Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. D. (C.A.) 236].

[(*g*) *Re Judd*, (1906) 1 Ch. (C.A.) 684, overruling *Re Walker and Oakshott's Contract*, (1901) 2 Ch. 383.]

[(*h*) *Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. D. (C.A.) 236; *Clay* v. *Rufford*, 5 De G. & Sm. 768.]

to exercise their discretion at the time of sale as to whether the terms are in the circumstances as then existing beneficial to the *cestuis que trust*. And on the same principle a covenant by a trustee in a lease to renew on the payment of a fixed fine was held to be a breach of trust and not enforceable by the lessee (*a*).]

Trust for sale will not in general authorise a mortgage.

12. A trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorise the trustees to execute a *mortgage* (*b*). But where an estate is devised to trustees, *charged with debts*, and subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell (*c*). [And a trustee and executor of a will containing no direct charge of debts, who is empowered to settle accounts, wind up the testator's affairs, and "make any sales or arrangements" which he judges expedient, can mortgage the real estate to raise money to meet pressing claims (*d*).] "A power of sale out and out," observed Lord St Leonards, "for a purpose or with an object beyond the raising of a particular charge, does not authorise a mortgage: but where it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money" (*e*).

[Implied power to mortgage.]

[Where real and personal property is given to trustees upon trust for sale with a discretion as to the postponement of sale, and with power during postponement, to manage or cultivate, and to make any outlay they consider proper "out of the income or capital," for the renewals of leases, &c., improvements, repairs, or otherwise for the benefit of the estate, the trustees have an implied power to raise money for the purposes specified by mortgage or charge of the unsold real estate (*f*); but trustees empowered to carry on a testator's business, and to "increase or diminish at their discretion the real or personal estate employed

[(*a*) *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63.]

(*b*) *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Page* v. *Cooper*, 16 Beav. 396; *Devaynes* v. *Robinson*, 24 Beav. 86; [*Walker* v. *Southall*, 56 L. T. N.S. 882; W. N. 1887, p. 109].

(*c*) *Ball* v. *Harris*, 4 M. & Cr. 264.

[(*d*) *Re Jones; Dutton* v. *Brookfield*, 59 L. J. Ch. 31; 61 L. T. N.S. 661; 38 W. R. 90; and see *Re Bellinger*, *inf.*]

(*e*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 645; *Page* v. *Cooper*, 16 Beav. 400.

[(*f*) *Re Bellinger*, (1898) 2 Ch. 534.]

therein at his death," have not an implied power to create a mortgage for the discharge of business debts, paramount to an annuity, which is made by the will a first charge on the real and personal estate (*a*).]

Where the power is left to the discretion of the trustees the purchaser cannot question the exercise of the discretion.

13. A testator devised an estate to trustees upon trust to apply the rents for fifteen years in payment of incumbrances charged thereon, and if, for any reason whatever, in the *opinion of the trustees* a sale should become necessary, they were authorised to sell. The purchaser objected that the amount of the incumbrances would not justify a sale of the whole estate, but it was held that the power of sale depended on the opinion of the trustees, and the fact that they thought it necessary would be evidenced by the conveyance (*b*).

A trust to mortgage will not authorise a sale.

14. A trust to raise money by *mortgage* will not authorise a sale, though the latter may be more beneficial to the estate; and the Court itself has no jurisdiction to substitute a sale for a mortgage (*c*).

Powers of sale.

15. It was held by V. C. Kindersley, that in the absence of any special direction, a mere power to *mortgage* does not authorise a mortgage *with a power of sale,* since how can a trustee who has not in himself even any power to sell give authority to another to sell (*d*)? But according to V. C. Malins, a direction to trustees to raise money "by mortgage *in such manner as they may think fit*," authorises a mortgage with a power of sale (*e*), and according to Lord Romilly, M.R., a power to raise money by *sale or mortgage* justifies a mortgage with a power of sale (*f*). There is no doubt a conflict of authority. If a mortgage *per se* does not imply a power of sale, a direction to sell or mortgage will not carry the matter further, for the trustee has no power to delegate his authority to sell, and if the broad general principle be adopted, that the power of sale is an ordinary incident to the mortgage, the logical result would be that a power of mortgaging

[(*a*) *Re Webb; Leedham* v. *Patchett*, 63 L. T. N.S. 545.]

(*b*) *Rendlesham* v. *Meux*, 14 Sim. 249; [and see *Binnie* v. *Broom*, 14 App. Cas. 576, 588, where Lord Watson said, "All that the law requires from a trustee who has power to sell and borrow is that he shall follow the dictates of ordinary prudence in adopting the one course or the other; and the question whether he did or did not act prudently is one of fact which must be solved according to the circumstances of each case"].

(*c*) *Drake* v. *Whitmore*, 5 De G. & Sm. 619; [and see *Re Holloway*, 60 L. T. N.S. 46; 37 W. R. 77].

(*d*) *Clarke* v. *Royal Panopticon*, 4 Drew. 26; but see *Russell* v. *Plaice*, 18 Beav. 21; *Leigh* v. *Lloyd*, 2 De G. J. & S. 330; 35 Beav. 445; *Re Chawner's Will*, 8 L. R. Eq. 569.

(*e*) *Re Chawner's Will*, 8 L. R. Eq. 569.

(*f*) *Bridges* v. *Longman*, 24 Beav. 27; and see *Cook* v. *Dawson*, 29 Beav. 128.

alone authorises a mortgage with a power of sale. Of course where the *Court* has jurisdiction to raise money out of an estate, as for payment of debts, it may either direct a sale, or a mortgage with a power of sale (*a*), and an executor is, for the purposes of paying debts, regarded as the absolute owner, and may therefore either sell or mortgage or give a mortgage with a power of sale (*b*). [Since the Conveyancing and Law of Property Act, 1881 (*c*), mortgagees, where the mortgage is made by deed, have by virtue of the Act a power of sale vested in them; and it is conceived that, as by the 66th section of the Act, a power of sale in the form contained in the Act is in effect declared to be a proper power to be contained in a mortgage deed, it can hardly be contended that a power to mortgage does not now authorise the insertion of a power of sale in the mortgage deed.]

Sale of equity of redemption.

16. If an equity of redemption be vested in trustees for sale with a direction to apply the proceeds in discharge of the *mortgage* and pay the balance to the settlor, the trustees, notwithstanding the direction to discharge the mortgage, may *sell subject to it* (*d*).

A power of sale will not authorise a partition.

17. A power to trustees to *sell* will not authorise a *partition*, and it was long considered doubtful whether a power to *sell and exchange* would do so (*e*), [but it has recently been decided that under the usual power of sale or exchange a partition can be effected (*f*), and this decision is not likely to be disturbed.

Effect of usual power of sale in settlements.

18. Prior to the Settled Land Act, 1882,] in *settlements* of real estate *a power of sale* was usually given to trustees, to be exercised with the consent of the tenant for life, with a direction to lay out the proceeds, with all convenient speed, in another purchase, and in the meantime to invest them upon some proper security. For determining upon what occasions the trustees would be justified in proceeding to a sale, it will be proper to notice, in the words of Lord Eldon, the intention of the settlement in so framing the power:—"The object of the sale," he said, "must be to invest the money in the purchase of another estate, to be settled to the same uses, and the trustees are not to

(*a*) *Selby* v. *Cooling*, 23 Beav. 418.

(*b*) *Cruikshank* v. *Duffin*, 13 L. R. Eq. 555; and see *Earl Vane* v. *Rigden*, 5 L. R. Ch. App. 663; [*Thorne* v. *Thorne*, (1893) 3 Ch. 196].

[(*c*) 44 & 45 Vict. c. 41, ss. 19, 20.]

(*d*) *Manser* v. *Dix*, 8 De G. M. & G. 703.

[(*e*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Attorney-General* v. *Hamilton*, 1 Madd. 214]; *Brassey* v. *Chalmers*, 16 Beav. 223; 4 De G. M. & G. 528; *Bradshaw* v. *Fane*, 2 Jur. N.S. 247; 3 Drew. 534.

[(*f*) *Re Frith and Osborne*, 3 Ch. D. 618, and see *Doe* v. *Spencer*, 2 Exch. 752; *Abel* v. *Heathcote*, 4 Bro. C. C. 278; 2 Ves. 98.]

be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this Court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money" (*a*). Sir W. Grant is said to have concurred in the same sentiments (*b*), so that clearly the trustees as between them and their *cestuis que trust* would not be justified in selling to gratify the caprice or promote the exclusive interest of the tenant for life. It might happen that particular circumstances might call for an immediate sale, as where an extremely advantageous offer is made, or there is a prospect of great deterioration by abstaining from exercising the power; but, generally speaking, the trustees ought not to convert the estate without having another purchase in view, and then not for the mere purpose of conversion, but in the honest exercise of their discretion, for the benefit of all parties claiming under the settlement (*c*). The power of investing the proceeds upon some security in the meantime was not meant to authorise the *continuance* of the property as *money*, but only to meet the exigencies of particular circumstances, as where the trustees are disappointed of the contemplated new purchase, or the state of the title to the new purchase leads to necessary delay.

Effect of the Drainage Acts.

19. It is also to be noticed that where the lands have been charged by the tenant for life under the *Drainage Acts*, and the sale is made subject to the charge, the exercise of the power will confer a benefit on the tenant for life, for *before* the sale he is bound by the Acts to pay not only the interest on the charge, but also part of the principal, but *after* the sale he becomes under the settlement tenant for life of the whole proceeds (*d*).

[At the request and by the direction of tenant for life.]

[20. Where the power of sale was given to the trustees "at the request and by the direction of" the tenant for life, the Court refused to restrain a sale, although no immediate reinvestment was contemplated, being of opinion that the tenant for life had a right to call upon the trustees to sell, and that they had no right to refuse his request (*e*).

[Settled Land Act.]

21. Under the Settled Land Act, 1882, the power of sale is given to the tenant for life, and may be exercised by him without

(*a*) *Mortlock* v. *Buller*, 10 Ves. 308, 309.

(*b*) *Lord Mahon* v. *Earl of Stanhope*, cited 2 Sug. Pow. 412.

(*c*) See *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369; *Watts* v. *Girdlestone*, 6 Beav. 188; *Marshall* v. *Sladden*, 4 De G. & Sm. 468; [*Jaques* v. *Wilson*, W. N. 1880, p. 83].

[(*d*) As to sale in such case by the tenant for life under the Settled Land Acts, see *Re Lord Strafford*, (1896) 1 Ch. 235.]

[(*e*) *Thomas* v. *Williams*, 24 Ch. D. 558.]

reference to any prospective reinvestment of the purchase-money in the purchase of another estate. His power of sale, subject to the giving of certain notices (*a*), may be exercised by him on any grounds which he thinks sufficient, without any liability on his part to justify the grounds, and without any power in the trustees of the settlement or in the Court to interfere so long as the power is honestly and properly exercised (*b*). It must, however, be borne in mind that the tenant for life is under the 53rd section "in relation to the exercise of any power under the Act, to be deemed in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement," and it is conceived that the effect of this is to put the tenant for life in the position of a trustee with a power of sale exercisable in all respects at his absolute discretion, and to make the exercise of the power subject to the control of the Court in all cases in which the tenant for life is influenced by improper motives (*c*).

[Power of sale in settlement not now necessary.]

It is now unnecessary and unadvisable to insert a power of sale in a family settlement of real estate; but the powers arising under the Act, which are sufficient for any ordinary case, should be relied on (*d*).

[Extraordinary Tithe Redemption Act, 1886.]

22. Under the Extraordinary Tithe Redemption Act, 1886, a tenant for life of land subject to an extraordinary charge or a rent-charge under the Act may sell the land or any part thereof, or any land settled to or on the like uses or trusts, and apply the proceeds in or towards redemption of the charge (*e*).

[Sale with consent.]

23. Where trustees were empowered to sell and enfranchise with the consent of the person for the time being entitled as beneficial tenant for life, and the will contained a direction that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession and of the age of twenty-one years, without the previous consent of such person, it was held that the trustees could, during the infancy of a tenant in tail in possession, make a good title under the power (*f*).]

[(*a*) 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.]

[(*b*) *Wheelwright* v. *Walker*, 23 Ch. D. 752.]

[(*c*) As to the control of the Court over the exercise of powers, see *post*, Chap. XXIV. s. 2. See also the observations in *Wheelwright* v. *Walker*, 23 Ch. D. 759, which seem not to give full effect to s. 53 of the Settled Land Act, 1882.]

[(*d*) As to the powers of a tenant for life under the Act, and the effect of the Act generally, see *post*, Chap. XXII.]

[(*e*) 49 & 50 Vict. c. 54, s. 6 (3).]

[(*f*) *Re Sir T. Neave and Chapman and Wren*, 49 L. J. N.S. Ch. 642; 43 L. T. N.S. 152; 28 W. R. 976.]

Sale at request of a party.

Trustees for sale at the *request* and by the *direction* of another party, to be testified in writing, &c., cannot obtain a decree for specific performance without first proving that the contract was entered into at such request and by such direction, and that such request and direction have, either before or since the contract, been testified by the requisite writing (*a*). Nor if trustees have a power of selling or leasing at the *written request* of another, will the Court enforce a contract without such request, though it is alleged that there was part performance by the trustees and by the person whose request was necessary, and that it is therefore a case where a mere *parol* contract is sufficient (*b*).

[Deferred power of sale.]

[24. Where trustees, who had no power of sale until the death of an existing tenant for life, entered into a contract for sale, the purchaser was justified in objecting to the title, and could not be compelled to carry out the sale by entering into a new contract with the tenant for life under the powers of the Settled Land Acts (*c*). And in a similar case where, after the time for completion had expired, and the contract had been repudiated by the purchaser, the trustees offered to procure the concurrence of the beneficiaries, it was held that such offer came too late (*d*); but where the trustee, having no power of sale, had entered into the contract for sale at the written request of the tenant for life and all the other beneficiaries, it was held that he could make a good title (*e*).]

[Concurrence of beneficiaries.]

Trustees for sale of a limited interest in an estate or of an aliquot part of an estate.

25. If an estate be vested in trustees upon trust for A. for life, and *on the decease of A.* to sell, the trustees have no power to sell during the life of A., however beneficial it may be to the parties interested in the trust (*f*). But if an estate be devised to A. for life, and after her decease to trustees upon trust to sell "as soon as conveniently may be after the *testator's* decease," the trustees, with the concurrence of A., can make a good title (*g*); and if the

(*a*) *Adams* v. *Broke*, 1 Y. & C. C. C. 627; *Sykes* v. *Sheard*, 33 Beav. 114; see the decree at the foot of the case; and see *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459.

(*b*) *Phillips* v. *Edwards*, 33 Beav. 440.

[(*c*) *Re Bryant and Barningham's Contract*, 44 Ch. D. (C.A.) 218; but see s. 16 of the Settled Land Act, 1890.]

[(*d*) *Re Head's Trustees and Macdonald*, 45 Ch. D. (C.A.) 311, where Fry, L.J., intimated that if the offer had been made "at an early stage of the proceedings, and if the trustees had been able to show that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown that they would concur in reasonable time," it was by no means clear that the vendors might not have enforced the contract.]

[(*e*) *Re Baker and Selmon's Contract*, (1907) 1 Ch. 238.]

(*f*) *Johnston* v. *Baber*, 8 Beav. 233; *Blacklow* v. *Laws*, 2 Hare, 40; *Mosley* v. *Hide*, 17 Q. B. 91; *Want* v. *Stallibrass*, 8 L. R. Ex. 175.

(*g*) *Mills* v. *Dugmore*, 30 Beav. 104.

tenant for life and the trustees in remainder sell for one entire sum, it has been held that the purchaser will get a good title, and the tenant for life and the trustees may agree amongst themselves how the purchase-money is to be apportioned, or if they cannot agree it will be apportioned by the Court (*a*); [and the same principle was applied where the trustees of a reversion expectant on a lease concurred with the owner of the lease in selling the fee (*b*)]. And generally trustees for sale of any aliquot part of an estate may join in a sale of the whole estate for one entire sum, and the purchase-money, as amongst the respective owners, may be left to be apportioned as before (*c*); [and by sect. 13 of the Trustee Act, 1893 (*d*), where a trust for sale or power of sale created by an instrument coming into operation after the 31st of December, 1881, is vested in trustees, they may, in the absence of the expression of a contrary intention, concur with any other person in selling all or any part of the property]. Where a testator's estate was under administration by the Court, and a house, part of that estate, was put up for sale with another house which was comprised in the testator's marriage settlement, in one lot, and the trustees of the settlement had leave to attend, it was held that as the sale of the entirety was beneficial, a good title could be made, and that the purchase-money could be apportioned in chambers (*e*). But a purchaser cannot be compelled to accept such a title if the separate interests of the *cestuis que trust* in such a joint sale be not brought to the sale with every advantage, or if the nature of the case be such that the purchase-money will not admit of apportionment upon any intelligible principle (*f*).

Trust for sale survives.

26. Where an estate is vested in several trustees upon trust to raise a sum by sale or mortgage, and one of the trustees dies, the survivors or survivor may sell or mortgage, unless there be words in the settlement which expressly declare that the trust shall not be exercised by the *survivors or survivor*, for the execution of a trust is not regarded in the same light as that of a power; but the presumption is that, as the estate, so the discretionary

(*a*) *Clark* v. *Seymour*, 7 Sim. 67; [and see *Re Cooper and Allen's Contract*, 4 Ch. D. 802].

[(*b*) *Morris* v. *Debenham*, 2 Ch. D. 540.]

(*c*) See *M'Carogher* v. *Whieldon*, 34 Beav. 107; [and see *Re Parker and Beech's Contract*, 55 L.J. Ch. 815; 56 Ib. 358].

[(*d*) 56 & 57 Vict. c. 53, replacing s. 35 of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41.]

(*e*) *Cavendish* v. *Cavendish*, 10 L. R. Ch. App. 319. [As to the power of trustees to grant a lease of two estates held upon different trusts, see *Tolson* v. *Sheard*, 5 Ch. D. (C.A.) 19.]

(*f*) *Rede* v. *Okes*, 32 Beav. 555; 10 Jur. N.S. 1246; [4 De G. J. & S. 505. See *Re Cooper and Allen's Contract*, 4 Ch. D. 802].

Though there be a power to appoint new trustees.

part of the trust passes to the survivors or survivor (*a*). The objection is sometimes taken that where there is a power of appointment of new trustees, and one of the trustees has died and a new trustee has not been substituted, the survivor is incompetent to execute a valid conveyance. But though a proviso for appointment of new trustees may certainly be so framed that the execution of the trust should, until a new trustee has been substituted, remain in suspense (*b*), yet the clause, as usually penned in settlements [and as framed in sect. 31 of the Conveyancing and Law of Property Act, 1881, and in sect. 10 of the Trustee Act, 1893, which has been substituted for that section], is considered by the Courts to be merely of a directory character (*c*).

Power of sale in a mortgage.

27. In a *mortgage* to two persons to secure a *joint* advance with a *power of sale* to "them, their heirs and assigns," if one dies, the survivor may sell (*d*); and in a mortgage to A. in fee, with a power of sale to him, "his heirs, executors, administrators or assigns," the administrator of the assign of A., though the legal estate of the lands be not in himself, but in a trustee for him under a conveyance from the heir of the assign, is, together with such trustee, an assign within the meaning of the power, and can therefore sell (*e*). And it does not vitiate the sale, that part of the purchase-money is left on mortgage of the estate, but the mortgagee is answerable for the whole amount to the mortgagor (*f*).

Lord Cranworth's Act.

28. By 23 & 24 Vict. c. 145, as to mortgages *by deed* created since 28th August, 1860, and where the security did not speak to the contrary, any mortgagee, though his security contained no power of sale, might, when the principal sum had been in arrear for twelve months, or the interest for six months, or there had been any default by the mortgagor in insuring, proceed to a sale, after six months' notice, and sign a valid receipt for the purchase-money (*g*). [But this has been repealed as to instruments

(*a*) *Lane* v. *Debenham*, 11 Hare, 188; [*Re Bacon*, (1907) 1 Ch. 475. But as to powers or trusts under instruments subsequent to 31st December, 1881, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22.]

(*b*) See *Foley* v. *Wontner*, 2 J. & W. 246.

(*c*) See *ante*, p. 294.

(*d*) *Hind* v. *Poole*, 1 K. & J. 383.

(*e*) *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

(*f*) *Davey* v. *Durrant*, 1 De G. & J. 535; [*Bettyes* v. *Maynard*, 49 L. T. N.S. 389; reversing *S. C.* 46 L. T. N.S. 766].

(*g*) 23 & 24 Vict. c. 145, ss. 11-16; and s. 35. [An equitable mortgagee in fee, by deed made before 1882, exercising the power of sale conferred by 23 and 24 Vict. c. 145, can, under s. 15 of that Act, convey the legal estate, if it was in the mortgagor at the date of the mortgage; *Re Solomon and Meagher*, 40 Ch. D. 508.]

executed after the 31st of December, 1881, and its place supplied as to such instruments by the Conveyancing and Law of Property Act, 1881, which gives to mortgagees of property generally, whether real or personal, where the mortgage is by deed, and no contrary intention is expressed in the instrument, power to sell the mortgaged property when the mortgage money has become due; but the power is not to be exercised unless and until— [44 & 45 Vict. c. 41.]

(1) Notice requiring payment of the mortgage money has been given, and default made in payment for three months; or

(2) Some interest has been in arrear for two months after becoming due; or

(3) There has been a breach on the part of the mortgagor of some provision, contained in the mortgage deed or in the Act, other than and besides a covenant for payment of the mortgage money or interest thereon (*a*).]

Trustees must show a good title.

29. As a trustee, like any ordinary vendor, is bound to make the purchaser a good title (*b*), it would be prudent before proceeding to the execution of the trust, to take the opinion of counsel whether a good title can be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser, in a suit for specific performance, would have his costs against the trustee (*c*), though the trustee, where his conduct was excusable, might charge them upon the trust estate under the head of expenses.

Timber.

30. If trustees have a *power of sale only*, they cannot sell the estate separate from the *timber* standing upon it, though the tenant for life be without impeachment of waste, and might have cut the timber previously to the sale; and a sale so effected is absolutely void (*d*), unless it be effected subsequently to 13th August, 1859, when it may be confirmed under the provisions of a legislative enactment in that behalf (*e*).

Minerals.

31. It is conceived that no distinction exists between timber and *minerals*, for both until severed form an integral part of the property. And it was accordingly decided that the surface could

[(*a*) 44 & 45 Vict. c. 41, ss. 19, 20, 71.]

(*b*) *White* v. *Foljambe*, 11 Ves. 343, 345, *per* Lord Eldon; and see *M'Donald* v. *Hanson*, 12 Ves. 277.

(*c*) *Edwards* v. *Harvey*, G. Coop. 40.

(*d*) *Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C. nom. Cockerell* v. *Cholmeley*, 10 B. & C. 654; 3 Russ. 565; 1 R. & M. 418; 1 Cl. & Fin. 60.

(*e*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 13. [See David. Conv. Vol. III. p. 295. As to the power of a tenant for life impeachable for waste with the consent of the trustees of the settlement to cut and sell timber under the Settled Land Act, 1882, see s. 35 of that Act, and *post*, Chap. XXII.]

Confirmation of Sales Act, 1862.

not be sold apart from the minerals (*a*). However by 25 & 26 Vict. c. 108, provisions were made authorising such sales in the future with the previous *sanction of the Court of Chancery*, to be obtained on petition (*b*), and for confirming such sales made in the past, [and now under the Trustee Act, 1893 (*c*), sect. 44, as amended by subsequent legislation (*d*), where a trustee or other person (*e*) is, for the time being, authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land; and any such trustee, or other person (*e*), with such sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals; but nothing in the section is to derogate from any power which a

[Sale of land or minerals separately under Trustee Act, 1893.]

(*a*) *Buckley* v. *Howell*, 29 Beav. 546; as to sales under the Settled Estates Act, see *Re Mallin*, 3 Giff. 126; [*Re Milward's Estate*, 6 L. R. Eq. 248]. In settling lands where there are minerals, it has been found convenient to enable the trustees for sale "as to any of the premises under which minerals may lie, to sell the surface apart from the minerals, or to sell the minerals together with, or apart from, the surface, and to grant or reserve such rights of way as in-stroke or out-stroke, and any other easements in, upon, over, or under any of the said premises as may be necessary or desirable for the winning, working, storing, selling, and carrying away of any such minerals." [But see now the Trustee Act, 1893, s. 44, *sup.*]

(*b*) Where the power of sale was in the trustees, with the consent of the tenant for life, it was held that a petition by the trustees must be served on the tenant for life, but not on the remainderman; *Re Pryse's Estate*, 10 L. R. Eq. 531; [*Re Nagle's Trusts*, 6 Ch. D. 104;] and the sanction of the Court being required for the protection of the beneficiaries, they were to be served; *Re Brown's Trust Estate*, 9 Jur. N.S. 349; *Re Palmer's Will*, 13 L. R. Eq. 408; [and a petition by mortgagees was to be served on the mortgagor; see *Re Hirst's Mortgage*, 45 Ch. D. 263. Where trustees had an absolute power of sale, Kay, J., did not require service on the infant beneficiaries, but observed that it might in some cases be expedient to require such service; *Re Wadsworth*, W. N. 1890, p. 143; and see *Re Skinner*, W. N. 1896, p. 68, where service on a beneficiary out of the jurisdiction and known to object to a sale was dispensed with, and an order authorising separate sale of the copyhold interest in surface and minerals made according to the form in *Re Willway*, Seton, 6th ed. pp. 1719, 1750; but see *Re Hardstaff*, W. N. (1899) 256, where Stirling, J., required that the petition should be served on children of the tenant for life entitled in remainder. In *Re Hallowe's Trusts*, (1906) 1 I. R. 526, the Court in Ireland made the order without entering into the question whether the sale by the trustees was beneficial.]

[(*c*) 56 & 57 Vict. c. 53.]

[(*d*) Trustee Act, 1894, (57 & 58 Vict. c. 10) s. 3.]

[(*e*) These words were inserted by the Act of 1894. The like words in the Act of 25 & 26 Vict. c. 108, were held to comprise mortgagees; *Re Beaumont's Mortgage Trusts*, 12 L. R. Eq. 86; *Re Wilkinson's Mortgaged Estates*, 13 L. R. Eq. 634.]

trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

[Sale of land without minerals under Settled Land Act, 1882.]

32. In the case of a sale by the tenant for life under the Settled Land Act, 1882, the sale may be made either of land with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any other land (*a*). During the minority of the tenant for life, or person having the powers of a tenant for life, this power may be exercised by the persons who are trustees of the settlement for the purposes of the Act, if any, and if there are none, then by such persons as the Court may direct (*b*).]

Where the estate is settled the timber cannot be sold separately.

33. If lands be devised to trustees in trust to sell for payment of debts, and, subject to that charge, are given to A. for life *without impeachment of waste*, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds (*c*).

Implied reconversion.

34. If a fund be subject to the ordinary trusts of a marriage settlement, with a power of varying securities and of selling out any part thereof and investing the proceeds on a *purchase of a freehold estate* to be held "upon such trusts as will best and nearest correspond with the trusts thereinbefore declared" of the securities sold out (being trusts for the benefit of the parents and issue), and with a direction that the purchase to be so made shall be "deemed *personal estate* for all the purposes of the settlement, and go accordingly," but *without a general receipt clause*, a trust for *reconversion* is implied, and the trustees can sell and sign a valid receipt (*d*).

[Trustees of personal estate, whose trust authorises them to call in the trust property, and invest the proceeds and vary the investments, have an implied power of sale over real estate covenanted to be settled upon similar trusts (*e*).]

[(*a*) 45 & 46 Vict. c. 38, s. 17.]

[(*b*) 45 & 46 Vict. c. 38, s. 60; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

(*c*) *Davies* v. *Wescombe*, 2 Sim. 425.

(*d*) *Tait* v. *Lathbury*, 35 Beav. 112; and see *Master* v. *De Croismar*, 11 Beav. 184.

[(*e*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

Sale may be by private contract or by auction.

35. The sale may be conducted by *public auction* or *private contract*, as the one or the other mode may be most advantageous according to the circumstances of the case (*a*), and of course it is not an essential preliminary to a sale by private contract that the trustees should have previously attempted a sale by auction, or even have inserted a public advertisement that the property was for sale (*b*). And it was held under the old Insolvent Debtors' Act, 7 Geo. 4. c. 57, sect. 20, directing a sale by *auction*, that the assignees of the insolvent might sell a real estate by *private contract*, after an ineffectual attempt to dispose of it by auction (*c*). And, again, though the subsequent Insolvent Debtors' Act, 1 & 2 Vict. c. 110, sect. 47, directed the assignees of insolvents to sell "in such manner" as the major part, in value, of the creditors should direct, yet in a case where the creditors resolved that there should be a reserved bidding of 325*l*., and the assignees sold by auction for 310*l*., it was held that the clause was merely *directory*, and that the deviation from the resolution of the creditors did not, therefore, vitiate the sale (*d*).

Sale must not be delegated.

36. The trustee cannot without responsibility *delegate* the trust for sale (*e*); but there is no objection to the employment of agents by him, where such a course is comformable to the common usage of business, and the trustee acts as prudently for the *cestuis que trust* as he would have done for himself (*f*). But an agent for sale must not be allowed to receive the purchase-money (*g*); [and an agent should not be employed to do anything out of the ordinary scope of his business (*h*)].

If the sale be by auction, proper advertisements must be given.

37. If the trustee think a sale by *auction* the more eligible mode, he must see that all proper advertisements are made, and due notice given. It was ruled in an old case (*i*) that a *cestui*

(*a*) See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Hurly*, 2 D. & C. 631; *Ex parte Ladbroke*, 1 Mont. & A. 384; *Davey* v. *Durrant*, 1 De G. & J. 535. As to trusts created since 28th Aug. 1860, the legislature has now enacted to this effect, unless the settlement direct to the contrary; 23 & 24 Vict. c. 145, s. 1; [(repealed by Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 64, as to which see *post*, p. 515, note (*f*); Trustee Act, 1893, (56 & 57 Vict. c. 53), s. 13].

(*b*) See *Davey* v. *Durrant*, 1 De G. & J. 535; and see *Harper* v. *Hayes*, 2 Giff. 210; 2 De G. & J. 542.

(*c*) *Mather* v. *Priestman*, 9 Sim. 352.

(*d*) *Wright* v. *Maunder*, 4 Beav. 512; and see *Sidebotham* v. *Barrington*, 4 Beav. 110.

(*e*) *Hardwick* v. *Mynd*, 1 Anst. 109.

(*f*) *Ex parte Belchier*, Amb. 218; [*Re Speight*, 22 Ch. D. (C.A.) 727; 9 App. Cas. 1 (nom. *Speight* v. *Gaunt*);] and see *Ord* v. *Noel*, 5 Mad. 438; *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377; [*Re Gasquoine*, (1894) 1 Ch. (C.A.) 470; *Robinson* v. *Harkin*, (1896) 2 Ch. 415].

[(*g*) As to appointing a solicitor to be agent for the purpose only of receiving the purchase-money, see *post*, p. 529.]

[(*h*) *Fry* v. *Tapson*, 28 Ch. D. 268, 279, 280; and see *ante*, p. 375.]

(*i*) *Pechel* v. *Fowler*, 2 Anst. 549.

que trust could not, by alleging the want of these preliminary steps, obtain an injunction against the sale; for the trustee being personally responsible to the *cestui que trust* for any consequential damage, the Court, it was said, could not regard it as a case of irreparable injury. But in more recent cases an injunction has been granted, it being the clear duty of the trustee to procure for the *cestui que trust* the most advantageous sale (*a*).

[38. By the Trustee Act, 1893, sect. 13, replacing sect. 35 of the Conveyancing and Law of Property Act, 1881, as to trusts or powers created since 31st December, 1881, and unless the settlement otherwise directs, a trustee may sell, or concur in selling, all or any part of the property either subject to prior charges or not (*b*).] [Prior charges.]

39. A trustee may sell subject to any reasonable *conditions of sale* (*c*), but would not be justified in clogging the property with restrictions that were evidently uncalled for by the state of the title (*d*). [Prior to the recent enactments it was] usual, in penning a trust for sale, to give express authority to the trustees to insert *special conditions of sale;* [but] as to trusts created after 28th August, 1860, and where the settlement did not otherwise direct, trustees [were authorised by Lord Cranworth's] Act to insert such *special or other stipulations*, either as to title or evidence of title or otherwise, as they might think fit (*e*). [This enactment has since been repealed (*f*), but its place had been previously supplied by the Conveyancing and Law of Property Act, 1881, sect. 35, now replaced by the Trustee Act, 1893 (*g*), sect. 13, which provides as to trusts for sale and powers of sale created by instruments coming into operation after the 31st day of December, 1881, that a trustee may, unless the instrument creating the trust or power otherwise provides, sell or concur with any other persons in selling, subject to any such conditions respecting title or evidence of title or other matter, as the trustee Conditions of sale.

(*a*) *Anon. case*, 6 Mad. 10; *Blennerhasset* v. *Day*, 2 B. & B. 133. As to restraining a *mortgagee* from selling, see *Matthie* v. *Edwards*, 2 Coll. 465; *S. C.* on appeal, *nomine Jones* v. *Matthie*, 11 Jur. 504; *Jenkins* v. *Jones*, 2 Giff. 99.

[(*b*) 56 & 57 Vict. c. 53.]

(*c*) *Hobson* v. *Bell*, 2 Beav. 17.

(*d*) *Wilkins* v. *Fry*, 2 Rose, 375; *S. C.* 1 Mer. 268; *Rede* v. *Okes*, 4 De G. J. & S. 505; 10 Jur. N.S. 1246; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902; [*Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. (C.A.) 586.]

(*e*) 23 & 24 Vict. c. 145, s. 2.

[(*f*) 45 & 46 Vict. c. 38, s. 64. The repeal is not to affect the operation, effect, or consequence of any instrument executed or made before the commencement of the Act. The section of Lord Cranworth's Act may therefore be called in aid in cases of settlements executed after 28th August, 1860, and prior to 31st December, 1881.]

[(*g*) 56 & 57 Vict. c. 53.]

thinks fit.] But still this would be no warrant for the introduction of stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale; [as, for instance, a condition limiting the commencement of the title to a recent date, where there is no difficulty in giving the earlier title, and no special advantage in withholding it, or a condition making all recitals in the abstracted documents conclusive evidence of the matters recited, or a condition that the property is sold subject to the existing tenancies, restrictive covenants, and other incidents of tenure (if any) when there are no such tenancies or covenants (*a*), but the opinion was expressed that a condition limiting the title to ten years in a case where the land was broken up into small lots, and the condition was inserted for the purpose of saving expense, was reasonable and proper under special circumstances (*b*). And] trustees would, it is conceived, be justified in inserting a condition, now not uncommon, empowering the vendor, if unable, or unwilling, for *reasonable cause*, to remove the purchaser's objection, to cancel the contract. Such a condition may be depreciatory at the sale itself and yet beneficial in its results (*c*); [it is not to be considered as giving an arbitrary right to rescind, but some reasonable ground for recission must be shown (*d*). A trustee for sale of shares is not necessarily precluded from selling part of them upon an agreement by him to vote in a particular way at a forthcoming election of directors (*e*).

[Depreciatory conditions.]

40. Where trustees agreed to sell property subject to conditions of such a nature that the sale could be impeached by the *cestuis que trust*, the Court has declined, at the instance of the trustees, to enforce the contract against the purchaser (*f*); but in future, by virtue of the provisions of the Trustee Act, 1893 (*g*), upon any sale made by a trustee after 24th December, 1888, no purchaser will be at liberty to make any objection against the title upon the ground that the conditions of sale were

[Trustee Act, 1893.]

[(*a*) *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. (C.A.) 586.]

[(*b*) *Dunn* v. *Flood*, 28 Ch. D. (C.A.) 586.]

(*c*) *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352.

[(*d*) *Re Jackson and Haden's Contract*, (1906) 1 Ch. (C.A.) 412; and see *Quinion* v. *Horne* (1906) 1 Ch. 596, where the purchaser asked for evidence that the trust for sale had arisen, and the trustee not having sufficient information proceeded to annul the sale, and it was held that the annulment was unreasonable, and the purchaser was entitled to specific performance.]

[(*e*) *Greenwell* v. *Porter*, (1902) 1 Ch. 530.]

[(*f*) *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. (C.A.) 586; and see Dart. V. & P. 6th ed., pp. 83, 84, 199.]

[(*g*) 56 & 57 Vict. c. 53, s. 14, replacing the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 3, sub-s. 3.]

depreciatory. It is further enacted (*a*) that no sale made after 24th December, 1888, by a trustee "shall be impeached by any beneficiary upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate"; and, in favour of purchasers, there is a further provision (*b*) that after the execution of the conveyance no such sale shall be impeached upon the like ground "unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made."

41. As a tenant for life selling under the powers of the Settled Land Act, 1882, is by sect. 53, in relation to the exercise of the powers, to have the duties and liabilities of a trustee, it is conceived that the same rules with regard to depreciatory conditions apply to him as to any other trustee.] [45 & 46 Vict. c. 38.]

42. There is no rule to prevent the trustees from selling in *lots*, should the auctioneer or other experienced person recommend it as the most advisable course (*c*), and this liberty is now given by express enactment as to trusts created since 28th August, 1860, where the settlement does not direct the contrary (*d*). Selling in lots.

[43. A trustee or mortgagee is justified, on the sale of a property of large value, in allowing the custom of auctioneers to accept a cheque in lieu of cash for the deposit to be acted upon, and will not be held guilty of negligence if the cheque be dishonoured (*e*).] [Cheque for deposit.]

44. *Trustees of bankrupts* cannot *buy in* at the auction without the authority of the creditors, and where the assignees had put up the estate in two lots, and bought them in, and afterwards upon a re-sale there was a gain upon one lot and a loss upon the other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other lot (*f*). Buying in.

[(*a*) S. 14, sub-s. 1. As the difficulty of proving that the price was rendered inadequate would in general be very great, the protection afforded to the trustee seems sufficient.]

[(*b*) S. 14, sub-s. 2.]

(*c*) See Co. Lit. 113*a*; *Ord* v. *Noel*, 5 Mad. 438; *Ex parte Lewis*, 1 Gl. & J. 69.

(*d*) 23 & 24 Vict. c. 145, s. 1. [Repealed by the Settled Land Act, 1882, (45 & 46 Vict. c. 38), s. 64, a similar power having been previously given to trustees under instruments coming into operation after 31st December, 1881, by the Conveyancing Act, 1881, (44 & 45 Vict. c. 41), s. 35, now replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13. As to the effect of the repealing clause, see *ante*, p. 515, note (*f*).]

[(*e*) *Farrer* v. *Lucy Hartland & Co.*, 25 Ch. D. 636; 31 Ch. D. (C.A.) 42.]

(*f*) *Ex parte Lewis*, 1 Gl. & J. 69; and see *Ex parte Buxton*, Id. 355; *Ex parte Baldock*, 2 D. & C. 60; *Ex parte Gover*, 1 De G. 349; *Ex parte Tomkins*, Sugd. V. & P. 815, 14th ed.

It may be thought perhaps that as trustees in bankruptcy act under a statute they have less discretionary power than belongs to ordinary trustees; but in *Taylor* v. *Tabrum* (*a*) the same principle was applied to trustees in the proper sense of the word.

Lord Cranworth's Act.

By 23 & 24 Vict. c. 145, as to trusts created [after 28th August, 1860, and prior to the repeal of the Act,] and where the settlement does not otherwise direct, trustees may sell at one time or at several times, and may *buy in*, or *rescind* a *private contract*, and resell without being responsible (*b*).

[Under the Trustee Act, 1893, as to trusts or powers created since 31st December, 1881, where the settlement does not otherwise direct, trustees may "vary any contract for sale," and may "buy in at any auction, or rescind any contract for sale, and resell without being answerable for any loss" (*c*).]

37 & 38 Vict. c. 78.

45. By the Vendor and Purchaser Act, 1874 (*d*), it is enacted, by the *first* section, that as to any contract "made *after* 31*st December*, 1874, and subject to any stipulation to the contrary, *forty years* shall be substituted as the period of commencement of title which a purchaser may require in place of *sixty years*, the present period of such commencement; nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required."

And the *second* section (as to any contract made *after* 31*st December*, 1874, and subject to any stipulation to the contrary), enacts—

(1) That "under a contract to grant or assign a *term of years*, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold" (*e*).

(2) That recitals, statements and descriptions of facts, matters and parties in instruments twenty years old "shall, unless and except so far as they shall be *proved* to be *inaccurate*, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions" (*f*).

(*a*) 6 Sim. 281; see *Ord* v. *Noel*, 5 Mad. 440; *Conolly* v. *Parsons*, 3 Ves. 628, note.

(*b*) 23 & 24 Vict. c. 145, ss. 1 and 2. [Since repealed see p. 515, note (*f*), and p. 517, note (*d*).]

[(*c*) 56 & 57 Vict. c. 53, s. 13, replacing 44 & 45 Vict. c. 41, s. 35.]

(*d*) 37 & 38 Vict. c. 78.

[(*e*) By s. 8, sub-s. 2 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing s. 4, sub-s. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the benefit of this provision is in effect extended to trustees *lending* upon security of leaseholds, see *ante*, p. 379.]

[(*f*) The fact that a title deed more than twenty years old contains a recital showing that the grantor was

(3) That "the inability of the vendor to furnish the purchaser with a *legal covenant*" for production of documents shall not be an objection to the title, if "the purchaser will, on completion of the contract, have an *equitable right* to the production."

(4) That "such covenants for production as the purchaser can and shall require, shall be furnished at *his* expense, and the *vendor* shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser."

(5) That "where the vendor retains *any part* of an estate to which any documents of title relate, he shall be entitled to *retain* such documents" (*a*).

[By sect. 15 of the Trustee Act, 1893 (*b*), it is enacted that "a trustee who is either a vendor or a purchaser may sell or buy without excluding the operation of sect. 2 of the Vendor and Purchaser Act, 1874."

46. The 3rd section of the Conveyancing and Law of Property Act, 1881, enacts (as to any *sale* made after the 31st December, 1881, and subject to any stipulation to the contrary in the contract of sale)— [44 & 45 Vict. c. 41.]

(1) That "under a contract to *sell and assign* a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the *leasehold* reversion."

(2) That "where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement."

(3) That a purchaser shall not require the production, or any abstract or copy of any document "dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised" by an abstracted instrument, or "require any information

seised in fee, does not preclude a purchaser from requiring a forty years title; *Re Wallis and Grout's Contract*, (1906) 2 Ch. 206; disapproving *Bolton* v. *London School Board*, 7 Ch. D. 766.]

[(*a*) Documents of title showing the extinguishment of an easement, formerly appurtenant to land sold, over a servient tenement retained by the vendor, relate to that tenement within the meaning of the section: *Re Lehmann & Walker's Contract*, (1906) 2 Ch. 646.]

[(*b*) 56 & 57 Vict. c. 53, replacing s. 3 of the Vendor and Purchaser Act, 1874. The express reference to the *second* section has suggested a doubt whether by implication trustees were meant to be excluded from the benefit of the *first* section. It is conceived, however, that no such distinction was intended, and that trustees who buy or sell may take advantage of the general enactment contained in the *first* section.]

[44 & 45 Vict. c. 41.]

or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any document forming part of that prior title are correct, and give all the material contents of the document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, inrolment, or otherwise."

(4) That "where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion."

(5) That "where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date."

(6) That "on the sale of any property, the expenses of the production and inspection of all documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all copies or abstracts of, or extracts from, any documents not in the vendor's possession," if required by a purchaser for any purpose, shall be borne by him (*a*); "and where the vendor

[(*a*) It was held by Pearson, J., that under this section the purchaser must bear the expense of procuring and making an abstract of any deed not in the vendor's possession of which he requires an abstract, even though it

retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

(7) That "on a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense."

And by the 13th section, "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion."

And by the 66th section, trustees and their solicitors are exonerated from all liability for omitting to exclude the application of the above-mentioned stipulations to any contract they may enter into, but nothing in the Act is to make the adoption in connection with any contract of any further or other stipulations improper.]

Clearing the title.

47. Trustees for sale may do all reasonable acts which they are professionally advised are proper for the purpose of clearing the title and completing the sale (*a*).

Succession duty.

48. Trustees for sale who are to stand possessed of the proceeds upon trust for one person for life with remainder to another, can, whether the power of sale be or not exercisable with the consent of the tenant for life or of the successor, *i.e.* the remainderman, give a good title to the purchaser free from *succession duty;* for the duty attaches on the interest of the successor, *i.e.* the money in the hands of the trustees who are responsible, and the sale is by a title which is paramount to the successor's interest; and if the sale is to be by *consent*, the power of selling free from the duty is by the Act not to be thereby prejudiced (*b*). So trustees for

forms part of the title which the vendor is bound to adduce, and the vendor is in a position to compel its production; but this construction of the section was overruled by the Court of Appeal, and it was held that the Act does not relieve the vendor from the obligation to furnish the purchaser with a proper abstract of title, either for the statutory period or for such period as may be agreed upon, but the section proceeds upon the assumption that such an abstract has been furnished; *Re Johnson and Tustin*, 28 Ch. D. 84; 30 Ch. D. (C.A.) 42; and see *Re Duthy and Jesson*, (1898) 1 Ch. 419. But the expense of searching for documents not in the vendor's possession, though required for verifying the root of title itself, must be borne by the purchaser; *Re Stuart and Olivant*, (1896) 2 Ch. (C.A.) 328. Every document forming a link in the vendor's title ought to be abstracted in chief, and not merely by way of recital; *Re Stamford, &c., Banking Co. and Knight's Contract*, (1900) 1 Ch. 287.]

(*a*) *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

(*b*) 16 & 17 Vict. c. 51, ss. 42, 44; see *Harding* v. *Harding*, 2 Giff. 597; *Hobson* v. *Neale*, 8 Exch. 368; *Earl Howe* v. *Earl of Lichfield*, 2 L. R. Ch. App. 155;

sale, who are to stand possessed of the proceeds to pay legacies, can pass the estate free from duty, for the succession duty does not attach where legacy duty is payable (*a*), and the legacy duty is not a charge on the estate, but is payable in respect of the proceeds in the hands of the trustees (*b*).

Hardship.

49. The Court will not enforce a contract against trustees where it presses with extreme *hardship*. Thus, where trustees, not being apprised of the real amount of the incumbrances upon an estate, entered into a personal engagement with the purchaser to clear off all incumbrances, the Court would not compel the trustees to fulfil their contract, but left the parties to law (*c*), and the bill was dismissed without costs (*d*).

Letting into possession.

50. The purchaser, after the contract, should not be let into *possession* of the estate until the completion of the sale by payment of the full purchase-money (*e*).

Of "granting" in the operative part of the conveyance.

51. Formerly, in drawing the conveyance, the word "*grant*" being commonly (though erroneously) supposed to contain a warranty (*f*), the trustee, instead of "granting, bargaining, selling, and releasing," was often, from extra caution, made to "bargain, sell, and release," with the omission of the word "grant" (*g*). And more recently, in order to secure the trustees from the possibility of parting with any interest vested in them beneficially, or from being construed to guarantee anything beyond the powers of their trust, it was not unusual to insert in the operative part of the instrument the words "according to their estate and interest as such trustees." [And now, since the Conveyancing and Law of Property Act, 1881 (*h*), the words "as trustees" are inserted in order that the covenants against incumbrances may be implied in the conveyance.]

Covenants.

52. A trustee cannot be compelled to enter into any other covenant for *title* than against incumbrances by his own acts (*i*).

Dugdale v. *Meadows*, 9 L. R. Eq. 212, affirmed on app. 6 L. R. Ch. App. 501. [See also the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), ss. 12-16.]

(*a*) As to leaseholds, see 16 & 17 Vict. c. 51, ss. 1 & 19.

(*b*) 16 & 17 Vict. c. 51, s. 18. [As to Estate Duty and Settlement Estate Duty, see Finance Act, 1894 (57 & 58 Vict. c. 30); Seton, 6th ed. pp. 1404-1414].

(*c*) *Wedgwood* v. *Adams*, 6 Beav. 600.

(*d*) *S. C.* 8 Beav. 103.

(*e*) *Oliver* v. *Court*, 8 Price, 166, *per* Chief Baron Richards; see *Browell* v. *Reed*, 1 Hare, 434.

(*f*) See Co. Lit. 384*a*, note (1), Hargrave and Butler's edit.

(*g*) See the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4.

[(*h*) 44 & 45 Vict. c. 41, s. 7 (1); see *post*, p. 523.]

(*i*) *White* v. *Foljambe*, 11 Ves. 345, *per* Lord Eldon; *Onslow* v. *Lord Londesborough*, 10 Hare, 74, *per Cur.*; *Worley* v. *Frampton*, 5 Hare, 560; *Stephens* v. *Hotham*, 1 K. & J. 571; and *Page* v. *Broom*, 3 Beav. 36. This is carried to such an extent that, where a lessor grants a lease with a

But it would be prudent in trustees to apprise the public that they sell in that character, that the purchaser may not say he was led to suppose from the advertisements of sale, that the vendors were the beneficial proprietors, and that the contract must, therefore, draw with it the usual incidents, and that the purchaser ought to have the benefit of the ordinary covenants. If the trust for sale is to be exercised with the *consent* [or *at the request*] *of the tenant for life* who joins in a sale, he must enter into the usual covenants for title (*a*).

Mortgagees' covenants.

53. *Mortgagees* with *power of sale* are regarded as trustees, and covenant only against their own acts (*b*). To the extent of their mortgage money they are beneficially interested, not however as owners of the estate, but only as incumbrancers entitled to a charge.

[Conveyancing Act, 1881.]

[54. By the Conveyancing and Law of Property Act, 1881, sect. 7, where, in any conveyance made after the 31st December, 1881, any person conveys, and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, a covenant against incumbrances by such person in the form stated in the Act is to be deemed to be included in the conveyance, and is by virtue of the Act to be implied, but such covenant is not to be implied unless the person so conveying is in the conveyance expressed to convey in one of the above capacities.

The benefit of the covenant so implied is to be annexed to and go with the estate of the implied covenantee. A covenant so implied may be varied or extended by deed.]

Attested copies and covenant for production.

55. It was laid down by Lord Eldon, that *assignees of bankrupts*

covenant for perpetual renewal, devisees in trust for the lessor, though bound to grant a new lease, are not bound to enter into a similar covenant. In these cases the Court has, in order to secure the lessee without making the trustees personally liable, declared the right of the lessee to a perpetual renewal, and directed the new lease to contain a recital of the old lease, and of the declaration of the Court in obedience to which the trustees purport to demise; *Copper Mining Company* v. *Beach*, 13 Beav. 478; *Hodges* v. *Blagrave*, 18 Beav. 405. So, if A. agrees to grant a lease to B. and B. dies, A. can compel the executors of B. to accept the lease, but the lease is so framed that the executors of B. are guarded against all personal liability; *Phillips* v. *Evered*, 5 Sim. 102; *Stephens* v. *Hotham*, 1 K. & J. 571; but in the latter case the V.C. added that if the lease were a *beneficial* lease *claimed* by the *executors*, that would be a different case, and they must enter into full covenants, p. 580; and see *Staines* v. *Morris*, 1 V. & B. 12.

(*a*) *Earl Poulett* v. *Hood*, 5 L. R. Eq. 115; [*Re Sawyer and Baring's Contract*, 53 L. J. N.S. Ch. 1104; 33 W. R. 26; 51 L. T. N.S. 356].

(*b*) Sugd. Vend. & Pur. p. 69, 14th ed.; [Dart. Vend. & Pur. 6th ed., p. 146].

were bound, in case they could not deliver up the title-deeds, to furnish the purchaser with *attested copies* and to *covenant for production* of the originals, the covenant to be confined to the period during which the assignees should continue in office (*a*). And trustees, where they retain the title-deeds, are equally required to give attested copies, and [either to] covenant for production during the period of their own custody, giving at the same time all such right at law or in equity as they lawfully can to call for the production as against the holder for the time being (*b*), [or else to give a statutory acknowledgment under the recent Act]. It is not easy to suggest a case where, upon a sale by trustees, the purchaser would not be entitled in equity (which would be sufficient) to call for the production of the deeds, but should there occur a case where the purchaser would not have such a right, either at law or in equity, he could not be compelled to complete, but might claim to be discharged from his contract and be paid his costs, which would fall upon the trust estate, or the trustees personally, according to the propriety or impropriety of their conduct in proceeding to a sale without guarding themselves by an express condition.

[Statutory acknowledgment.]

[56. Under the Conveyancing and Law of Property Act, 1881 (*c*), sect. 9, the practice has been introduced of giving an acknowledgment in writing of the right of the purchaser to the production of the documents of title, and to delivery of copies thereof, in lieu of the old covenant for production, and with reference to this acknowledgment the following points are noticeable :—

(1) The person who "retains possession of the documents" (by which, apparently, is meant the person who *has* the documents in his possession, or under his control), and he only, can give the statutory acknowledgment.

(2) The acknowledgment binds the documents in the possession or under the control of every person who from time to time has such possession or control, but binds the "individual possessor or person so long only as he has possession or control thereof."

(3) The acknowledgment does not confer any right to damages for loss or destruction of or injury to the documents from whatever cause arising.

(4) The acknowledgment satisfies any liability to give a

(*a*) *Ex parte Stuart*, 2 Rose, 215.

(*b*) See *Onslow* v. *Lord Londesborough*, 10 Hare, 74 ; Sugd. Vend. & Pur. 54, 13th ed. ; 453, 14th ed.

[For two forms of covenant, one suggested by the author of this work, the other stated to be under Lord Eldon's own hand, see the 8th edition of this work, p. 443.]

[(*c*) 44 & 45 Vict. c. 41.]

covenant for production and delivery of copies of or extracts from documents.

The obligations and liabilities arising under the statutory acknowledgment correspond with those which arose under the old qualified covenant for production usually entered into by trustees independently of the Act, and it is conceived that trustees may safely give the acknowledgment for documents in their possession, and that they cannot be required to do more than give this acknowledgment.

57. The same section has introduced the practice of giving an undertaking in writing for safe custody of the documents retained, which "imposes on the person giving it and on every person having possession or control of the documents from time to time, but on each individual possessor or person so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident," and under this, trustees who have the custody of documents as to which a former holder has given the statutory undertaking will be personally liable for their safe custody, but it is conceived that they will, in the absence of neglect on their part, be entitled to be recouped, out of their trust estate, any loss they may suffer in respect of the documents. [Statutory undertaking.]

The undertaking for safe custody involves a personal liability which trustees are not by law bound to take upon themselves, and they should accordingly decline to give the statutory undertaking when retaining the possession of documents (*a*).]

58. In a sale of *leaseholds* by *trustees* who take by *assignment*, they cannot, in any case, require from a purchaser a covenant of indemnity against a breach of the covenants; for, as regards *themselves*, they took the lease by assignment without personally covenanting, and therefore cease to be liable on the assignment over; and, as regards a covenant for the protection of the *settlor*, he has become a stranger by the execution of the trust deed, and the trustees could neither, in the absence of an express stipulation, insist upon a benefit to one with whom there is no existing privity, nor, as they are bound to make the sale the most beneficial to the *cestuis que trust*, could they insert a condition in favour of a stranger which might operate as a discouragement to purchasers (*b*). Sale of leaseholds.

59. The *executor* of a *lessee* upon assigning the term would be Executor of lessee.

[(*a*) See Wolstenholme's Conv. Act, 8th ed., pp. 47-50.]

(*b*) See *Wilkins* v. *Fry*, 1 Mer. 244; *Garratt* v. *Lancefield*, 2 Jur. N.S. 177.

entitled to such a covenant, his testator's estate being liable under the original covenant of his testator.

Practice of the Court.

60. Subject to the effect of the Act to be mentioned presently, where a lessee's estate is in course of distribution under the direction of the Court, a portion of the estate is usually reserved for the purpose of forming an indemnity fund against the covenants of the lease (*a*), unless the risk be inconsiderable (*b*). But no indemnity is provided where the testator's estate is not liable, as where the testator himself was not a *lessee*, but the *assignee* of a lease, and had entered into no covenants (*c*). And if the executor has assented to the bequest unconditionally, he is held to have waived his claim to indemnity (*d*).

Principle of practice.

It is difficult to say upon what principle this practice of the Court is based. In some of the older cases the judges seem to have thought that it was to indemnify the *executor*. But as the distribution of the assets is made by the *Court*, and is *not the act of the executor*, it is impossible to maintain that the executor can be personally liable for the debt. In other cases the fund is said to be set apart out of regard to the interests of the lessor. But if the lessor can prove by way of claim in the suit, why should the Court protect one who will not protect himself? and if he cannot prove in the suit (*e*), it seems anomalous that the Court, while it refuses to hear the lessor on the subject of his interest, should deal with the assets behind his back in respect of such interest. The whole doctrine, said V. C. Kindersley, is in a very unsatisfactory state, and does not seem to be founded on sound principle (*f*).

Lord St Leonards' Act.

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 27, where an *executor* has satisfied all accrued liabilities under a *lease*, and has set apart a fund to answer covenants for expenditure of *fixed sums* on the property (which would not include rents), and assigns the lease to a purchaser, he may distribute the

(*a*) *Cochrane* v. *Robinson*, 11 Sim. 378; *Fletcher* v. *Stevenson*, 3 Hare, 360; *Dobson* v. *Carpenter*, 12 Beav. 370; *Hickling* v. *Boyer*, 3 Mac. & G. 635; *Brewer* v. *Pocock*, 23 Beav. 310.

(*b*) *Dean* v. *Allen*, 20 Beav. 1; *Brewer* v. *Pocock*, 23 Beav. 310; and see *Reilly* v. *Reilly*, 34 Beav. 406.

(*c*) *Garratt* v. *Lancefield*, 2 Jur. N.S. 177. *N.B.*—It may be collected from the judgment that the ordinary covenant to indemnify had not been entered into by the testator on the occasion of the assignment to him.

(*d*) *Shadbolt* v. *Woodfall*, 2 Coll. 30; and see *Smith* v. *Smith*, 1 Dr. & Sm. 384.

(*e*) See *King* v. *Malcott*, 9 Hare, 692; *Re Haytor Granite Company*, 1 L. R. Eq. 11; *Smith* v. *Smith*, 1 Dr. & Sm. 387; [Williams on Exors. 9th ed. pp. 1204, 1205].

(*f*) *Smith* v. *Smith*, 1 Dr. & Sm. 387; [and see *Re Nixon*, (1904) 1 Ch. 638, where it was held that assets will not be set aside to indemnify executors against possible liabilities in respect of leaseholds, unless there is privity of estate between the executors and the lessee].

assets without being personally liable to the lessor, who, however, may still follow the assets in the hands of the recipients.

Practice since the Act.

The practice of the Court for the future has not been settled (*a*), but it is presumed that where a lease is sold under the direction of the Court, and all existing liabilities have been satisfied, and provision made for future fixed sums covenanted to be laid out on the property, the Court will not think it necessary to protect a lessor, who, as the legislature has now pronounced, cannot under such circumstances claim protection out of Court. In other cases the law will remain as it was, and the general principle would appear to be, that the Court should (not by way of indemnity to the executor, except as to costs of resisting proceedings against him, but *ex debito justitiæ* to a *bonâ fide* future creditor) set apart a fund where it plainly appears that future liabilities will arise, and that the whole estate itself is not a sufficient security, and the devisee of the lease cannot give adequate security either by personal undertaking or otherwise. [And in recent cases, both in England (*b*) and in Ireland (*c*), the Court has refused to set aside any part of the assets, or to give the executor any further indemnity than that which arises by reason of the administration of the estate by the Court. But where the estate consists to an appreciable extent of leaseholds, which involve a liability in the executor, he is entitled as of right to have the estate administered by the Court for his protection (*d*).]

Assignment of a *chose in action*.

61. In the assignment of a *chose in action* [not falling within sect. 25 of the Judicature Act, 1873,] the trustee may be required to give a *power of attorney* to receive the money, and to sue in his name, but this should be accompanied by a proviso that no action or suit shall be commenced unless the assignor consent, or unless the assignee tender a sufficient *indemnity* (*e*). [But in the case of an absolute assignment by writing within sect. 25, as the assignee can, by giving notice under the Act, acquire the right to sue at law in his own name for the *chose in action*, it is conceived that a trustee could not be compelled to give such a power of attorney.]

Sale by mortgagee.

62. In a *mortgage* accompanied with a *power of sale*, the

(*a*) *Smith* v. *Smith*, 1 Dr. & Sm. 384. In *Reilly* v. *Reilly*, 34 Beav. 406, the Court after a lapse of eight years, and no claim having been made, distributed the fund which had been set apart for an indemnity.

[(*b*) *Re Bosworth*, 29 W. R. 885; 45 L. T. N.S. 136.]

[(*c*) *Buckley* v. *Nesbitt*, 5 L. R. Ir. 199; *Fitzgerald* v. *Lonergan*, cited 5 L. R. Ir. 203.]

[(*d*) *Re Bosworth*, 45 L. T. N.S. 136.]

(*e*) *Ex parte Little*, 3 Moll. 56.

mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor (*a*); and a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing the necessity of procuring the mortgagor's consent to the sale (*b*).

Whether the *cestuis que trust* should be parties.

63. If the trustees have a power of signing discharges for the purchase-money, the *cestuis que trust* need not be made parties to the conveyance (*c*); but as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are usually made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests (*d*). In sales, however, under the direction of the Court of Chancery, it is the rule *not* to make the *cestuis que trust* parties; for this would involve the necessity of previously inquiring *who* are beneficially interested, and in *what* proportions, whereas it is a common proceeding of the Court to order a sale in the first instance, and leave the rights of the respective parties to be settled by a subsequent adjudication (*e*).

[Trustees having power of sale, whether persons "absolutely entitled" under Lands Clauses Act.]

[64. The question has arisen whether trustees having a power of sale, and enabled by the recent enactments or otherwise to give a complete discharge for purchase-money, are persons "absolutely entitled" within the meaning of the Lands Clauses Consolidation Act, 1845, sect. 69, so as to give the Court jurisdiction to order money in Court, under that Act, to be paid out to such trustees without having their *cestuis que trust* before the Court. The payment has been ordered by the Court in cases where the corporation or company by whom the money has been paid in have consented (*f*). In a recent case the jurisdiction was treated as doubtful by the Court of Appeal (*g*); but in more recent

(*a*) *Corder* v. *Morgan*, 18 Ves. 344; *Clay* v. *Sharpe*, cited Id. 346, note (*b*); *Alexander* v. *Crosbie*, 6 Ir. Eq. Rep. 518.

(*b*) *Corder* v. *Morgan*, 18 Ves. 347, *per* Sir W. Grant.

(*c*) See *Binks* v. *Lord Rokeby*, 2 Mad. 227.

(*d*) See *Re London Bridge Acts*, 13 Sim. 176.

(*e*) *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233, 504; affirmed in D. P. 8 B. P. C. 145; *Colston* v. *Lilley*, 3 May, 1855, V. C. Stuart at chambers; *Wyman* v. *Carter*, 12 L. R. Eq. 309; *Re Williams's Estate*, 5 De G. & Sm. 515; *Cottrell* v. *Cottrell*, 2 L. R. Eq. 330; and see *Loyd* v. *Griffith*, 3 Atk. 264; *Freeland* v. *Pearson*, 7 L. R. Eq. 246.

[(*f*) *Re Hobson's Trusts*, 7 Ch. D. (C.A.) 708; *Re Thomas's Settlement*, W. N. 1882, p. 7; *Re Ward's Estates*, 28 Ch. D. 100, where it was held to make no difference that the trust for sale was at the request of some other person, if that person concurred with the trustees in asking for the payment to them of the money.]

[(*g*) *Re Smith*, 40 Ch. D. (C.A.) 386.]

cases decided in Courts of first instance, the jurisdiction has been upheld (*a*). It is clear, however, that under the Settled Land Act, 1882, sect. 21, which authorises payment of capital money arising under that Act to any person "becoming absolutely entitled or empowered to give an absolute discharge," the Court has a discretion to order such payment; but it cannot be demanded as of right (*b*).

[Receipt of money by solicitor or agent.]

65. Independently of powers recently conferred by statute, and in the absence of special circumstances, trustees were not justified in authorising their solicitor or other agent to receive purchase-money which ought to be paid personally to them (*c*), so that in general, even though a written authority, signed by the trustees and authorising a purchaser to pay the purchase-money to their solicitors, were produced, the purchaser could not be required to act upon it.

[Conveyancing Act, 1881.]

By the 56th section of the Conveyancing and Law of Property Act, 1881 (*d*), it was enacted that "where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." In the case of *Re Bellamy and the Metropolitan Board of Works* (*e*), it was held that this section did not alter or enlarge the powers of trustees as to giving an authority to an agent to receive purchase-money for them, and that, therefore, in the absence of special circumstances justifying trustees in giving such an authority, a purchaser from them could insist upon paying the money to the trustees personally or to their joint account at a bank designated by them. But by sect. 2 of the Trustee Act, 1888 (*f*), which came into operation on 25th December, 1888, the law in this respect was altered, and that enactment

[(*a*) *Re Morgan*, (1900) 2 Ch. 474, Stirling, J.; *Re Mayor of Sheffield*, (1903) 1 Ch. 208, Byrne, J.]

[(*b*) *Re Smith*, 40 Ch. D. (C.A.) 386.]

[(*c*) *Per* Cotton, L.J., in *Re Bellamy and the Metropolitan Board of Works*, 24 Ch. D. (C.A.) 387, at p. 400; but see *ibid.*, p. 397, and *Robertson* v. *Armstrong*, 28 Beav. 123; *Hope* v. *Liddell*, 21 Beav. 202; *Webb* v. *Ledsam*, 1 K. & J. 385; *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56; and see Sugd. V. & P. 14th ed. 667.]

[(*d*) 44 & 45 Vict. c. 41.]

[(*e*) 24 Ch. D. (C.A.) 387; and see *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, 494.]

[(*f*) 51 & 52 Vict. c. 59, s. 2, sub-s. 1.]

[Trustee Act, 1893.]

has now been replaced by sect. 17 of the Trustee Act, 1893 (*a*), which provides that a "trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce (*b*) a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee." The section applies only where the money or valuable consideration or property is received after 24th December, 1888 (*c*).

As this enactment only authorises the appointment of a solicitor as agent, it does not enable trustees to appoint one of themselves to receive purchase-money, and if the money is to be paid to them directly, the purchaser can, it seems, require *all of them* to attend personally to receive it (*d*).

The statutory provision extends only to the receipt of the money and not to the retention of it—it being expressly provided (*e*) that the trustee shall not be exempt from any liability which he would have incurred if the Act had not passed, "in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the solicitor for a period longer than is reasonably necessary to enable the solicitor to pay or transfer the same to the trustee."

Production of the deed pursuant to sect. 56 of the Conveyancing Act is "equivalent to a special authority given to the solicitor to receive the money" (*f*), and it has been intimated that the person producing the deed must be the solicitor acting for the party to whom the money is expressed to be paid (*g*). The solicitor must be appointed, and authorised to produce the deed,

[(*a*) 56 & 57 Vict. c. 53.]

[(*b*) *Semble*, at the time of payment to or receipt by the agent, see *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, 493.]

[(*c*) Sub-s. 4.]

[(*d*) *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; and it is open to question whether even where one of the trustees is himself a solicitor, his appointment as agent to receive the money is authorised by the Act.]

[(*e*) 56 & 57 Vict. c. 53, s. 17, sub-s. 3.]

[(*f*) *Re Bellamy*, 24 Ch. D. (C.A.) 387, 399, *per* Cotton, L.J.]

[(*g*) *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, *per* North, J.; but as to this dictum, and as to the awkward position in which the person to whom the deed is produced might be placed, see observations of Farwell, J., in *King* v. *Smith*, (1900) 2 Ch. 425.]

by the trustee himself, and not by a person acting under a general power of attorney given by the trustee (*a*).

66. By section 17 of the Trustee Act, 1893, it is further enacted (*b*) that "a trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee," but (as under the clause already referred to) the trustee is to be liable in respect of the money in case he permits it to remain in the hands or under the control of the banker or solicitor longer than is reasonably necessary. [Receipt of policy money by trustees.]

67. In cases not falling within the above statutory provisions it is clear that] payment to a solicitor or agent *without* a written or other express authority from the trustees, will be no discharge (*c*). However, if the money has been put into a channel by which it may reach the hands of the vendor, and the vendor by his agent delivers a receipt for it to the purchaser, the vendor cannot afterwards throw the loss of the money on the purchaser (*d*). [In cases not within recent Acts.]

68. When trustees sell by auction, the *auctioneer* is their agent, and the trustees will be answerable if they improperly trusted him, or be guilty of any unnecessary delay in recovering the deposit from him (*e*). Deposit money.

69. Trustees for sale for *payment of debts* are of course bound at any time to answer inquiries by the author of the trust, or the persons claiming under him, as to what estates have been sold and what debts have been paid (*f*). Trustees bound to answer inquiries.

70. When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the *vouchers* as their discharge to the *cestuis que trust;* but the *cestuis que trust* will have a right to the inspection of them (*g*); but not to copies without paying for them. Custody of vouchers.

[(*a*) *Re Hetling and Merton*, (1893) 3 Ch. (C.A.) 269. But a purchaser from trustees who unreasonably requires proof that the solicitor has the permission would probably have to pay for his excess of caution; *S. C. per* Lindley, L. J., at p. 280.]

[(*b*) 56 & 57 Vict. c. 53, s. 17, sub-s. 2.]

(*c*) *Re Fryer*, 3 K. & J. 317; and see *Viney* v. *Chaplin*, 2 De G. & J. 468; [*Ex parte Swinbanks*, 11 Ch. D. 525].

(*d*) *West* v. *Jones*, 1 Sim. N.S. 205; [*Gordon* v. *James*, 30 Ch. D. (C.A.) 249; *Coupe* v. *Collyer*, 62 L. T. N.S. 927; and see *London Freehold and Leasehold Property Company* v. *Suffield*, (1897) 2 Ch. (C.A.) 608].

(*e*) See *Edmonds* v. *Peake*, 7 Beav. 239.

(*f*) *Clarke* v. *Earl of Ormonde*, Jac. 120, *per* Lord Eldon. [As to duty to give information and to observe secrecy under Public Trustee Act, 1906, see *post*, Chap. XXIII.]

(*g*) Ib. *per eundem*. [As to vouchers and documents under Public Trustee Act, 1906, see *post*, Chap. XXIII.]

Land discharged when money raised.

71. The *land* is discharged so soon as the fund has been actually raised, even though the proceeds may be misapplied, and do not reach their proper destination. The remedy of the parties aggrieved is against the trustees personally, without any *lien* upon the estate (*a*). And if a legacy be charged on land (either by the creation of a term or without a term), on the *insufficiency of the personal estate*, and the personal estate was originally sufficient, but becomes insufficient by the *devastavit* of the executor, the land is discharged (*b*) unless the devisees of the land are also the persons by whose default the insufficiency arose (*c*).

Effect of administration suit.

72. The effect of an *administration suit* upon a trust for sale is that the trustees do not lose their powers, but must exercise them under the direction of the Court, and if they have a *legal power* of sale they can execute it with the sanction of the Court for the purpose of passing the legal estate. But the power, though exercised under the eye of the Court, must of course be pursued as strictly as if there were no suit, and though the trustees may be able to pass the legal estate, yet in equity no good title will be conferred as against a *cestui que trust* who was not a party to the suit, or otherwise bound by the exercise of the power. Trustees for sale, with a power of signing receipts, can, if there be no suit, convey the estate, and sign a valid discharge for the purchase-money, but if the *Court*, and not the trustees, sell the estate, the purchaser would not acquire a good title as against any *cestui que trust* who was not a party to the suit, or not bound by the order. These observations must not be taken to interfere with the legal power of an *executor*, even after decree, to deal with the general personal assets of the testator (*d*).

[Conduct of sale by Court.]

[73. If in an administration action, or an action for the execution of the trusts of a written instrument, a sale is ordered of any property vested in any executor, administrator, or trustee, the conduct of the sale is to be given to such executor, administrator, or trustee, unless the Court otherwise directs (*e*).

(*a*) *Anon.* 1 Salk. 153; *Juxon* v. *Brian*, Pr. Ch. 143; *Carter* v. *Barnardiston*, 1 P. W. 505, see 518; *Hutchinson* v. *Massareene*, 2 B. & B. 49; and see *Omerod* v. *Hardman*, 5 Ves. 736; *Dunch* v. *Kent*, 1 Vern. 260; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Harrison* v. *Cage*, 2 Vern. 85; *Hepworth* v. *Hill*, 30 Beav. 476.

(*b*) *Richardson* v. *Morton*, 13 L. R. Eq. 123. But see *contra*, *Re Massey*, 14 Ir. Rep. 355.

(*c*) *Humble* v. *Humble*, 2 Jur. 696; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236; [*Re Bradford's Estate*, (1895) 1 I. R. 251].

(*d*) *Berry* v. *Gibbons*, 8 L. R. Ch. App. 747; [*Re Hoban*, (1896) 1 I. R. 401; and see now as to the real estate of a testator dying on or after 1st January, 1898, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 2].

[(*e*) Rules of the Supreme Court Ord. 50, R. 10. Where there were four trustees, and one, who was also tenant for life, was plaintiff, and the others

Where a sale is ordered by the Court, the Court may authorise the same to be carried out by proceedings altogether out of Court (*a*).] [Sale out of Court.]

SECTION II

THE POWER OF TRUSTEES TO SIGN DISCHARGES FOR THE PURCHASE-MONEY

The power of trustees to sign discharges for the purchase-money resolves itself into two questions:—First: Are the trustees justified in making the *sale* at all? and, Secondly: Supposing the sale itself to be proper, is the purchaser bound to see to the *application* of his purchase-money?

First. Are the trustees justified in proceeding to a sale?

1. If a testator [dying before 1st January, 1898 (*b*),] *devise an estate* to trustees, and direct a sale of it for payment of debts *on the insufficiency of the personal assets*, the trustees *ought* not to dispose of the realty, until it appears that the personal fund is not equal to meet the demands of the creditors. But the point we have here to consider is, how will the *purchaser* be affected, and, as he has no means of investigating the accounts, he is not to be prejudiced should it prove eventually that the personalty is sufficient (*c*). All that could reasonably, and which, perhaps *would* be required of him, is, that he should apply to the executor, where the trustee does not sustain that character, and ask if the necessity for the sale has arisen. However, a purchaser is prevented in such a case from dealing exclusively with the trustee out of Court, where a *suit* has been instituted for the administration of the estate (*d*). And the Court itself cannot make a good title where it has been found in the suit that *all the debts have been paid* (*e*). Trust for sale for payment of debts.

were defendants, the conduct of the sale was given to the three defendant trustees; *Re Gardner*, 48 L. J. N.S. Ch. 644; 41 L. T. N.S. 82.]

[(*a*) Ord. 51, R. 1A (*b*).]

[(*b*) The date of the commencement of the Land Transfer Act, 1897, under the provisions of which the real estate will vest as if it were a chattel real in the personal representatives (s. 1), who are invested with powers of administration accordingly (ss. 2-4).]

(*c*) *Culpepper* v. *Aston*, 2 Ch. Ca. 115, *per* Lord Nottingham; *Keane* v. *Robarts*, 4 Mad. 356, *per* Sir J. Leach; Co. Lit. 290, b, note by Butler, s. 14; *Shaw* v. *Borrer*, 1 Keen, 559; *Greetham* v. *Colton*, 11 Jur. N.S. 848; but see Fearne's P. W. 121.

(*d*) *Culpepper* v. *Aston*, 2 Ch. Ca. 116, 223, *per* Lord Nottingham; and see *Walker* v. *Smalwood*, Amb. 676; and *sup.*

(*e*) *Carlyon* v. *Truscott*, 20 L. R. Eq. 348.

Power of sale on insufficiency of personal estate.

2. But if a testator give not the *estate* but a *power of sale* only to his trustees, and that conditional on the insufficiency of the personal estate, then the purchaser must at his peril ascertain that the power can be exercised (*a*). The difference between a trust and a power is this. In the former case, the trustees, having the legal estate, can transfer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the true state of things, will not allow his title to be impeached. But where there is a power merely, the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist in fact, the power never arose, and the purchaser took nothing by the assumed execution of it.

Case of selling more than the trust requires.

3. A purchaser is not bound to ascertain whether *more* is offered for sale than is sufficient to answer the purposes of the trust: for how is the purchaser to know what exact sum is wanted, without investigating the accounts? And if the sale be by auction, the trustees cannot tell *a priori* what the property will fetch. Besides, the trustees are entitled, as incident to their office, to raise their costs and expenses (*b*).

Pierce *v.* Scott.

4. But where a testator directed on the insufficiency of his personal estate a sale in the first instance of estate A., and, should that not answer the purpose, then of estate B., and the trustees, *fifteen* years after the testator's death, contracted for the sale of B. first, and then filed a bill for specific performance, alleging the existence of debts, and that A. was already in mortgage, or otherwise charged to the full value, the Court, considering it was unlikely that creditors would have lain by for so many years, and that the non-existence of debts might therefore be suspected, and that what was ground for suspicion might be deemed notice to a purchaser, determined against the title (*c*).

Secondly. Supposing the sale to be proper, is the purchaser bound to see to the *application* of his purchase-money?

Lord St Leonards' Act.

We must here advert *in limine* to some important enactments. By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 23 (passed 13th August, 1859), it is declared that "the *bonâ fide* payment to and the receipt of any person to whom any *purchase* or *mortgage* money *shall be payable* upon any *express* or *implied* trust *shall* effectually discharge the person paying the same from seeing to the application or being answerable for the

(*a*) *Culpepper* v. *Aston*, 2 Ch. Ca. 221; *Dike* v. *Ricks*, Cro. Car. 335; *S. C.* Sir W. Jones, 327.

(*b*) *Spalding* v. *Shalmer*, 1 Vern. 301; *Thomas* v. *Townsend*, 16 Jur. 736.

(*c*) *Pierce* v. *Scott*, 1 Y. & C. 257.

misapplication thereof, unless the contrary *shall be* expressly declared by the instrument creating the trust or security." It will be observed, 1. That the Act applies not to all moneys subject to a trust, but only to moneys arising from *sales* and *mortgages* and subject to a trust. 2. That the language of the section, more particularly of the latter part of it, is in the future tense, so that the enactment is not to be retrospective. If future settlors are to have the option of excluding the operation of the Act, it should not affect prior settlements by settlors who had no such option. 3. As regards trusts or mortgages created by instruments since the date of the Act, it would seem that to the extent of sale moneys and mortgage moneys the whole doctrine in equity of seeing to the application of money has been swept away. It cannot be said that where A. is trustee for B. the money is payable to B. and not to A., and that therefore the clause shall not apply, for the doctrine of equity is that the money is *payable* to A., but the purchaser or mortgagee is bound to see it properly *applied* by A.

Lord Cranworth's Act.

By the Act, 23 & 24 Vict. c. 145, sect. 29 (passed 28th August, 1860), it was enacted that "the receipts in writing of any trustees or trustee for *any money* payable to them or him by reason or in exercise of any *trusts* or *powers*" should be good discharges; but by sect. 34, the operation of the Act was expressly confined to instruments executed after the passing of the Act.

[Trustee Act, 1893; receipt of trustee now sufficient under trust whenever created.]

[Sect. 29 of Lord Cranworth's Act was repealed by the Conveyancing and Law of Property Act, 1881 (*a*), and a new provision was substituted for it, but that provision has in its turn been repealed and substantially reproduced by sect. 20 of the Trustee Act, 1893, whereby "the receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power" is made a sufficient discharge, and the section applies to trusts created either before or after the commencement of the Act (*b*).]

As the clauses in [the Acts prior to the Conveyancing and Law of Property Act, 1881, were not retrospective, and questions may still arise on titles as to the validity of receipts by trustees who had no express powers of signing receipts, and the earlier authorities are of importance with reference to the construction

[(*a*) 44 & 45 Vict. c. 41, ss. 36, 71.]

[(*b*) 56 & 57 Vict. c. 53, s. 20. The purchaser must of course satisfy himself that the money is "payable" to the trustee. He would not, it is apprehended, be justified in paying to a bare trustee. Compare *Hockey* v. *Western*, (1898) 1 Ch. (C.A.) 350.]

and application of the recent enactments,] it is necessary to consider generally and apart from legislative enactment the power of trustees for sale to sign receipts.

Principle of requiring a purchaser to see to the application of his purchase-money.

1. As a general rule, if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the true owner. If an estate be vested in A. upon trust to sell, and divide the proceeds between B. and C., in a Court of *law* the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity B. and C., the *cestuis que trust*, are the true proprietors, and A. is merely the instrument for the execution of the settlor's purpose, and the receipt, therefore, to be effectual, must be signed by B. and C. (*a*).

The rule controlled by the intention of the settlor.

2. Such is the *primâ facie* rule in trusts; but in every instance it is liable to be controlled and defeated by an intention to the contrary collected from the instrument creating the trust, whether that intention be *expressed* or *implied*.

Either expressed.

3. The former is the case, if the settlor direct in *express* terms that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase-money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt.

The words in a *power of attorney*, "to sign discharges in the name of the assignor *or otherwise*, and to do all other acts *as the principal might have done*," have been held to carry such a direction (*b*) where not controlled by a subsequent receipt clause tending to negative that intent (*c*). But the receipt clause has not always been liberally construed; as where trustees were entitled to receive a sum of *stock* with a power of varying securities, a receipt signed for *cash* was held to be no discharge, though the Court said that had there been any indication of an intention to exercise the power of varying securities for which cash would be required, the decision might have been different (*d*). It would have been more satisfactory had the Court held that as the trust fund in the hands of the trustees in the shape of cash

(*a*) See *Weatherby* v. *St Giorgio*, 2 Hare, 624. The power of the vendor to sign a discharge for the purchase-money is a question not of *conveyance* but of *title*; *Forbes* v. *Peacock*, 12 Sim. 521.

(*b*) *Binks* v. *Lord Rokeby*, 2 Mad. 227; see 238, 239; *Desborough* v. *Harris*, 5 De G. M. & G. 439. See also further *Ottley* v. *Gray*, 16 L. J. N.S. Ch. 512; *Curton* v. *Jellicoe*, 14 Ir. Ch. Rep. 180.

(*c*) *Brasier* v. *Hudson*, 9 Sim. 1.

(*d*) *Pell* v. *De Winton*, 2 De G. & J. 13.

did not necessarily imply a breach of trust, the receipt was sufficient.

4. In what cases a power of signing receipts is *implied*, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which most of the distinctions taken by the Courts have been founded. Or implied.

5. *First.* In the creation of a trust for *immediate* sale, it is implied that a legal and equitable discharge for the purchase money shall be *signed by some one at the time of the sale.* There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor have contemplated a sale at a time when, as he must have known, the *cestuis que trust*, or some of them, were either not in existence, or not of capacity to execute legal acts (*a*), [or could only be ascertained *in futuro* (*b*)], the intention must be presumed that the receipts of the trustees should be a release to the purchaser. Direction to sell implies power in some one to sign discharges at time of sale.

As to *cestuis que trust* who, *after* the date of the instrument, go *out of the jurisdiction*, or are otherwise incapacitated to concur, the general rule does not apply, for it cannot be said that the settlor *meant* the trustees to sign receipts for them, the presumption being the other way. As to *cestui que trust* out of the jurisdiction.

6. *Secondly.* If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the inference is that the settlor meant to confide the execution of the trust to the hands of the trustee, and not of the purchaser, and that the trustee therefore can sign a receipt (*c*). Where trust is annexed to the purchase-money it is implied that the trustee shall apply it.

An opinion of Mr Booth shows that even in his time regard was had to the nature of the trust in exempting the purchaser from liability. A testator had directed his trustees to sell, and Mr Booth's opinion.

(*a*) *Sowarsby* v. *Lacy*, 4 Mad. 142; *Lavender* v. *Stanton*, 6 Mad. 46; and see *Breedon* v. *Breedon*, 1 R. & M. 413; *Cuthbert* v. *Baker*, Sugd. Vend. & Purch. 842, 843, 11th ed.

(*b*) *Balfour* v. *Welland*, 16 Ves. 151, see 156.

(*c*) *Doran* v. *Wiltshire*, 3 Sw. 699; *Balfour* v. *Welland*, 16 Ves. 157; *Wood* v. *Harman*, 5 Mad. 368; *Locke* v. *Lomas*, 5 De G. & Sm. 326. See *Glynn* v. *Locke*, 3 Dr. & War. 11; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342. In *Cox* v. *Cox*, 1 K. & J. 251, Vice-Chancellor Wood held, that a power of signing receipts was by no means one inserted as of course in legal instruments, but often excluded, and when excluded, was never implied, except under very special circumstances. The question in that case arose upon the construction of a will which gave to the tenant for life the like powers of selling and exchanging as were contained in a settlement referred to, and in which were not only powers of sale and exchange, but also a power of signing receipts, and the Vice-Chancellor was of opinion that the powers of sale and exchange only, without the power of signing receipts, were incorporated by reference.

invest the proceeds upon the trusts thereinafter mentioned, and then gave his wife an annuity of 50*l.* a year for her life, to be paid out of the proceeds, and subject thereto, gave the fund to his son; but in case of his death under twenty-one, to the person entitled to his Taunton lands. Mr Booth wrote, "I am of opinion that all that will be incumbent on the purchaser to see done will be to see that the trustees invest the purchase-money, in their names, in some of the public stocks or funds, or on Government securities, and in such case the purchaser will not be answerable for any misapplication, after such investment of the money, of any moneys which may arise by the dividends or interest, or by disposition of such funds, stocks, or securities, *it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase was carrying on, and therefore the testator must be supposed to place his sole confidence in the trustees*, and this is the settled practice in these cases, and I have often advised so much, and no more, to be done." And in this opinion Mr Wilbraham also concurred (*a*).

Trust to pay debts.

7. To the principle under consideration is referable the well-known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of *debts generally;* for to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers which the purchaser would have no right to require (*b*). And mere absence of statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for payment of debts (*c*). So if the trust be for

(*a*) 2 Cas. and Op. 114.

(*b*) *Forbes* v. *Peacock*, 11 Sim. 152; and see *S. C.* 12 Sim. 528; 1 Ph. 717; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Corser* v. *Cartwright*, 7 L. R. H. L. 731; *Dowling* v. *Hudson*, 17 Beav. 248; *Culpepper* v. *Aston*, 2 Ch. Ca. 223; *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Anon.* Mos. 96; *Hardwick* v. *Mynd*, 1 Anst. 109; *Johnson* v. *Kennett*, 3 M. & K. 630, *per* Lord Lyndhurst; [*Re Rebbeck*, 63 L. J. Ch. 596]; *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Walker* v. *Smalwood*, Id. 677, *per* Lord Camden; *Barker* v. *Duke of Devonshire*, 3 Mer. 310; *Abbot* v. *Gibbs*, 1 Eq. Ca. Ab. 358; *Binks* v. *Rokeby*, 2 Mad. 238, *per* Sir T. Plumer; *Dunch* v. *Kent*, 1 Vern. 260, admitted; *Elliot* v. *Merryman*, Barn. 78; *Smith* v. *Guyon*, 1 B. C. C. 186, and cases cited Ib. note; *Ithell* v. *Beane*, 1 Ves. 215, *per* Lord Hardwicke; *Lloyd* v. *Baldwin*, Ib. 173, *per eundem; Dolton* v. *Hewen*, 6 Mad. 9; *Ex parte Turner*, 9 Mod. 418, *per* Lord Hardwicke; *Gosling* v. *Carter*, 1 Coll. 644; *Eland* v. *Eland*, 1 Beav. 235; *S. C.* 4 M. & Cr. 420; *Jones* v. *Price*, 11 Sim. 557; *Currer* v. *Walkley*, 2 Dick. 649, corrected from Reg. Lib. Sugd. Vend. & Purch. 168, 10th ed.

(*c*) *Corser* v. *Cartwright*, 7 L. R. H. L. 731.

payment of a *particular* debt named, and of the testator's *other* debts (*a*). So if the trust be for payment of debts and *legacies*, the purchaser is equally protected; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the debts, he is necessarily absolved from all liabilities in respect of the legacies (*b*), [even though the money is expressed to be raised for the payment of legacies only (*c*)].

Scheduled debts or legacies.

8. But if the trust be for payment of *particular* or *scheduled debts only* (*d*), or of *legacies only* (*e*), then, as there is no trust to be executed requiring time or discretion, but the purchase-money is simply to be distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase-money finds its way into the proper channel. And the purchaser, where legacies only were charged, continued to be bound to see to the application of his money, though by 3 & 4 W. 4. c. 104, the real estate of all persons deceased since the 29th of August, 1833, was rendered liable, in the hands of the heir or devisee, to the payment of debts generally, whether by specialty or simple contract (*f*).

Administration of Estates Act, 1833.

Where, notwithstanding a charge of debts, the purchaser must see to the application of his money.

9. And even where the estate is subjected by the testator to a trust for payment of debts generally, the purchaser will not be indemnified by the receipt of the trustee if there be any collusion between them (*g*); or if the purchaser have notice from the intrinsic evidence of the transaction that the purchase-money is intended to be misapplied (*h*); or if a suit has been instituted which takes the

(*a*) *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

(*b*) *Rogers* v. *Skillicorne*, Amb. 188; *Smith* v. *Guyon*, 1 B. C. C. 186; *Jebb* v. *Abbot*, and *Beynon* v. *Gollins*, cited Co. Lit. 290 b, note by Butler; *Williamson* v. *Curtis*, 3 B. C. C. 96; *Johnson* v. *Kennett*, 3 M. & K. 630, *per* Lord Lyndhurst; 6 Ves. 654, note (*a*); *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Eland* v. *Eland*, 1 Beav. 235; *S. C.* 4 M. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269. *Forbes* v. *Peacock*, 12 Sim. 528; 1 Ph. 717.

[(*c*) *Re Henson*, (1908) 2 Ch. 356.]

(*d*) *Doran* v. *Wiltshire*, 3 Sw. 701, *per* Lord Thurlow; *Smith* v. *Guyon*, 1 B. C. C. 186, *per eundem*, and cases cited, Ib. note; *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Humble* v. *Bill*, 1 Eq. Ca. Ab. 359, *per* Sir N. Wright; *Anon*, Mos. 96; *Spalding* v. *Shalmer*, 1 Vern. 303, *per* Lord North; *Abbot* v. *Gibbs*, 1 Eq. Ca. Ab. 358; *Elliot* v. *Merryman*, Barn. 81, *per* Sir J. Jekyll; *Binks* v. *Rokeby*, 2 Mad. 238, *per* Sir T. Plumer; *Ithell* v. *Beane*, 1 Ves. 215, *per* Lord Hardwicke; *Lloyd* v. *Baldwin*, 1 Ves. 173, *per eundem*; and see *Dunch* v. *Kent*, 1 Vern. 260; *Culpepper* v. *Aston*, 2 Ch. Ca. 223.

(*e*) *Johnson* v. *Kennett*, 3 M. & K. 630; *Horn* v. *Horn*, 2 S. & S. 448; [*Re Rebbeck*, 63 L. J. Ch. 596].

(*f*) *Horn* v. *Horn*, 2 S. & S. 448.

(*g*) *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Eland* v. *Eland*, 4 M. & Cr. 427, *per* Lord Cottenham.

(*h*) *Watkins* v. *Cheek*, 2 S. & S. 199; *Eland* v. *Eland*, 4 M. & Cr. 427, *per* Lord Cottenham; *Burt* v. *Trueman*, 6 Jur. N.S. 721; and see *Stroughill* v. *Anstey*, 1 De G. M. & G. 648; *Colyer* v. *Finch*, 5 H. L. Ca. 923.

administration of the estate out of the hands of the trustees (*a*); and these doctrines, it is conceived, are not affected by the clauses in Lord St Leonards' and Lord Cranworth's Acts [and the Trustee Act, 1893, above referred to (*b*)], which apply only to *bonâ fide* payments.

Purchase from trustees after a length of time.

10. And if the purchaser is dealing with trustees at a great distance of time, and when the trust ought long since to have been executed, the purchaser is bound to inquire and satisfy himself to a fair and reasonable extent, that the trustees are acting in the discharge of their duty (*c*). In *Sabin* v. *Heape*, where *twenty-seven* years had elapsed, and the beneficiaries subject to the charge had been let into possession, and the purchaser asked if there were any debts and the vendors declined to answer, it was held that the vendors could make a good title (*d*), and Lord Romilly observed that he had known so many cases where, after distribution of the assets, debts had appeared which did not exist at the death of the testator, but which arose subsequently out of obligations entered into by him, that a very liberal term ought to be allowed for the exercise of the power of sale (*e*). [The Court of Appeal has, however, recently expressed an opinion that twenty-seven years is too long a period, and laid down the rule that for a period of twenty years from the testator's death a purchaser should not be bound or entitled to ascertain whether the debts were paid, but that after the lapse of that period it is fair to presume that the debts have been paid, and the purchaser is bound to inquire (*f*), but this rule does not extend to the case of an executor selling leaseholds (*g*).]

Power of signing receipts a question of intention at the date of the instrument.

11. As the exemption of the purchaser from seeing to the application of the purchase-money depends as a general rule upon the settlor's *intention*, the question must be viewed with reference to the date of the instrument, and not as affected by circumstances which have subsequently transpired (*h*). Thus, if a trust be created for payment of debts and legacies, and the trustees, after full payment of the debts, contract for the sale of

(*a*) *Lloyd* v. *Baldwin*, 1 Ves. 173.

[(*b*) See *ante*, p. 535.]

(*c*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 654, *per* Lord St Leonards; and see *Forbes* v. *Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; *Devaynes* v. *Robinson*, 24 Beav. 93; *Sabin* v. *Heape*, 27 Beav. 553; *McNeillie* v. *Acton*, 2 Eq. Rep. 21.

(*d*) 27 Beav. 553.

(*e*) Ib. 560.

[(*f*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465; and see *Re Molyneux and White*, 13 L. R. Ir. 382; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42; and *post*, p. 565.]

[(*g*) *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, (1894) 2 Ch. 101; and as to the real estate of a testator dying on or after 1st January, 1898, see the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2, sub-s. 2.]

(*h*) See *Balfour* v. *Welland*, 16 Ves. 156; *Johnson* v. *Kennett*, 3 M. & K. 631; *Eland* v. *Eland*, 4 M. & Cr. 428.

the estate, the purchaser will not, upon this principle, be bound to see to the application of the money in payment of the legacies (*a*).

12. In *Forbes* v. *Peacock* (*b*), a testator directed his *debts to be paid*, and gave the estate to his wife (whom he appointed his executrix) for life, subject to his debts and certain legacies, and *empowered* her to sell the estate in her lifetime, and *directed* that if it were not sold in her lifetime, it should be *sold at her death*, and the proceeds applied in a manner showing that they were intended to pass through the hands of the *executors*, and the testator requested certain persons to act as executors and *trustees* with his wife. The widow lived twenty-five years, and after her death the surviving executor contracted for the sale of the estate. The Vice-Chancellor of England held that, after so long a lapse of time from the testator's death, the purchaser had a right to ask if the debts had been paid, and if he received no answer, it amounted to notice that they had been paid, and he must see to the application of his purchase-money. The V. C. observed: "When the objection is made by the purchaser that the executors cannot make a good title because all the debts have been paid, *if the question is put by him simply, are there or are there not any debts remaining unpaid, he has a right to an answer*" (*c*). And on a subsequent day he observed: "Here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, *and the executor refused to give him an answer*. Under these circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied" (*d*). Forbes *v.* Peacock.

(*a*) *Johnson* v. *Kennett*, 3 M. & K. 624, reversing *S. C.* 6 Sim. 384; *Eland* v. *Eland*, 4 M. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635.

(*b*) 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 650.

(*c*) 12 Sim. 537; see *Sabin* v. *Heape*, 27 Beav. 553. In the case of *A. Solomon*, vendor, and *F. Davey*, purchaser, under the 9th section of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), V.C. Hall decided that the vendor was bound to answer the purchaser's inquiry, "whether the vendor is or her solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property, not disclosed by the abstract of the vendor's title." But the V. C. added that he "must not be considered as altogether approving of the requisition being made in the form above-mentioned. The answer might lead to the disclosure of what the purchaser would rather not know. The requisition should, he thought, be added to, thus, 'and which if remaining undisclosed might prejudicially affect the purchaser,'" March, 1875. [But this view has since been overruled by the Court of Appeal in the case of *Re Ford and Hill*, 10 Ch. D. (C.A.) 365, where it was held that the purchaser was not entitled to make any such requisition at all.]

(*d*) 12 Sim. 542.

It is evident that this doctrine was not in accordance with former decisions, and the cause was carried on appeal to the Lord Chancellor, when the decision below was reversed (*a*). Lord Lyndhurst said: "If the purchaser had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible. But assuming that the facts relied upon in this case amount to notice that the debts had been paid; yet, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this: If authority is given to sell for the payment of debts and legacies, and the purchaser *knows that the debts are paid*, is he bound to see to the application of the purchase-money? I apprehend not."

Lord St Leonards, with reference to the same important case, observed: "When a testator by his will charges his debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is, by implication, a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* If a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud), be bound to see to the application of the money raised." And his lordship added, "as to *Forbes* v. *Peacock*, it is quite a mistake to suppose that that was a trust executed at a distance of twenty-five years from the time when it arose, for it was executed at the time when it did arise, which happened to be twenty-five years after the death of the testator" (*b*).

Power of varying securities, and of investment.

13. If a trustee have authority to invest the trust fund with a power of *varying securities*, but without an express power of signing receipts, it is implied from the nature of the trust that he shall sign receipts (*c*); and if he be authorised to *invest*

(*a*) 1 Ph. 717; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 653; *Mather* v. *Norton*, 16 Jur. 309; [*Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465].

(*b*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 653, 654.

(*c*) *Locke* v. *Lomas*, 5 De G. & Sm. 326.

on security simply without power of varying securities he can sign receipts, for he cannot prevent the borrower from paying off the money, and who but the trustee can receive it back (*a*). Indeed a power of *investment* has been held to carry with it a power of *varying the securities* (*b*). Where, however, the trustee was directed to invest upon *security*, but *real security* was not mentioned, and he lent upon a *mortgage*, the Court did not think it so clear that the trustee could sign a receipt when the money was paid off, as to compel a purchaser to take a title which depended on that question (*c*). The power of signing a receipt in such cases turns on the intention as collected from the instrument, and unless it contain authority to lend on a *mortgage* no power of signing a receipt when the mortgage money is paid off is implied.

Power of sale and exchange.

14. A power of signing receipts was held not to be implied in a power of sale and exchange (*d*). But in that case it was a mere power of sale and exchange, and not the ordinary power inserted in settlements, accompanied with directions for laying out on another purchase with interim investment on securities.

Charge of debts.

15. The case in which a testator, instead of devising the estate upon an *express trust* for payment of debts, creates a *charge* of debts upon his real estate, seems to require particular examination. It might have been a simple and useful rule to hold under such circumstances that the executor, and the executor only, as the person who has administration of the *personal* assets, should, by virtue of an implied power, sell the real estate for payment of the debts; but no such rule ever existed, and we proceed, therefore, to ascertain, as far as we can, by what principle the Court is guided.

Devise to trustees with a charge of debts.

a. If a testator *charge* his real estate with debts, and then *devises it to trustees* upon certain trusts, which do not provide for a sale, or perhaps even negative the intention of conferring a power of sale, can the *trustees* give a good title to a purchaser? It is clear that [subject to the restrictions arising under the Settled Land Act, 1882, which will be subsequently discussed (*e*),] the trustees and the executor together can sell (*f*), and the

(*a*) *Wood* v. *Harman*, 5 Mad. 368.
(*b*) *Re Cooper's Trust*, W. N. 1873, p. 87.
(*c*) *Hanson* v. *Beverley*, Sugd. Vend. & Purch. 848, 11th ed.
(*d*) *Cox* v. *Cox*, 1 K. & J. 251.
[(*e*) *Post*, pp. 553, 554.]
(*f*) *Shaw* v. *Borrer*, 1 Keen, 559; *Ball* v. *Harris*, 8 Sim. 485; *S. C.* 4 M. & Cr. 264; *Page* v. *Adam*, 4 Beav. 269; and see *Forbes* v. *Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Ph. 717; *Sabin* v. *Heape*, 27 Beav. 553; *Corser* v. *Cartwright*, 7 L.

question is, upon what principle this proceeds. Is the *executor* the vendor, and if so, has he a *legal* power which enables him to pass the estate at law independently of the trustee? V. C. (late L. J.) Knight Bruce seemed, on one occasion, to think that the cases of *Shaw* v. *Borrer* and *Ball* v. *Harris* might have been decided on this footing (*a*), and some recent cases lean in the same direction (*b*). But in the earlier cases the notion of the executor passing the legal estate in such a case was never suggested, and what was said by the Court of Exchequer in *Doe* v. *Hughes* was at least true at the time it was spoken, viz. that not a single case could be produced in which a mere charge had been held to give the executors a legal power (*c*). Have the executors then an *equitable* power, and is the trustee who has the legal estate bound to convey it as the executor directs? This doctrine would be a very rational one, but there is no trace of it in the cases themselves. Apparently they were decided on the familiar principle that in a Court of Equity there is no difference between a charge of debts and a trust for payment of debts (*d*), and that the trustees therefore took the legal estate upon the trusts of the will, the first of which was to pay the testator's debts. It is certainly not a little remarkable that after an examination of all the authorities upon the subject, there does not appear to be one in which the trustee has sold alone, without the concurrence of the executor. This circumstance may be easily accounted for, as trustees of the will are almost invariably appointed executors also, and where that is not the case, the purchaser naturally requires the concurrence of the executor, not on the ground that he is the vendor, but to satisfy the purchaser that the sale of the real estate is *bonâ*

R. H. L. 731. In *Shaw* v. *Borrer*, the trustees and executors were co-plaintiffs, and the prayer of the bill was, that the purchase-money might be paid to the executors. This, if done by the order of the Court, would indemnify the trustees; but it did not follow that the trustees, on the completion of the sale *out of Court*, could have allowed the executors to receive the money. The question to whom the money should be paid was not adverted to in the argument, nor does it appear to whom it was paid.

(*a*) *Gosling* v. *Carter*, 1 Coll. 649.

(*b*) See *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Wrigley* v. *Sykes*, 21 Beav. 337; *Storry* v. *Walsh*, 18 Beav. 568; *Colyer* v. *Finch*, 5 H. L. Ca. 905; *Hodkinson* v. *Quinn*, 1 J. & H. 310; *Greetham* v. *Colton*, 34 Beav. 615.

(*c*) *Doe* v. *Hughes*, 6 Exch. 231. [See *Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465, 476, where it was regarded as settled law, that a charge alone would not enable the executors to pass the legal estate.]

(*d*) *Elliot* v. *Merryman*, Barn. 81; *Ex parte Turner*, 9 Mod. 418; *Jenkins* v. *Hiles*, 6 Ves. 654, note (*a*); *Bailey* v. *Ekins*, 7 Ves. 323; *Ball* v. *Harris*, 4 M. & Cr. 267; *Wood* v. *White*, 4 M. & Cr. 482; *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 197.

fide from the insufficiency of the personal assets. In some of the cases the Court has noticed, but not laid any stress upon, the circumstances of the personal representative concurring (*a*), or of the characters of trustee and personal representative being combined; but in others that fact has been passed over in silence as a mere accident, and the Court has relied on the general doctrine that a trustee of the estate charged with debts could sell, and sign a valid discharge for the purchase-money (*b*). In *Doe* v. *Hughes* (*c*), the case most adverse to the powers arising from the charge of debts, it was admitted that by a devise to *trustees* of the real estate, subject to a charge of debts, the trustees had thereby imposed upon them the duty of raising the money to pay the debts, and this was the opinion of Lord Hardwicke, as expressed in a case which we do not remember to have been cited. In *Ex parte Turner* (*d*), where the estate had been given subject to debts, but no express trust was created for the purpose, he observed: "Where a devise is general 'in trust' or 'subject to pay debts,' the *devisee* may sell or mortgage, but *he* must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer, for in cases of these general devises he is not obliged to see to the application of the money he advances. But even in this case inconveniences often arise, for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally, and *pari passu*. However, if the *trustee* prefer one creditor to another, where he ought not, the remedy usually is against the trustee, and not the lender of the money, for if the latter was to see to the application of his money upon so general a trust, he could not safely advance his money without a decree in this Court."

If the trustees of an estate charged with debts can, by virtue not of the express trust but of the trust implied by the charge, sell the estate and sign a receipt for the purchase-money, it would seem to follow that they cannot allow the proceeds to be paid to

(*a*) See *Shaw* v. *Borrer*, 1 Keen, 559; *Forbes* v. *Peacock*, 12 Sim. 537; and see V. C. Knight Bruce's remarks upon *Shaw* v. *Borrer*, and *Ball* v. *Harris*, in *Gosling* v. *Carter*, 1 Coll. 649. But in *Ball* v. *Harris*, the V. C. of England observed: "It is manifest that *Harris* (the trustee), who had the legal fee, was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate," 8 Sim. 497; and it is equally clear that Lord Cottenham was of opinion that *Harris* was a trustee for payment of debts; 4 M. & Cr. 267.

(*b*) See *Ball* v. *Harris*, at the passages referred to in the preceding note; *Forbes* v. *Peacock*, 12 Sim. 546.

(*c*) 6 Exch. 231.

(*d*) 9 Mod. 418; and see *Colyer* v. *Finch*, 5 H. L. Cas. 922.

the *executor*, as not being the proper hand to receive (*a*), the executor in that character having no privity with the real estate. The necessity of requiring the concurrence of the personal representative would often lead to practical inconvenience, for on the death of the executor intestate there would be no personal representative of the testator, and the personal assets having been exhausted, there would be no fund for taking out letters of administration; not to mention that, should the executor be held to have any concern with the proceeds of the real estate, by virtue of the *will*, the administrator, not being appointed by the will, would not succeed to the power of the executor, which should be borne in mind as of some importance in considering whether the sale is substantially that of the executor, or of the trustee who takes subject to the charge.

Should the neat point ever call for a decision, it will probably be held that the trustee, without the concurrence of the executor, can give a good title (*b*).

Lord St Leonards' Act.

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 14, where, by a will coming into operation after 13th August, 1859, [and before 1st January, 1898 (*c*)], a testator charges real estate with the payment of *debts*, or any *specific legacy* or *sum*, and devises the estate so charged to *trustees* for the whole of his estate or interest, and makes no *express* provision for raising the debts, legacy, or sum, the *devisees in trust* may sell or mortgage; and by sect. 15, the power is continued to all persons taking the estate so charged by survivorship, descent (*d*), or devise; and by sect. 17, purchasers and mortgagees are not bound to inquire whether such powers "have been duly and correctly exercised by the person or persons acting in virtue thereof." Where *debts* are charged, of course a purchaser or mortgagee under these powers is not bound to see to the application of his money, and where a *specific legacy* or *sum* is charged, if the above enactments do not *per se* confer a power of signing receipts, a purchaser or mortgagee from trustees is exempted from seeing to the application by the 23rd section of the same Act (*e*).

(*a*) See *Gosling* v. *Carter*, 1 Coll. 650, where V. C. Knight Bruce says: "If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another."

(*b*) The case of *Hodkinson* v. *Quinn*, 1 J. & H. 303, when closely considered, will be found to afford little aid towards solving this question; and see *Cook* v. *Dawson*, 29 Beav. 126; 3 De G. F. & J. 127.

[(*c*) The commencement of the Land Transfer Act, 1897, as to which see *ante*, pp. 248, 533.]

[(*d*) And s. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), seems to extend this to the legal personal representatives of a sole surviving trustee.]

[(*e*) See also the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20, *ante*, p. 535, replacing 44 & 45 Vict. c. 41, s. 36.]

The 18th section declares that the Act shall "not extend to a devise to any person or persons in fee or in tail (*a*), or for the testator's whole estate and interest, charged with debts or legacies, nor shall it affect the power of any such devisee or devisees to sell or mortgage *as he or they may by law now do.*" To make this section consistent with the 14th, the "devise" referred to in the 18th section must mean a *beneficial devise*, and "devisee or devisees" a *beneficial devisee* or *devisees*, and the inference would seem to be that, in the view of the framer of the Act, no legislative assistance was needed in the case of a beneficial devise subject to a charge. Indeed, the concluding words of the section seem almost tantamount to a declaration of the legislature that beneficial devisees subject to a charge have power to sell or mortgage, which is the case we next proceed to consider (*b*).

Devise to a person beneficially with a charge of debts.

β. If a testator charge his debts and devise the estate subject to the charge to *A. and his heirs* not upon trust but *for his own use*, can the beneficiary in this case make a good title? The answer to the question last discussed is an answer also to this, for if, where the express trust negatives the intention of conferring a power to sell, the trustee can still make a good title, it is evident that he can only do so by virtue of the charge. Any distinction between the two cases would be in favour of the beneficial devisee, for if the trustee in defiance of the express trust can sell, *a fortiori* the devisee can, who is fettered by no such restriction. In both instances the charge operates as a trust for payment of debts, and is attended with all the same consequences. "A charge," said Lord Eldon, "is in substance and effect *pro tanto* a devise of the estate upon trust to pay the debts" (*c*), and "this," observed Lord St Leonards, on citing the dictum, "is supported by the current of authorities" (*d*). It is clear that the devisee can, where he also fills the character of executor, make a good title (*e*), [and give a good receipt to the purchaser, though not expressly purporting to execute the deed as executor (*f*),] and in some of the cases the Court did not in terms rely on the characters being

[(*a*) The expression "devise to any person or persons in fee or in tail" will not include a devise *in futuro*, *e.g.* contingently upon the devisee attaining a particular age: *Re Barrow-in-Furness Corporation*, (1903) 1 Ch. 339.]

[(*b*) See *In re Wilson*, 34 W. R. 512; 54 L. T. N.S. 600.]

(*c*) *Bailey* v. *Ekins*, 7 Ves. 323.

(*d*) *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 198.

(*e*) *Elton* v. *Harrison*, 2 Sw. 276, note; *Elliot* v. *Merryman*, Barn. 78; *Dolton* v. *Young*, 6 Madd. 9; *Johnson* v. *Kennett*, 6 Sim. 384; 3 M. & K. 624; [*Re Rebbeck*, 63 L. J. Ch. 596;] *Eland* v. *Eland*, 1 Beav. 235; 4 M. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269; *Corser* v. *Cartwright*, 8 L. R. Ch. App. 971; affirmed by H. L., 7 L. R. H. L. 731; [*Re Venn and Furze*, (1894) 2 Ch. 101, 112].

[(*f*) *Re Henson*, (1908) 2 Ch. 356.]

combined (*a*), but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen.

In the Court of Exchequer (*b*) it was said that in a devise to *trustees*, subject to a charge of debts, the trustees could sell; but that a charge in the hands of a *devisee*, if the lands were devised, or in the hands of the *heir-at-law*, if the lands descended, was a charge only in equity. The Court was there considering, more particularly, the question of *legal* powers; but if it was intended to be said that a devisee, subject to a charge, could not sell and sign a receipt for the money, the doctrine is inconsistent with the nature of a charge of debts in equity as commonly understood. The prevalent opinion hitherto is believed to have been that a devisee subject to debts can sign a receipt for the purchase-money (*c*), and the cases in which the Court has upheld purchases from a devisee with the concurrence of the executor, but without relying upon such concurrence, would be a trap for purchasers should the Court refuse to uphold a purchase from a devisee only. Considering the declaratory words contained at the end of the 18th section of 22 & 23 Vict. c. 35 (*d*), it may now, it is conceived, be safely assumed that under that Act a purchaser from a devisee subject to a charge of debts, would, without the concurrence of the executor, acquire a good title.

Charge of debts where there is no devise of the estate.

γ. If a testator charge his debts on the real estate, and *does not devise the estate at all*, but allows it to descend to the *heir*, can the heir sell and sign a receipt for the purchase-money? It appears to be clear that he cannot, for he takes nothing under the will, and cannot therefore be regarded as a person constituted by the testator a trustee by implication for payment of debts (*e*); he can pass the legal estate, but he could not sign the receipt; *i.e.* if the heir misapplied the money, the creditors might still come upon the estate.

Whether executor can sell in such a case.

But in this case, if the heir is disabled from selling, can the *executor* sell (*i.e.* independently of the statute of 22 & 23 Vict. to

(*a*) *Elliott* v. *Merryman*, *Dolton* v. *Young*, *Johnson* v. *Kennett*, *Eland* v. *Eland*, *ubi sup.*; *Colyer* v. *Finch*, 5 H. L. Ca. 905, 922.

(*b*) *Doe* v. *Hughes*, 6 Exch. 231.

(*c*) See the cases cited *ante*, p. 544, note (*d*).

[(*d*) See *ante*, p. 547.]

(*e*) See *Gosling* v. *Carter*, 1 Coll. 650 (where the V.C. said that the intention to be collected was, that the heir-at-law should have nothing to do with it); *Robson* v. *Flight*, 34 Beav. 110; 5 N. R. 344; *S. C.* on appeal, 4 De G. J. & S. 608; *Doe* v. *Hughes*, 6 Exch. 231; *Forbes* v. *Peacock*, 11 M. & W. 637, 638; [and under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), the estate will vest in the executor, or in the administrator when appointed].

be mentioned presently), for otherwise the charge of debts amounts to a direction for a Chancery suit? (*a*). The legal question arose in *Doe* v. *Hughes* (*b*) before the Court of Exchequer, and the Court held that *a charge had no operation at law, but must be enforced in equity.* This decision has been found much fault with. The Master of the Rolls said that before the case in the Exchequer he had considered the law to be that a charge of debts gave the *executors* an implied power of sale (*c*); for otherwise, it is argued, in the case of a charge where the estate descends, there can be no sale without the aid of the Court. But this does not appear to follow. If a testator *expressly direct that his estate shall be sold* (without naming the person), and the fund is to be distributed in a way in which the executors alone can distribute it, a power of sale is given to the executors by implication over the legal estate even in Courts of law (*d*). By analogy to this, where there is no direction to sell, but only a charge of debts, this last, though an *umbra* in a Court of law, creates an *equitable* power of sale or mortgage in the view of a Court of Equity—*i.e.* the executor may contract for the sale, and on the acceptance of the title by the purchaser, the person in whom the legal estate is vested will, as being a trustee for the executor, be compellable to convey as the executor directs, and if he refuses, the legal estate may be vested in the purchaser by the aid of the Trustee Acts (*e*). In *Gosling* v. *Carter* (*f*), Vice-Chancellor Knight Bruce declined to give an opinion whether a mere charge of debts gave to the executors a power of sale either at law or in equity, but would not compel a purchaser to take the title from the executor without the concurrence of the heir-at-law. In *Robinson* v. *Lowater* (*g*), the legal estate was already in the purchaser, so that the legal question did not arise, but it was held that the executors had given the purchaser a good title. In *Eidsforth* v. *Armstead* (*h*), Vice-Chancellor Wood professed to

(*a*) See *Robinson* v. *Lowater*, 5 De G. M. & G. 275.

(*b*) 6 Exch. 223.

(*c*) *Robinson* v. *Lowater*, 17 Beav. 601; and see *Wrigley* v. *Sykes*, 21 Beav. 337; *Storry* v. *Walsh*, 18 Beav. 568; *Sabin* v. *Heape*, 27 Beav. 553; *Hodkinson* v. *Quinn*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Greetham* v. *Colton*, 34 Beav. 615; *Hamilton* v. *Buckmaster*, 12 Jur. N.S. 986.

(*d*) *Forbes* v. *Peacock*, 11 M. & W. 630: *Tylden* v. *Hyde*, 2 S. & S. 238; *Bentham* v. *Wiltshire*, 4 Madd. 44.

(*e*) See *Re Wise*, 5 De G. & Sm. 415; *Hodkinson* v. *Quinn*, 1 J. & H. 303.

(*f*) 1 Coll. 650, 652.

(*g*) 17 Beav. 592; 5 De G. M. & G. 272; and see *Storry* v. *Walsh*, 18 Beav. 568.

(*h*) 2 K. & J. 333. It does not appear how the purchaser had got or was to get the legal estate, whether from the executor, as having a legal power, or from the trustee, on the construction that the legal fee simple

follow *Robinson* v. *Lowater*, and held the power of sale to be, according to the report, in the *trustees*, which, however, appears to be a mistake for the *executors*. The surviving trustee had devised the trust estate, and the devisee therefore could not sell, but the surviving trustee was also surviving *executor*, and appointed the devisee his *executor*, and in the character of *executor* the devisee might be thought to represent the original testator, though it seems the better opinion that even then the power of sale would not pass to him (*a*). In *Wrigley* v. *Sykes* (*b*), the Master of the Rolls decided that the executors could contract for the sale of the estate, but guarded himself by saying that the Court, as far as it could, would certainly secure to the purchaser a good legal estate when the conveyance was made. It is conceived that *Doe* v. *Hughes* was a perfectly sound decision upon the legal question, but that the executors have an *equitable power of sale*, and consequently that the holder of the legal estate is a trustee for them (*c*).

[Power of sale not implied in administrator.]

[As the power of sale is implied because the executors are appointed by the testator to pay his debts, there has never been any such implication in the case of an administrator, who is not appointed by the testator, but is the officer of the Probate Court (*d*).]

Lord St Leonards' Act.

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 16, as to wills taking effect since 13th August, 1859, where a testator *charges* his debts or any *legacy* or *specific sum*, and has *not devised* the hereditaments so charged "in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees," the *executor* for the time being may sell or mortgage (*e*); and by the 23rd section, the purchaser or mortgagee is not bound to see to the application of the money, and it would seem that the executor is thus empowered to pass the *legal* as well as the *equitable* estate, for the clause proceeds that

Power of executor to sell and pass legal estate.

vested in the trustee under the will, or from the trustee, as having the legal estate during the life of H. Toulmin, with the concurrence of H. Toulmin, as having the legal estate in remainder, so as to extinguish his power of appointing by will. The case loses much of its force from the amicable manner in which the point was submitted to the Court.

(*a*) See Sugd. Powers, 129, 8th ed.

(*b*) 21 Beav. 337; and see *Colyer* v. *Finch*, 5 H. L. Cas. 922; *Cook* v. *Dawson*, 29 Beav. 123; *Greetham* v. *Colton*, 34 Beav. 615.

[(*c*) See *Re Tangueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465.]

[(*d*) *Re Clay and Tetley*, 16 Ch. D. (C.A.) 3.]

[(*e*) Where one executor has renounced probate, the acting executors or executor for the time being may exercise the powers of this section, notwithstanding the will contains an express direction that the property shall be sold by the executors; *Re Fisher and Haslett*, 13 L. R. Ir. 546.]

"any sale or mortgage under the Act shall operate only on the estate and interest, whether *legal* or equitable, of the testator, and shall not render it unnecessary to get in any *outstanding* subsisting legal estate." It must not escape notice that the power of sale is confined to the *executor*, the person to whom the testator himself trusted, and is not extended to an *administrator* (*a*).

Charge of debts where the estate lapses.

δ. Should a testator charge his debts on the real estate, and then devise the estate to A. and his heirs beneficially, and the *devisee dies in the testator's lifetime*, so that the estate descends, can the heir in this case sell and sign a receipt? If the heir cannot sell where the estate was never devised, but left to descend, *a fortiori* he cannot in this case, for here not only the heir is not invested with the character of trustee under the will, but the estate, subject to the charge, was devised to another person, who was therefore intended to execute the implied trust. The machinery contemplated by the testator failed by the act of God, and no alternative remains but that the trusts should be executed by the Court (*b*). It is presumed that under these circumstances it could not be held that the executors have by the will even an *equitable* power of sale. The devisee, had he lived, would have been the proper person to execute the trust, and a power of sale cannot belong to the executors, as the testator could not be taken to have contemplated his own intestacy as to real estate.

Lord St Leonards' Act.

However, by the Law of Property Amendment Act, 1859, (22 & 23 Vict. c. 35), sects. 16 & 23, as to wills coming into operation since 13th August, 1859, the executor may sell or mortgage and sign a receipt for the money.

Charge of debts where the estate is subjected to various limitations.

ε. Suppose a testator to charge his debts, and to devise the estate to A. *for life with contingent remainders or other limitations*, which render it impossible that the implied power of sale can be executed by the devisees. This has occurred in several cases (*c*), and the result appears to be that the Court, if it can

[(*a*) *Re Clay and Tetley*, 16 Ch. D. (C.A.) 3; as to the effect of the Land Transfer Act, 1897, see *ante*, pp. 248, 533.]

(*b*) But see *Hardwick* v. *Mynd*, 1 Anst. 109; *Austin* v. *Martin*, 29 Beav. 523. The latter case may possibly be supported on the ground that the mortgagee, who had a power of sale and of signing receipts, was a party to the conveyance; but the reasoning of M.R., if correctly reported, is not satisfactory. How can it be said, for instance, that "the whole of the beneficial interest was vested in T. F. Stephens, either in his character of heir-at-law or in his character of *legal personal representative*"? What beneficial interest in a testator's *freehold* estate can vest in his *personal representative*?

(*c*) *Gosling* v. *Carter*, 1 Coll. 644; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Wrigley* v. *Sykes*, 21 Beav. 337;

possibly avoid it, will not construe the charge as a direction for a Chancery suit, but will assume that a power of sale for payment of the debts was given to some one, and that as it was not given to the devisees it must have been intended for the executors. In such a case the executors must be considered as having an *equitable* power of sale. The case in the Exchequer (*a*) directly decided that the executors have no power themselves to pass the *legal* estate. Where, in the case supposed, the executors take an implied equitable power of sale upon the face of the will, it is immaterial whether the devised estates do or not lapse, except that the legal estate will, as the event happens, be in the devisees or in the heir-at-law. If a conveyance cannot be obtained, recourse must be had to the Trustee Acts for the transfer of the legal estate.

Lord St Leonards' Act.

However, the statute of 22 & 23 Vict. c. 35 appears to apply to such a case, for though the devise is not to trustees as required by the 14th section, yet it is a case within the 16th section, where "the whole estate and interest" of the testator "has not become vested in any trustee or trustees"; and it is presumed that the 18th section was meant to except from the Act devises to a person or body of persons taking the *fee-simple or fee-tail in præsenti free from executory limitations over*, and not devises of the fee-simple to several persons in succession for particular estates (*b*).

True principle.

The true principle which, independently of the enactments referred to, ought to govern these cases would appear to be, that where a testator devises the estate to trustees, or to a beneficiary, and charges his debts, there the trustees or the beneficiary should have a power of sale and signing receipts, but that where a testator charges his debts, and does not devise the estate, or devises it in such a manner that there is no one who can execute the trust, there the executors should have an equitable power of sale and signing receipts, and that the depositories of the legal estate should be trustees for them, and bound to convey as they direct; but that where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, there, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the Court.

Bolton v. *Stannard*, 4 Jur. N.S. 576; and see *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Sabin* v. *Heape*, 27 Beav. 553; *Greetham* v. *Colton*, 34 Beav. 615; *Hooper* v. *Strutton*, 12 W. R. 367.

(*a*) *Doe* v. *Hughes*, 6 Exch. 223.

[(*b*) See *Re Barrow-in-Furness Corporation*, (1903) 1 Ch. 339, *ante*, p. 547, note (*a*).]

16. It remains to notice the decision of Sir J. Romilly, M.R., in the case of *Storry* v. *Walsh* (*a*), which appears to show that the devisee, subject to a charge of debts and legacies may, with the concurrence of the *executors* declaring that all debts and legacies have been paid, *sell for his own private purposes*, and give a good title to a purchaser. This case resembles that of an executor, who is also specific or residuary legatee, selling a chattel interest for his own private debt (*b*). Storry *v.* Walsh.

[17. Before quitting this subject it will be proper to advert to the question whether the power of selling or mortgaging the property which arises under the charge of debts is affected by sect. 56 of the Settled Land Act, 1882 (*c*). That Act, after giving to the tenant for life of settled property, amongst other large powers, a general power of sale, and a power of mortgaging for specific purposes, and providing by sect. 56, sub-sect 1, that powers given by the settlement to trustees are not to be prejudicially affected by the Act, enacts in sub-sect. 2, that "the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act," and the question is whether this makes the consent of the tenant for life necessary to the exercise by the trustees of the power of selling or mortgaging which arises under a charge of debts. The power of mortgaging given by the Act of 1882 is now by sect. 11 of the Settled Land Act, 1890 (*d*), which is to be read and construed together with the principal Act, extended to the raising of money for the purpose of discharging incumbrances on the settled land, and under sect. 21 of the principal Act, the proceeds of any sale effected under the general power of selling may be applied in discharging the incumbrances affecting the inheritance of the settled land. The purpose of paying off incumbrances seems to be strictly a "purpose provided for in this Act," and it is difficult, construing the Acts fairly, to avoid the conclusion that the trustees cannot mortgage or sell, without the consent of the tenant for life. The result of this construction of the Acts is without doubt inconvenient, and the view that the power of sale arising under a charge of debts is unaffected by the 56th sect. is supported by weighty opinions (*e*), [Effect of Settled Land Act.]

(*a*) 18 Beav. 559; and see *Howard* v. *Chaffers*, 2 Dr. & Sm. 236.

(*b*) As to receipts of executors, see *post*, p. 560, *et seq.*

[(*c*) 45 & 46 Vict. c. 38.]

[(*d*) 53 & 54 Vict. c. 69.]

[(*e*) See Wolstenholme and Turner's Settled Land Act, 7th ed. p. 367; 8th ed. p. 387.]

but until that view has received the sanction of the Court, a purchaser could not be safely advised to accept a title from the trustees without the consent of the tenant for life (*a*).]

Who must sign the receipt.

18. As the trust for sale is a joint office, the receipt must be signed by *all the trustees* who have undertaken to act. And where a *power* is given to trustees to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law carries not along with it the confidence in equity (*b*). But the receipt need not be signed by a trustee who has *disclaimed*, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned (*c*).

Power to sign receipts in one, and delegation to another.

19. As a trust cannot be *delegated*, it follows that if A. & B. be trustees for payment of debts, and they convey the estate to C. upon the like trusts, the purchaser could not safely pay his purchase-money upon the receipt of C. In *Hardwick* v. *Mynd* (*d*), the executors and trustees renounced probate, and (probably with the intention of disclaiming) conveyed the estate to C., the heir-at-law; and certain mortgages made by C. were upheld. It might have been argued that as the trustees, by disclaiming, vested the estate in the heir, he was properly the trustee to sell or mortgage. It would be difficult, however, to maintain that the heir under such circumstances could sign a receipt, and certainly the Court did not put it upon that ground, but said that the mortgages, if made by the trustees, would have been good, and that they were in fact made by them, as they had deputed C. to act for them in the trust. Such a doctrine, however, at the present day could not be sustained.

Power of signing receipts, as regards trustees appointed by the Court.

20. As a general rule, where a special *discretionary* or *arbitrary* power was given to trustees, and the settlement contained no proviso for the appointment of new trustees with similar powers, it was not competent for the *Court*, [prior to the recent Acts,] on the substitution of new trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. But in a trust for sale an authority to sign receipts is not a mere power, but enters into the substance of the trust; that is, it is so interwoven

[(*a*) As to the meaning of the term "tenant for life," and the limited owners who have the powers of a tenant for life, see ss. 2, 58, and 62; and see also *post*, Chap. XXIV. s. 2, v.]

(*b*) *Crewe* v. *Dicken*, 4 Ves. 97.

(*c*) *Adams* v. *Taunton*, 5 Mad. 435; *Hawkins* v. *Kemp*, 3 East, 410; *Smith* v. *Wheeler*, 1 Vent. 128.

(*d*) 1 Anst. 109; and see *Lord Braybroke* v. *Inskip*, 8 Ves. 432.

with the trust itself that there can be no execution of the trust without the accession of the power; and in such cases the appointment of new trustees by the Court may be taken to have included the power. Thus, suppose A. and B. are trustees of an estate to sell for payment of debts, and on the death of A. and B. the Court appoints C. and D. upon the like trusts; if C. and D. cannot sign receipts, they cannot sell, and their appointment as trustees is nugatory (*a*). [But now, by recent Acts (*b*), trustees appointed by the Court have "the same powers, authorities, and discretions, and may in all respects act" as if originally appointed by the instrument creating the trust.]

Receipt after a breach of trust.

21. It sometimes happens that the trustees *had* clearly at first a power of signing receipts, but subsequently, by a *breach of trust* or some irregularity in the administration of the estate, the fund has got out of its proper channel, and then the question arises whether, if the person who ought never to have had possession of the fund intend to restore it to its proper state, the trustees can sign a receipt. It may be said that as the power never contemplated a breach of trust, it would not be safe to consider the exercise of the power as an indemnity, if the money cannot be properly paid to the trustees upon any other ground: on the other hand, if the fund be reinstated *in specie*, so that it is standing in the exact form in which the trust required it, and in the names of the persons whom the settlement appointed the trustees, how can it be said that in such a state of things any liability can remain? (*c*).

Re-sale of unauthorised investment in real estate.

22. It not unfrequently happens that trustees without any sufficient power lay out trust money in the purchase of real estate, and then the question arises when they want to sell again whether they can make a good title (*d*). [In a recent

(*a*) See *Drayson* v. *Pocock*, 4 Sim. 283; *Byam* v. *Byam*, 19 Beav. 58; *Bartley* v. *Bartley*, 3 Drew. 385; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98. As to the powers generally of trustees appointed by the Court, see *post*, Chap. XXIV. s. 2.

[(*b*) 23 & 24 Vict. c. 145, s. 27; since repealed and its place supplied by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 37, reproducing 44 & 45 Vict. c. 41, s. 33; and see *post*, Chap. XXIV. s. 2.]

(*c*) See *Lander* v. *Weston*, 3 Drew. 389; *Hanson* v. *Beverley*, Sugd. Vend. & Purch. 848, 11th ed. In *Carver* v. *Richards*, A. & B. were trustees of Mrs Warren's settlement, dated 31st May, 1825, which contained a power of investing the trust fund on a mortgage of lands of *inheritance in fee simple*, with the usual receipt clause. On 27th July, 1826, the trustees invested 1200*l.* on a mortgage of a *term of* 500 *years*. On 23rd November, 1844, the owner of the fee subject to the term paid the 1200*l.* to A. & B., who assigned the term to attend, and the receipt of A. & B., notwithstanding the breach of trust, was held to be sufficient; M.R., 10th December, 1859. The defendants appealed from the decree upon other points, and also included this, but wanted the courage to argue it at the hearing.

(*d*) The case may be provided for

case where trustees had, without any power so to do, purchased land and had it conveyed to them upon the trusts of the settlement, and afterwards resold it for a much larger sum than they gave, it was held that upon the purchase-money being invested by the trustees on the securities authorised by the trust, and on one of the *cestuis que trust* concurring in the sale to show that they had not all elected to take the real estate as realty, the purchasers would have a good title from the trustees (*a*); and this has since been followed (*b*).]

Sale where no money is to be received by the trustees.

23. Where the trust estate is *in mortgage*, and the money receivable by the trustees is applicable either wholly or in part in payment of the mortgage, of course the trustees may sell and sign a receipt for the difference, or, if there be no surplus beyond the mortgage, may sell without signing any receipt.

Hope *v.* Liddell.

24. Where the trustees have a power of signing receipts, it was held not to be necessary that the trustees who signed the receipts, should themselves actually receive the money, provided it was paid to some person by their direction, and the transaction did not on the face of it imply a breach of trust (*c*). Thus, where the purchase-money was expressed in the deed to be paid to the trustee, and a receipt by the trustee was endorsed, but in fact the money was paid, by the direction of the trustee, to the tenant for life, Lord Romilly, M.R., said that the purchaser was bound to pay the money as the trustee directed (*d*), and having obeyed that direction was exonerated from the consequences. Various transactions might have occurred between the trustee and *cestuis que trust* (such as the execution of a previous mortgage on sufficient security), which would make such a payment perfectly legitimate (*e*). The Court in this case was protecting a *bonâ fide*

by a special condition of sale, or the sanction of the Court may be obtained in a suit for the purpose; see *Robinson* v. *Robinson*, 10 Ir. Rep. Eq. 189.

[(*a*) *Re Patten and Guardians of the Edmonton Union*, 52 L. J. N.S. Ch. 787; 48 L. T. N.S. 870; 31 W. R. 785.]

[(*b*) *Power* v. *Banks*, (1901) 2 Ch. 487, 496; *Re Jenkins and Randall*, (1903) 2 Ch. 362.]

[(*c*) In *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, Kay, J., seems to have been of opinion that such a transaction necessarily implied a breach of trust; but see *ante*, p. 325. However, in the present state of the authorities no trustee can be advised to allow his co-trustee to *receive* trust money unless the circumstances of the case render it *necessary*.]

[(*d*) But see as to this *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. (C.A.) 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, where it was held that the purchaser could not be compelled to pay to the nominee of the trustees, or even to one of the trustees by the direction of the others, and see *ante*, p. 529.]

(*e*) *Hope* v. *Liddell*, 21 Beav. 202-3; and see *Locke* v. *Lomas*, 5 De G. & Sm. 326; *M'Carogher* v. *Whieldon*, 34 Beav. 107; [*Ferrier* v. *Ferrier*, 11 L. R. Ir. 56;] but see *Pell* v. *De Winton*, 2 De G. & J. 13.

purchaser, and the principle here laid down must be applied with great caution. A purchaser who has paid his money to another by the direction of the trustee may be protected under the special circumstances of the case, but no purchaser who has the money still in his pocket can be advised to pay it to any other than the trustee or his solicitor duly authorised to act as his agent (*a*) [under the provisions of sect. 17 of the Trustee Act, 1893, already referred to (*b*)].

Receipts for money extraneous to trust.

25. A power of signing receipts in a settlement will extend only to what the trustees are by the settlement authorised to receive (*c*).

Feme covert.

26. When one of the trustees is a *married woman*, [to whom the provisions of the Married Women's Property Act, 1882 (*d*), are not applicable], the questions arise, can she by virtue of the power sign a receipt without the concurrence of her husband, who is answerable for her acts; and ought the money to be paid to herself, or to her husband who on the one hand is answerable for her acts, but on the other hand is not the person pointed out by the settlement as the hand to receive it? It would appear on principle that the money cannot be paid to the husband, who is a stranger, and the safest course would be to pay the money into some responsible bank in the joint names of the trustees (excluding the husband), and to take a written receipt from the trustees, to be also signed by the husband as sanctioning the receipt by the wife (*e*). [The concurrence of the husband may, however, be dispensed with if he has abjured the realm or is an outlaw (*f*), and where a married woman who is a trustee sues under Order 16, Rule 16, without her husband, she can give a good discharge for the money recovered under the judgment without his concurrence (*g*). And where the marriage has taken place since the 31st December, 1882, or the trust has been undertaken by the married woman since that date, she can sign a receipt for the money, without the concurrence of her husband, who is not to be answerable for her acts unless he has intermeddled in the trust (*h*).]

[(*a*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. (C.A.) 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; *Re Hetling and Merton*, (1893) 3 Ch. (C.A.) 269; and] see *Re Fishbourne*, 9 Ir. Eq. Rep. 340; and *ante*, pp. 529, 530.

[(*b*) See *ante*, p. 530.]

(*c*) *Pell* v. *De Winton*, 2 De G. & J. 20, *per Cur.*

[(*d*) 45 & 46 Vict. c. 75.]

[(*e*) See *Kingsman* v. *Kingsman*, 6 Q. B. D. (C.A.) 122, 128, 131.]

[(*f*) Per Lord Selborne, L.C., *Kingsman* v. *Kingsman*, 6 Q. B. D. (C.A.) 122, 128.]

[(*g*) *Kingsman* v. *Kingsman*, *ubi sup.*]

[(*h*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 24; see *ante*, p. 35.]

Solicitor receiving purchase-money.

27. If the trustees of an estate, bound by a contract for sale of a date prior to the trust deed, execute a conveyance to the purchaser, and sign a receipt endorsed, and leave the deed in the hands of the solicitor of the settlor, who had contracted to sell, and the solicitor completes the sale, and receives the purchase-money and misapplies it, the trustees are personally liable to the *cestuis que trust*, as having improperly enabled the solicitor of a third person to get possession of the fund (*a*).

Practical directions where no power to sign receipts.

28. The following observations of Lord St Leonards upon the subject of trustees' receipts deserve every attention. "Where," he says, "a purchaser is bound to see the money applied according to the trust, and the trust is for payment of *debts* or *legacies*, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one; or if the creditors or legatees are but few, they may be made parties to the conveyance. Another mode by which the purchaser may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into Court; and this is the surest mode, because the money will not be paid out of Court without the knowledge of the purchaser" (*b*).

Principle suggested.

29. From the preceding discussion the fundamental principle may be collected, that (where no Act of Parliament applies (*c*)) *a purchaser is in all cases bound to see to the application of his purchase-money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust.* Such indeed is the conclusion to which the authorities conduct us; but, independently of precedent, it might be suggested that the better principle would be, that *primâ facie, a direction to sell should imply in all cases a power of signing discharges; but that where it was practicable,*

(*a*) *Ghost* v. *Waller*, 9 Beav. 497; and see *Wood* v. *Weightman*, 13 L. R. Eq. 434; *West* v. *Jones*, 1 Sim. N.S. 205; [but see now the Trustee Act, 1893, (56 & 57 Vict. c. 53), s. 17, *ante*, p. 530].

(*b*) Vend. & Purch. 848, 11th edit.

(*c*) See 22 & 23 Vict. c. 35, s. 23; 23 & 24 Vict. c. 145, s. 29; [Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 36; replaced by Trustee Act, 1893, (56 & 57 Vict. c. 53), s. 20, *ante*, p. 535].

and no impediment to the execution of the trust was thereby created, the purchaser should pay his money directly to the party beneficially entitled. The distinction between the two principles is very material. According to the former rule, if a trust be created for payment of debts and legacies, and the debts be paid, and then the trustees sell, though the purchaser has notice of all debts having been discharged, he is, nevertheless, not bound to see to the application of his purchase-money, because there was an implied intention by the settlor that the receipts of trustees should be sufficient acquittances (*a*); but, by the operation of the latter rule, the purchaser *would* be bound, for the necessity of his paying the money immediately to the legatees would not, if they were of age, prevent the completion of the sale, and therefore there is no reason why the purchaser should be exempted from seeing to the application. Again, suppose a trust for sale, with a direction to distribute the proceeds between A., B., and C., and that, after the date of the instrument, C. quits the country or cannot be found. According to the first principle, as the absence of C. was not an event in the contemplation of the settlor, and no inference can be drawn that he meant the trustees to sign receipts, it follows that the sale is rendered impossible, and the contradiction arises, that the settlor having in *express terms* directed a sale, and it being admitted that the will of the settlor is authoritative, yet the execution of that intention is intercepted by the construction of equity. "It were difficult," says Lord St Leonards, "to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate" (*b*), and yet to such a result the rule in question, if there be no exception to it, would apparently lead. But according to the other principle suggested, no such obstacle arises. The receipts of the trustees would then *primâ facie* be discharges, as necessary to the execution of the sale; and as C. is not at hand, the purchaser, in respect of C.'s share in the purchase-money, could not be called upon to observe a rule which would interpose a bar to the accomplishment of the expressed purpose of the settlor (*c*).

Cestui que trust abroad.

[30. If a person is interested in property in several capacities, and in one of such capacities can give a valid discharge for the

[Person interested in several capacities.]

(*a*) See *ante*, p. 540, *et seq.*

(*b*) Sugd. Vend. & Purch. 844, 11th ed.; and see *Forbes* v. *Peacock*, 12 Sim. 544; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342.

(*c*) Receipts of trustees are now in most cases made sufficient discharges by Act of Parliament, see *ante*, p. 535.

purchase-money on the sale of the property, a purchaser who has no notice of an intended misapplication by such person of the purchase-money will be discharged by his receipt (*a*), and it is immaterial that the conveyance does not show that the vendor is selling or receiving the purchase-money in the capacity in which he is empowered to do so; and where a person was both executrix and trustee, and as such executrix and trustee had power to carry out a transaction, and she purported to carry out such transaction as a trustee, in which capacity she had not the power, it was held that the transaction was validly effectuated (*b*).]

Receipts of executors.

31. As *executors* are to a certain extent invested with the character of trustees, it may be proper to introduce a few remarks upon their powers in disposing of the assets.

Power to sell or mortgage.

On the death of a testator the personal estate (*c*) vests wholly in the executor, and to enable him to execute the office with facility, the law permits him, with or without the concurrence of any co-executor (*d*), to sell or even to mortgage (*e*), by actual assignment or by equitable deposit (*f*), with or without a power of sale (*g*), all or any part of the assets, legal or equitable (*h*); and though liable to render an account to the Court, he cannot be interrupted in the discharge of his office by any person claiming *dehors* the will, as a creditor, or under it, as a legatee. The

[(*a*) *Corser* v. *Cartwright*, 7 L. R. H. L. 731; *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138; *Re Venn and Furze*, (1894) 2 Ch. 101, 114.]

[(*b*) *West of England and South Wales District Bank* v. *Murch*, *ubi sup.*; and see *Re Henson*, (1908) 2 Ch. 356, *ante*, p. 547.]

[(*c*) Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), in the case of persons dying after the commencement of that Act, real estate vests in the executor, as if it were a chattel real (s. 1, sub-s. 1); and if there are several executors, it vests in all, and not only in those who prove the will or act: *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58; and as to the powers of the executor, see ss. 2-4.]

(*d*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Smith* v. *Everett*, 27 Beav. 446; Shep. Touch. 484; *Murrell* v. *Cox and Pitt*, 2 Vern. 570; *Fellows* v. *Mitchell*, 2 Vern. 515; *Doe* v. *Stace*, 15 M. & W. 623; Dyer, 23, a.; and see *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; [*Re Macdonald*, (1897) 2 Ch. 181, 189; and as to the power of one executor independently of his co-executor, see *ante*, pp. 295, 296].

(*e*) *Bonney* v. *Ridgard*, 1 Cox, 145, see 148; *Scott* v. *Tyler*, 2 Dick. 727, *per* Lord Thurlow; *Mead* v. *Orrery*, 3 Atk. 240, *per* Lord Hardwicke; *Andrew* v. *Wrigley*, 4 B. C. C. 138, *per* Lord Alvanley; *M'Leod* v. *Drummond*, 17 Ves. 154, *per* Lord Eldon; *Keane* v. *Robarts*, 4 Mad. 357, *per* Sir J. Leach; and see *Humble* v. *Bill*, 2 Vern. 444; *Sanders* v. *Richards*, 2 Coll. 568; *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*f*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; and see *M'Leod* v. *Drummond*, 14 Ves. 360; *S. C.* 17 Ves. 167; *Ball* v. *Harris*, 8 Sim. 485.

(*g*) *Russell* v. *Plaice*, 18 Beav. 21; and see p. 564, *ante*.

(*h*) *M'Leod* v. *Drummond*, 14 Ves. 360, *per* Sir W. Grant; *Nugent* v. *Gifford*, 1 Atk. 463; [*Graham* v. *Drummond*, (1896) 1 Ch. 968].

creditor has merely a demand against the executor personally (*a*), the *pecuniary* or *specific legatee* is not entitled to the legacy or bequest until the executor has assented (*b*), and the *residuary legatee* has no lien until the estate has been liquidated and cleared of all liabilities, both *dehors* and under the will (*c*). Upon the sale of the chattel by the executor, the purchaser is not concerned to see to the application of his purchase-money, and it need not be recited in the conveyance that the money is wanted for the discharge of liabilities (*d*): it is sufficient that the purchaser trusts him whom the testator has trusted (*e*): if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor (*f*). It is impossible for the purchaser to ascertain the necessity of the sale, for this must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship (*g*). Even express notice of the will, and of the bequests contained in it, works to the purchaser no prejudice; for "every person," said Sir J. Leach, "who deals with an executor has necessarily implied, if not express, notice of the will: but as a purchaser of real estate devised in aid for payment of debts is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally available in law for the payment of debts" (*h*).

Notice of the will.

Thus nothing can be clearer than that an executor may go to market with his testator's assets, (even with a chattel specifically

(*a*) *Nugent* v. *Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 238, *per eundem*; *M'Leod* v. *Drummond*, 17 Ves. 163, *per* Lord Eldon.

(*b*) *Mead* v. *Orrery*, 3 Atk. 238, 240, *per* Lord Hardwicke. But the executor is bound to assent as soon as the funeral and testamentary expenses and debts have been paid; *Greene* v. *Greene*, 3 I. R. Eq. 102, *per Cur.*

(*c*) *M'Leod* v. *Drummond*, 17 Ves. 163, 169, *per* Lord Eldon; and see *Mead* v. *Orrery*, 3 Atk. 238, 240.

(*d*) *Bonney* v. *Ridgard*, 1 Cox, 148, *per* Lord Kenyon.

(*e*) Id.

(*f*) *Humble* v. *Bill*, 2 Vern. 445, *per Cur.*; *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Watts* v. *Kancie*, Toth. 77; *Nurton* v. *Nurton*, Ib.

(*g*) *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Humble* v. *Bill*, 2 Vern. 445, *per Cur.*; *Nugent* v. *Gifford*, 1 Atk. 464, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 242, *per eundem*.

(*h*) *Keane* v. *Robarts*, 4 Mad. 356,

bequeathed (*a*),) and the purchaser will not be bound to see to the application of his purchase-money (*b*).

[But an executor or administrator has no power to mortgage the assets to raise money for repairing or re-instating dilapidated buildings on leasehold property, unless the testator or intestate was liable under covenants to execute the works (*c*).]

Fraud an exception.

32. But *fraud* and *collusion* will vitiate any transaction, and turn it to a mere colour (*d*), and therefore if fraud be proved, either expressed or implied, the parties cannot protect themselves by pleading the general rule (*e*). The only question is, What will amount to a case of fraud?

Sale at a nominal price.

α. The sale cannot stand if the chattel be sold at *a nominal price* or a *fraudulent undervalue* (*f*).

Sale by executor for payment of his own debt.

β. The executor may not sell or pledge the assets for raising money to carry on the testator's business, though in pursuance of the directions contained in his will, for the debts of the business are not the testator's debts, [and a direction by a testator that his trade shall be carried on by his executors does not authorise the employment in that trade of more of the testator's property than was employed by him in his business] (*g*). Nor may the executor sell or pledge in order to pay or secure his own debt (*h*),

(*a*) *Watts* v. *Kancie*, Toth. 77, 161; *Nurton* v. *Nurton*, Ib.; *Ewer* v. *Corbet*, 2 P. W. 148. As to *Humble* v. *Bill*, 2 Vern. 444; 1 B. P. C. 71, see *Ewer* v. *Corbet*, *ubi sup.*; *Andrew* v. *Wrigley*, 4 B. C. C. 137; *M'Leod* v. *Drummond*, 17 Ves. 160.

(*b*) *Bonney* v. *Ridgard*, 1 Cox, 147, *per* Lord Kenyon.

[(*c*) *Ricketts* v. *Lewis*, 20 Ch. D. 745; and the mortgagee, having, by the terms of the deed, notice of the purpose for which the money was raised, his claim against the estate was disallowed.]

(*d*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow.

(*e*) *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *M'Leod* v. *Drummond*, 17 Ves. 154, *per* Lord Eldon; *Hill* v. *Simpson*, 7 Ves. 166, *per* Sir W. Grant; *Taner* v. *Ivie*, 2 Ves. 469, *per* Lord Hardwicke; *Keane* v. *Robarts*, 4 Mad. 357, *per* Sir J. Leach; *Crane* v. *Drake*, 2 Vern. 616; *Nugent* v. *Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 240, *per eundem*; *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Whale* v. *Booth*, 4 T. R. 625, note (*a*), *per* Lord Mansfield; *Elliot* v. *Merryman*, Barn. 81, *per* Sir J. Jekyll; *Bonney* v. *Ridgard*, 1 Cox, 147, *per* Lord Kenyon; *Earl Vane* v. *Rigden*, 5 L. R. Ch. App. 663, &c.

(*f*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *M'Mullen* v. *O'Reilly*, 15 Ir. Ch. Rep. 251; and see *Drohan* v. *Drohan*, 1 B. & B. 185.

(*g*) *McNeillie* v. *Acton*, 2 Eq. Rep. 21; 4 De G. M. & G. 744. [But the executors may sell or pledge any part of the property actually employed in the business, and it has been held in a case in Ireland that the power of disposition extends to mortgaging the freehold premises upon which the business is carried on; *Devitt* v. *Kearney*, 13 L. R. Ir. 45; reversing *S. C.* 11 L. R. Ir. 225.]

(*h*) *Scott* v. *Tyler*, 2 Dick. 712; *Hill* v. *Simpson*, 7 Ves. 152; *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Keane* v. *Robarts*, 4 Mad. 357, *per eundem*; *Crane* v. *Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; *Andrew* v. *Wrigley*, 4 B. C. C. 137, *per* Lord

or for a debt *wrongfully contracted* by him as executor (*a*), for *primâ facie* this is a diversion of the assets to a purpose wholly foreign to the administration, and therefore a *devastavit*. "Though," observed Sir W. Grant, "it may be dangerous at all to restrain the power of *purchasing* from the executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the *executor's debt*, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to *sell* the assets, but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt" (*b*).

Where the executor is specific or residuary legatee.

But if the executor *be also the specific* (*c*), *or residuary legatee* (*d*), then it seems to be established upon the authority of several cases that he *may* dispose of the chattel in payment of his own debt, for as soon as the debts and legacies of the testator have been discharged, the property is the executor's; and how is a purchaser to ascertain, but from the mouth of the executor, whether such prior liabilities upon the estate have been fully satisfied? [And the rule is applicable to an equitable as well as to a legal asset, and in favour of an equitable incumbrancer who has perfected his title by giving notice to the legal owner (*e*).]

Where the executor is specific legatee jointly with another, or subject to a charge.

But if the executor is specific or residuary legatee *jointly with others, or subject to certain charges under the will*, then he has no power by himself to offer the chattel in payment of his own debt. For in what character does the executor sell? It must be either as executor or as legatee: but it is not as executor, for then he cannot pay his own debt with the testator's assets; nor is it as legatee, for he is not exclusively such, but only jointly with others, or subject to certain charges. The creditor therefore cannot deal for the chattel without the concurrence of the co-legatees, or of the other persons jointly entitled (*f*). And the *mere representation* by the executor that

Alvanley; and see *Eland* v. *Eland*, 4 M. & Cr. 427; *Miles* v. *Durnford*, 2 De G. M. & G. 641; [*Jones* v. *Stöhwasser*, 16 Ch. D. 577].

(*a*) *Collinson* v. *Lister*, 20 Beav. 356; 7 De G. M. & G. 634.

(*b*) *Hill* v. *Simpson*, 7 Ves. 169.

(*c*) *Taylor* v. *Hawkins*, 8 Ves. 209.

(*d*) *Nugent* v. *Gifford*, 1 Atk. 463; corrected from Reg. Lib. 4 B. C. C. 136; *Mead* v. *Orrery*, 3 Atk. 235; *Whale* v. *Booth*, 4 T. R. 625, note (*a*). See the comments of Lord Eldon, *M'Leod* v. *Drummond*, 17 Ves. 163; and see *Bedford* v. *Woodham*, 4 Ves. 40, note; *Storry* v. *Walsh*, 18 Beav. 559.

[(*e*) *Graham* v. *Drummond*, (1896) 1 Ch. 968.]

(*f*) *Bonney* v. *Ridgard*, 1 Cox, 145;

he is absolute owner under the will is no protection, for common prudence requires that the purchaser should look to the will himself and ascertain the fact; and if he neglect this precaution, and assume the executor's veracity, he must incur the hazard of the executor's falsehood (*a*).

Express notice that debts not paid.

The executor in his character of specific or residuary legatee cannot pay or secure the debt of his own creditor out of the testator's assets, if such creditor have *express* notice that any debt of the testator still remains unsatisfied (*b*).

Sale by executor for other private purposes.

γ. If the executor sell or mortgage for money either advanced at the time or to be advanced, the dealing *primâ facie* is in a due course of administration (*c*). "Where," observed Sir W. Grant, "a party having a debt due to him by the executor takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character, undoubtedly suspicion of fraud must always arise; but where a man is applied to for a loan of money, there is no motive of fraud, for he may keep his money if not satisfied with the security" (*d*). But such is the *primâ facie* presumption only, for if there be legal evidence to the purchaser or mortgagee that the immediate or future advance is not on account of the testator's estate, but is meant to be applied to the private purposes of the executor, the Court must regard the transaction as fraudulent, and will not allow it to stand (*e*).

Sale of specific chattel, and notice that there are no debts.

δ. A purchaser cannot deal with an executor for the purchase of a chattel specifically bequeathed, if the purchaser have notice (a fact, however, not easily to be proved, and not lightly to be presumed), that there were no debts of the testator, or that they have since been discharged (*f*).

Payment to executor who will probably misapply it.

ε. If a person owe money to a testator's estate, and be apprised that the executor *means to misapply it*, he cannot safely hand it over (*g*).

Hill v. *Simpson*, 7 Ves. 152, see 170; and see *Haynes* v. *Forshaw*, 11 Hare, 93; [*Re Queale's Estates*, 17 L. R. Ir. 361].

(*a*) *Hill* v. *Simpson*, 7 Ves. 152, see 170.

(*b*) See *Nugent* v. *Gifford*, 1 Atk. 464; *Whale* v. *Booth*, 4 T. R. 625, note (*a*); *M'Leod* v. *Drummond*, 17 Ves. 163; [*Graham* v. *Drummond*, (1896) 1 Ch. 968].

(*c*) *M'Leod* v. *Drummond*, 17 Ves. 155, *per* Lord Eldon.

(*d*) *M'Leod* v. *Drummond*, 14 Ves. 362; and see *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*e*) *M'Leod* v. *Drummond*, 14 Ves. 353; *S. C.* reversed 17 Ves. 152; *Scott* v. *Tyler*, 2 Dick. 712, compare 17 Ves. 166; and see *Keane* v. *Robarts*, 4 Mad. 358.

(*f*) *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; and see *M'Mullen* v. *O'Reilly*, 15 Ir. Ch. Rep. 251.

(*g*) See *Watkins* v. *Cheek*, 2 S. & S. 199; *Eland* v. *Eland*, 4 M. & Cr. 427; *Stroughill* v *Anstey*, 1 De G. M. & G. 648.

Payment after long interval from testator's death.

ξ. If a great *length of time* has elapsed since the testator's death, it may be argued that here all debts must be *presumed* to be paid, and that the executor is a trustee for the next of kin or residuary legatee, and that the money cannot be paid safely to any other than the *cestui que trust*. However, in the absence of all *mala fides*, the executor's receipt will in general be sufficient. Where there had been a lapse of sixteen years, Lord Hatherley observed, "there is no authority for holding that merely because a debt to the testator's estate is not called in for some time, we are to imply that the executors have ceased to be executors, and have become trustees. A debtor who has been paying interest for perhaps twenty years, does not therefore become cognisant of the fact of all the testator's estate having been administered, and of the executors having become trustees. The persons with whom the executors are dealing, are not bound to know the state of the testator's assets, and it may be many years before all his debts are paid, and his estate wound up" (*a*). In a case where there had been a lapse of *thirty-five years* from the testator's death, and no allegation of debts, the late V.C. of England held that the executor could sign a receipt (*b*), [but as to real estate, the rule has now been adopted that after *twenty years* it is fair to presume that the debts have been paid, and the onus is upon the executors selling under a charge of debts to show that such is not the case (*c*); but the rule does not in general apply to the case of an executor selling the leaseholds of his testator (*d*)]. As regards an *administrator* it will be remembered that all necessary protection is thrown around the estate by the bond taken for due administration, and also by the form of proceeding in the Probate Court; for if A. (to whose estate the money is payable) die, leaving B. his next of

(*a*) *Charlton* v. *Earl of Durham*, 4 L. R. Ch. App. 438; and see *Sabin* v. *Heape*, 27 Beav. 553.

(*b*) *Gough* v. *Birch*, 10th July 1839, MS.; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 654; [*Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465; *Re Molyneux and White*, 13 L. R. Ir. 382;] *Ewer* v. *Corbet*, 2 P. W. 148; *Court* v. *Jeffery*, 1 S. & S. 105; *Orrok* v. *Binney*, Jac. 523; *Pierce* v. *Scott*, 1 Y. & C. 257; *Forbes* v. *Peacock*, 11 Sim. 152; *Hawkins* v. *Williams*, 10 W. R. 692; *Greetham* v. *Colton*, 34 Beav. 615; 6 N. R. 311; *Williams* v. *Massey*, 15 Ir. Ch. Rep. 68.

[(*c*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. (C.A.) 465; and see *Re Molyneux and White*, 13 L. R. Ir. 382; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42; *Re M'Curdy*, 27 L. R. Ir. 395.]

[(*d*) *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, (1894) 2 Ch. 101; and as to the real estate of a testator dying on or after 1st January, 1898, see the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-ss. 1, 5; s. 2, sub-s. 2. Where the purchaser had actual notice that there were no debts of the testator remaining unpaid, and it did not appear that the sale by the executrix was for purposes of administration, the Court declined to force the title on the purchaser; *Re Verrell's Contract*, (1903) 1 Ch. 65.]

kin, who afterwards dies, leaving C. his next of kin, who afterwards dies, leaving D. his next of kin, in order to take out letters of administration to A., you must first show yourself to have an interest by taking out letters to B. And again, to take out letters to B. you must first, for the same reason, take out letters to C.; so that, in fact, letters cannot be taken out to A. without previously taking out letters to B. and C. If, in such a case, the receipt of A.'s administrator even after the lapse of twenty years, were not sufficient, it would be necessary in a suit to make the administrators of B. and C. parties as *cestuis que trust*, a thing quite unheard of in practice. In an extreme case, however, where an administrator who was beneficially entitled to one-fourth, filed a bill *one hundred and fifty years* after the intestate's decease, the Court, while it admitted the plaintiff's legal title to the whole, refused to order payment to him of the other three-fourths, which apparently belonged in equity to other parties (*a*).

Sale by banker by direction of executor.

η. An *agent* is accountable to his principal only, and therefore if an executor employ a banker to sell out part of the testator's stock and remit the proceeds to him, it seems the banker, though he has reason to believe that a misapplication is intended, is bound to transfer the money to the executor, and does not thereby render himself accountable. A contrary doctrine would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length (*b*). [An agent is bound to accept as correct

(*a*) *Loy* v. *Duckett*, Cr. & Ph. 305. [In a recent case, in 1885, where stock standing in the name of an owner, who died in 1791, had been transferred to the Commissioners for the reduction of the National Debt, and an inquiry was directed upon petition who were the persons entitled to the fund, the Court directed that the beneficial title should be inquired into as regarded all the shares to which the legal personal representatives of persons who died before 1871 were entitled; *Ex parte Roskrow*, W. N. 1885, p. 3. In *Trevor* v. *Hutchins*, (1896) 1 Ch. 844, where a beneficiary died in 1842, and his legal personal representative was constituted in 1890, an inquiry was directed, which in the result had the effect of preventing the retainer of a statute barred debt by the representative.]

(*b*) *Keane* v. *Robarts*, 4 Mad. 332, see 356, 359; and see *Davis* v. *Spurling*, 1 R. & M. 64; *S. C.* Taml. 199; *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 585; [*The New Zealand and Australian Land Company* v. *Ruston*, 7 Q. B. D. (C.A.) 374; reversing *S. C.* 5 Q. B. D. 474;] *Crisp* v. *Spranger*, Nels. 109; *Saville* v. *Tancred*, 3 Sw. 141, note; *Ex parte Barnwell*, 6 De G. M. & G. 801; *Gray* v. *Johnston*, 3 L. R. H. L. 1. In this case, before the House of Lords, the doctrine as laid down by *Lord Cairns* was, that on the one hand bankers were not on grounds of mere suspicion or curiosity, to refuse to honour the cheque of an executor or trustee, being their customer, and on the other hand, that bankers were not, under shelter of that title, to be at liberty to become parties or privies to a breach of trust, and to pay away trust money when they *knew* it was going to be misapplied, and for the purpose of its being so misapplied;

the trustees' statement as to the intended application of the fund (*a*).] But an agent who derives a *personal benefit* from the breach of trust of his principal will be accountable (*b*).

Sale before probate.

θ. Though an executor *can* make an assignment and give a receipt for purchase-money before *probate*, yet a purchaser is not *bound to pay* his purchase-money before probate, which is the evidence of the executor's title (*c*).

[Payment by order of executor.]

[33. If a person indebted to a testator's estate pays a third party by order of the executor, and obtains the executor's receipt without notice that the payment is wrongfully made, he thereby obtains a complete discharge (*d*).]

Who may impeach the sale.

34. Wherever, as in the several cases mentioned, there is suspicion of fraud, the transaction may be impeached by creditors (*e*),

and he stated the result of the cases to be, that to justify a banker in refusing payment, 1. There must be a misapplication or breach of trust actually intended; 2. The bankers must be privy to such intended misapplication or breach of trust; and 3. That any personal benefit to the bankers designed or stipulated for, would be the strongest evidence of such privity; Ib. p. 11. But the principle enunciated by *Lord Westbury* went further, for he said that a banker could not be allowed to set up the *jus tertii* against the order of his own customer, or refuse to honour his draft, on any other ground than some sufficient one resulting from the act of the customer himself, and that if a banker became incidentally aware that a trustee, his customer, meditated a breach of trust, and drew a cheque for that purpose, the banker had no right to refuse payment of the cheque, as this would be making himself party to an inquiry as between his customer and third persons. But that if a trustee being indebted to a banker, applied part of the trust estate in the banker's hands to the payment of the debt, the banker became *particeps criminis*, and was answerable; Ib. p. 14. It would seem, therefore, that in Lord Westbury's opinion, if the trustee did not himself confess the breach of trust, the banker could not refuse payment on evidence *aliunde* that a breach of trust was intended; and see *Barnes* v. *Addy*, 9 L. R. Ch. App. 244.

[(*a*) *Rodbard* v. *Cooke*, 25 W. R. 555.]

(*b*) *Pannell* v. *Hurley*, 2 Coll. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; [and see *Foxton* v. *Manchester and Liverpool District Banking Company*, 44 L. T. N.S. 406, where Fry, J., said that "those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment"; but see *Coleman* v. *Bucks and Oxon Union Bank*, (1897) 2 Ch. 243, where, under the special circumstances of the case, and having regard to the decision in *Gray* v. *Johnston*, 3 L. R. H. L. 1, this principle was held not to be applicable to the case of bankers who, without any intention to benefit themselves, or suspicion of intended breach of trust, had placed trust money to the private account of their customer on which he was indebted to them by way of overdraft. In *Powell and Thomas* v. *Evan Jones & Co.*, (1905) 1 K. B. (C.A.) 11, a sub-agent who, with the knowledge of the principal, shared commission with the agent, was held to be in a fiduciary position, and accountable to the principal for a further commission secretly received].

(*c*) *Newton* v. *Metropolitan Railway Company*, 1 Dr. & Sm. 583.

[(*d*) *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56.]

(*e*) *Crane* v. *Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; and see *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Orrery*, 3 Atk. 238.

Effect of time.

or specific (*a*), residuary (*b*), or even pecuniary legatees (*c*). But in no case will the Court grant relief where the right of unravelling the transaction has been neglected for a period of twenty years (*d*).

Executor or administrator of a trustee.

35. The preceding powers belong to executors and administrators for the purpose of administration of the testator's or intestate's estates. But these powers cannot be assumed to exist where property, though legally vested in an executor or administrator, is not available for the ordinary purposes of administration. Thus the *executor* or *administrator* of a surviving *trustee* stands on no higher ground than an ordinary trustee, and cannot therefore pass a good title to the purchaser, unless it be warranted by the terms of the trust.

SECTION III

DISABILITY OF TRUSTEES FOR SALE TO BECOME PURCHASERS OF THE TRUST PROPERTY

We now come to the subject of *purchases by trustees* of the property vested in them upon trust.

Under this head it will be proper to consider: *First*, The extent and operation of the rule, that a trustee shall not purchase the trust estate; *Secondly*, The species of relief to which the *cestui que trust* is entitled; *Thirdly*, The time within which the *cestui que trust* must apply to the Court.

First. The extent of the rule.

Trustee for sale may not purchase.

1. A trustee for *sale*, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property (*e*), whether it be real estate or a chattel personal (*f*), land, or

(*a*) *Humble* v. *Bill*, 2 Vern. 444; *Scott* v. *Tyler*, 2 Dick, 712.

(*b*) See *Burting* v. *Stonard*, 2 P. W. 150; *Mead* v. *Orrery*, 3 Atk. 235, see 238; *M'Leod* v. *Drummond*, 17 Ves. 161, 169.

(*c*) *Hill* v. *Simpson*, 7 Ves. 152; and see *M'Leod* v. *Drummond*, 17 Ves. 169.

(*d*) *Andrew* v. *Wrigley*, 4 B. C. C. 125; *Bonney* v. *Ridgard*, 1 Cox, 145; *Mead* v. *Orrery*, 3 Atk. 235, see 243; and see *M'Leod* v. *Drummond*, 14 Ves. 353; reversed 17 Ves. 152, see 171.

(*e*) *Fox* v. *Mackreth*, 2 B. C. C. 400; *S. C.* 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258, &c. That *Fox* v. *Mackreth* was decided upon this ground, see *Gibson* v. *Jeyes*, 6 Ves. 277; *Ex parte Lacey*, Id. 627; *Ex parte James*, 8 Ves. 353; *Coles* v. *Trecothick*, 9 Ves. 247; *Ex parte Bennett*, 10 Ves. 394.

(*f*) *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Killick* v. *Flexney*, 4 B. C. C. 161; *Hall* v. *Hallet*, 1 Cox, 134; *Watson* v. *Toone*, 5 Mad. 54; 6 Mad. 153; *Armstrong* v. *Armstrong*, 7 L. R. Ir. 207.

a ground rent (*a*), in reversion or possession (*b*), whether the purchase be made in the trustee's own name or in the name of a trustee for him (*c*), directly, or indirectly, [as to a purchaser upon a contract or understanding (amounting to more than mere expectation) that the purchaser shall resell to the trustee (*d*),] by private contract or public auction (*e*), from himself as the single trustee, or with the sanction of his co-trustees (*f*); for he who undertakes to act for another in any matter cannot, in the same matter, act for himself (*g*). The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*h*). Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled (*i*).

[Duration of disability to repurchase.]

[The disability of a trustee who has sold to repurchase from his own purchaser subsists so long as the contract remains executory (*j*).]

Trustee who has disclaimed.

The rule does not apply to a person named as trustee, but who has *disclaimed* without having acted in the trust (*k*), [or to a person who has the power of becoming a trustee, though he never

(*a*) *Price* v. *Byrn*, cited *Campbell* v. *Walker*, 5 Ves. 681.

(*b*) *Re Bloye's Trust*, 1 Mac. & G. 488, see 492, 495; *Spring* v. *Pride*, 4 De G. J. & S. 395; as "the inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party"; *Aberdeen Railway Company* v. *Blakie*, 1 Macq., at p. 472, *per* Lord Cranworth; [*Costa Rica Railway Company* v. *Forwood*, (1901) 1 Ch. (C.A.) 746].

(*c*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Randall* v. *Errington*, 10 Ves. 423; *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Hall* v. *Hallet*, 1 Cox, 134; *Watson* v. *Toone*, 6 Mad. 153; *Baker* v. *Carter*, 1 Y. & C. 250; *Knight* v. *Majoribanks*, 2 Mac. & G. 12.

[(*d*) *Re Postlethwaite*, 59 L. T. N.S. 58; reversed on appeal on other grounds; 37 W. R. 200; 60 L. T. N.S. 514; and see *Parker* v. *M'Kenna*, L. R. 10 Ch. 96, at p. 125.]

(*e*) *Campbell* v. *Walker*, *Randall* v. *Errington*, *ubi sup.*; *Ex parte Bennett*, 10 Ves. 381, see 393; *Ex parte James*, 8 Ves. 337, see 349; *Whelpdale* v. *Cookson*, 1 Ves. 9; *S. C.* stated from R. L., *Campbell* v. *Walker*, 5 Ves. 682; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625; *Lister* v. *Lister*, Id. 631; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Attorney-General* v. *Lord Dudley*, G. Coop. 146; *Downes* v. *Grazebrook*, 3 Mer. 200.

(*f*) *Whichcote* v. *Lawrence*, 3 Ves. 740; *Hall* v. *Noyes*, cited Id. 748; and see *Morse* v. *Royal*, 12 Ves. 374.

(*g*) *Whichcote* v. *Lawrence*, 3 Ves. 750, *per* Lord Rosslyn; *Ex parte Lacey*, 6 Ves. 626, *per* Lord Eldon; *Re Bloye's Trust*, 1 Mac. & G. 495.

(*h*) See *Ex parte James*, 8 Ves. 348; [*Luddy's Trustee* v. *Peard*, 33 Ch. D. 500].

(*i*) See *Ex parte Lacey*, 6 Ves. 629.

[(*j*) *Williams* v. *Scott*, (1900) A.C. (P.C.) 499; *Delves* v. *Gray*, (1902) 2 Ch. 606, following *Parker* v. *M'Kenna*, L. R. 10 Ch. 96, 125.]

(*k*) *Stacey* v. *Elph*, 1 M. & K. 195; and see *Chambers* v. *Waters*, 3 Sim. 42.

actually does become one (*a*),] or to a *tenant for life* whose *consent to the sale* is required by the terms of the power (*b*); or to mere nominal trustees, as *trustees to preserve contingent remainders* (*c*); or where A. is the trustee in fee for B. in fee, and A. has *no duty to perform* (*d*); or where a trustee sells to the trustees of his own settlement, under which he has a partial interest (*e*), [or to a company in which he is a shareholder (*f*); and in the absence of circumstances of suspicion, a person, who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, may become a purchaser of the trust property (*g*)].

Lord Rosslyn's doctrine.

2. Lord Rosslyn is reported to have considered that to invalidate a purchase by a trustee, it was necessary to show that he had gained an *actual advantage* (*h*); but the doctrine (if any such was ever held by his Lordship (*i*)) has since been expressly and unequivocally denied (*j*). The rule is now universal, that, *however fair the transaction*, the *cestui que trust* is at liberty to set aside the sale and take back the property (*k*). If a trustee were permitted to buy in an *honest* case, he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise* (*l*). Thus a trustee for the sale of an estate might, by the knowledge acquired by him in that character, have discovered a valuable coal mine under it, and locking that up in his own breast, might enter into a contract for the purchase by himself. In such a case, if the trustee chose to deny it, how could the Court establish the fact against the denial? The probability is that a trustee who had once

[(*a*) *Clark* v. *Clark*, 9 App. Cas. 733.]

(*b*) *Howard* v. *Ducane*, T. & R. 81; *Bevan* v. *Habgood*, 1 J. & H. 222; *Dicconson* v. *Talbot*, 6 L. R. Ch. App. 32, see *ante*, p. 347.

(*c*) *Sutton* v. *Jones*, 15 Ves. 587; *Naylor* v. *Winch*, 1 S. & S. 567; *Pooley* v. *Quilter*, 4 Drew. 189; *Parkes* v. *White*, 11 Ves. 226.

(*d*) *Pooley* v. *Quilter*, 4 Drew. 189; and see *Denton* v. *Donner*, 23 Beav. 289, 290.

(*e*) *Hickley* v. *Hickley*, 2 Ch. D. 190.

[(*f*) *Farrar* v. *Farrars, Limited*, 40 Ch. D. (C.A.) 395; and see *Kennedy* v. *De Trafford*, (1896) 1 Ch. (C.A.) 762; (1897) A. C. 180.]

[(*g*) *Re Boles and British Land Company's Contract*, (1902) 1 Ch. 244.]

(*h*) See *Whichcote* v. *Lawrence*, 3 Ves. 750.

(*i*) See *Ex parte Lacey*, 6 Ves. 626; *Lister* v. *Lister*, Id. 632.

(*j*) *Ex parte Bennett*, 10 Ves. 385; *Ex parte Lacey*, 6 Ves. 627; *Attorney-General* v. *Lord Dudley*, G. Coop. 148; *Ex parte James*, 8 Ves. 348; *Mulvany* v. *Dillon*, 1 B. & B. 409, see 418.

(*k*) *Ex parte Lacey*, 6 Ves. 625, see 627; *Owen* v. *Foulkes*, cited Id. 630, note (*b*); *Ex parte Bennett*, 10 Ves. 393, *per* Lord Eldon; *Randall* v. *Errington*, 10 Ves. 423, see 428; *Campbell* v. *Walker*, 5 Ves. 678, see 680; *Ex parte James*, 8 Ves. 347, 348, *per* Lord Eldon; *Lister* v. *Lister*, 6 Ves. 631; *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; and see *Kilbee* v. *Sneyd*, 2 Moll. 186; [*Re Postlethwaite*, 59 L. T. N.S. 58; 37 W. R. 200; 60 L. T. N.S. 514].

(*l*) *Ex parte Bennett*, 10 Ves. 385, *per* Lord Eldon.

conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded (*a*).

Trustee may not buy as agent.

3. As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as *agent* for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other (*b*).

Agent of trustee may not buy.

4. And the rule against purchasing the trust property applies to an *agent* employed by the trustee for the purposes of the sale, as strongly as to the trustee himself (*c*). And an *agent not for sale, but for management only* (*d*), [an officer of a friendly society (*e*), and a solicitor or counsel (*f*),] stand in a confidential relation, and cannot purchase without putting themselves at arm's length, and a full disclosure of their knowledge; and so a receiver appointed by the Court cannot purchase without the leave of the Court (*g*), [even where the sale is made, not under a decree in the action, but by a mortgagee selling with leave outside the action (*h*); and the partner of a trustee, or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase, cannot purchase the trust property from the trustee (*i*)].

Trustees may not lease to themselves.

5. The *lease* of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him, shall be made to account for the profits if it be in his favour (*j*).

(*a*) *Ex parte Lacey*, 6 Ves. 627, *per* Lord Eldon; and see *Ex parte Bennett*, 10 Ves. 385, 394, 400; *Ex parte James*, 8 Ves. 348, 349; *Parkes* v. *White*, 11 Ves. 226; *Campbell* v. *Walker*, 5 Ves. 681; *Lister* v. *Lister*, 6 Ves. 632; *Ex parte Badcock*, 1 Mont. & Mac. 239.

(*b*) *Ex parte Bennett*, 10 Ves. 381, see 400; *Coles* v. *Trecothick*, 9 Ves. 248, *per* Lord Eldon; and see *Gregory* v. *Gregory*, G. Coop. 204; [*Mockerjee* v. *Mockerjee*, 2 L. R. Ind. App. 18].

(*c*) *Whitcomb* v. *Minchin*, 5 Mad. 91; *Re Bloye's Trust*, 1 Mac. & G. 488, see 495; [*Martinson* v. *Clowes*, 21 Ch. D. 857].

(*d*) *King* v. *Anderson*, 8 Ir. R. Eq. 147, 625; *Alven* v. *Bond*, 1 Flan. & Kelly, 196. [But the Court, on proposals for the purchase of a business under the order of the Court, refused to restrain the receiver and manager from doing business with the customers on his own account; *Re Irish*, 40 Ch. D. 49.]

[(*e*) *Hodson* v. *Deans*, (1903) 2 Ch. 647.]

[(*f*) *Carter* v. *Palmer*, 8 Cl. & F. 657; 11 Bli. N.S. 397; *Brown* v. *Kennedy*, 4 De G. J. & S. 217; 10 Jur. N.S. 141; *Cookson* v. *Lee*, 23 L. J. Ch. 243; *Pisani* v. *Attorney-General of Gibraltar*, 5 L. R. P. C. 516; *McPherson* v. *Watt*, 3 App. Cas. 254; *Dougan* v. *McPherson*, (1902) A.C. (H.L.) 197.]

(*g*) *Alven* v. *Bond*, 1 Flan. & Kelly, 196; *White* v. *Tommy*, referred to, Ib. 224.

[(*h*) *Nugent* v. *Nugent*, (1908) 1 Ch. (C.A.) 546, approving *Alven* v. *Bond*, *supra*.]

[(*i*) *Ex parte Moore*, 51 L. J. N.S. Ch. 72; 45 L. T. N.S. 558; 30 W. R. 123; *Ex parte Burnell*, 7 Jur. 116; *Ex parte Forder*, W. N. 1881, p. 117.]

(*j*) *Ex parte Hughes*, 6 Ves. 617; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 500.

Specific performance.

6. Where a trustee for sale was the purchaser by an agent at the auction, the *heir* of the trustee had no right to have the contract completed at the expense of the *personal* estate, though the *cestuis que trust* were willing to acquiesce in the sale (*a*).

Trustee may purchase from the *cestui que trust*.

7. When it is said that a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself*, that is, he cannot perform the two functions of seller and buyer; for there is no rule that a trustee, whether for sale or otherwise, may not *purchase from* his *cestuis que trust* (*b*). Hence, while a purchase by a trustee conducting the sale, either personally or by his agent, cannot stand, a purchase by a trustee from a *cestui que trust* of the interest of the latter in the trust *may* stand, if the trustee can show that the fullest information and every advantage were given to the *cestui que trust* (*c*). However, a purchase by a trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy (*d*), [and will set aside if the consideration was insufficient (*e*);] and the exception runs, it is said, so near the verge of the rule, that it might as well have been included within it (*f*).

The relation of trustee and *cestui que trust* must first be dissolved.

8. Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be *actually* or *virtually* dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character (*g*), or if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser (*h*), the

(*a*) *Ingle* v. *Richards* (No. 1), 28 Beav. 361.

(*b*) *Ex parte Lacey*, 6 Ves. 626, *per* Lord Eldon; *Coles* v. *Trecothick*, 9 Ves. 244, 246, *per eundem*; *Gibson* v. *Jeyes*, 6 Ves. 277, *per eundem*; *Downes* v. *Grazebrook*, 3 Mer. 208, *per eundem*; *Randall* v. *Errington*, 10 Ves. 426, *per* Sir W. Grant; *Whichcote* v. *Lawrence*, 3 Ves. 750, *per* Lord Rosslyn; *Sanderson* v. *Walker*, 13 Ves. 601, *per* Lord Eldon; *Ayliffe* v. *Murray*, 2 Atk. 59, *per* Lord Hardwicke; *Kilbee* v. *Sneyd*, 2 Moll. 214, *per* Sir A. Hart; [*Thomson* v. *Eastwood*, 2 App. Cas. 215, 236, *per* Lord Cairns; and see *Dougan* v. *McPherson*, (1902) A.C. (H.L.) 197].

(*c*) *Denton* v. *Donner*, 23 Beav. 285; *Luff* v. *Lord*, 34 Beav. 220; [*Readdy* v. *Prendergast*, 55 L. T. N.S. 767].

(*d*) *Coles* v. *Trecothick*, 9 Ves. 244, *per* Lord Eldon; *Ex parte Lacey*, 6 Ves. 626, *per eundem*; *Downes* v. *Grazebrook*, 3 Mer. 209, *per eundem*; [*Plowright* v. *Lambert*, 52 L. T. N.S. 646].

[(*e*) *Mockerjee* v. *Mockerjee*, 2 L. R. Ind. App. 18; *Plowright* v. *Lambert*, 52 L. T. N.S. 646.]

(*f*) *Morse* v. *Royal*, 12 Ves. 372, *per* Lord Erskine.

(*g*) *Downes* v. *Grazebrook*, 3 Mer. 208, *per* Lord Eldon.

(*h*) *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; and see *Ex parte Lacey*, 6 Ves. 626, 627; *Ex parte Bennett*, 10 Ves. 394; *Morse* v. *Royal*, 12 Ves. 373; *Sanderson* v. *Walker*, 13 Ves. 601; [*Re Worssam*, 46 L. T. N.S. 584; *Readdy* v. *Prendergast*, 55 L. T. N.S. 767].

cestui que trust distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground (*a*), and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information (*b*). The trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then, casting aside his character of trustee, turn his experience to his own account (*c*).

Instances where trustee has been allowed to purchase.

9. In what cases a trustee will be at liberty to become a purchaser may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees for sale acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed (*d*).

Again, a *cestui que trust* had strongly urged the purchase upon one of his trustees, who at first expressed an unwillingness, but afterwards, upon being pressed, agreed to the terms; and the sale was supported (*e*).

So, where a trustee for sale had endeavoured in vain to dispose of the estate, and then purchased himself of the *cestui que trust*, at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said he did not "*like* the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole, he did not see any principle upon which he could set the transaction aside" (*f*).

Solicitor of the *cestuis que trust.*

10. It has been pronounced too dangerous to allow the *cestui que trust's* solicitor, without a *special* authority, to bind his employer by such a contract with the trustee (*g*).

Creditors.

11. Where the *cestuis que trust* are creditors, it has been held

(*a*) See *Randall* v. *Errington*, 10 Ves. 427.

(*b*) *Coles* v. *Trecothick*, 9 Ves. 247, *per* Lord Eldon; *Morse* v. *Royal*, 12 Ves. 373, 377, *per* Lord Erskine; *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; *Randall* v. *Errington*, 10 Ves. 427, *per* Sir W. Grant; [*Re Worssam*, 46 L. T. N.S. 584; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500].

(*c*) See *Ex parte James*, 8 Ves. 352; *Spring* v. *Pride*, 4 De G. J. & S. 395.

(*d*) *Coles* v. *Trecothick*, 9 Ves. 234.

(*e*) *Morse* v. *Royal*, 12 Ves. 355.

(*f*) *Clarke* v. *Swaile*, 2 Eden, 134.

(*g*) *Downes* v. *Grazebrook*, 3 Mer. 209, *per* Lord Eldon.

that the trustee cannot purchase with the sanction of the major part of them, but that the liberty must be given by the unanimous voice of the whole body (*a*). However, the Court has sanctioned purchases of a bankrupt's estate by *assignees*, where the assent of a general meeting of creditors had been obtained (*b*); and the Court would, no doubt, in executing the trust of a creditors' deed, allow a trustee to purchase, if it were really for the benefit of the creditors.

Court will not authorise the trustee to bid.

12. The Court has no jurisdiction, on behalf of the *cestuis que trust* who are *sui juris*, to authorise a trustee to bid, for that is a question the *cestuis que trust* are entitled to decide for themselves (*c*). So far as the Court is concerned, it will not give a trustee leave to bid, for it is his duty to communicate all the information he can for the benefit of the sale, and this he might not be disposed to do if he were allowed to purchase himself (*d*). But if a sale by auction under the direction of the Court has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may be induced to accept the offer (*e*).

[Effect of leave to bid.]

[13. Where, in an administration action, leave was given to the solicitor for the defendant (the executor) to bid at the sale, which was to be conducted by the plaintiffs' solicitors, independently of the executor, it was held that the effect of the leave was to put an end to the fiduciary relation in which he formerly stood, and to place him in the position of a mere stranger, and that he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property. If, however, the intending purchaser lays information on any particular subject before the Court for the purpose of guiding its discretion and obtaining its approval of the sale, he is bound to disclose all the material facts within his knowledge relating to that subject; but it does not follow that because information on some material point or points is offered or is given on request by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implicit

(*a*) *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited Id. 630, note (*b*). *Whelpdale* v. *Cookson* (cited *Campbell* v. *Walker*, 5 Ves. 682), was doubted by Lord Eldon, 6 Ves. 628.

(*b*) *Anon. case*, 2 Russ. 350; *Ex parte Bage*, 4 Mad. 459.

(*c*) See *Ex parte James*, 8 Ves. 352.

(*d*) *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 545.

(*e*) *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 547.

representation, positive or negative, direct or indirect, in what is actually stated (*a*).]

Where *cestuis que trust* are infants.

14. If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, cannot by any act *in pais* become the purchaser of the estate (*b*); but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may institute proceedings in equity, and apply to the Court to be allowed to purchase, and the Court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particulars of sale, and allow the trustee to bid (*c*); and, generally, if the Court can see clearly that under the circumstances of the case it would be for the benefit of the *cestui que trust* that the trustee should purchase (as at a certain sum beyond what could be obtained elsewhere), the Court would sanction a sale to the trustee (*d*).

Of executors, administrators, assignees, &c.

15. The principles laid down with reference to *trustees for sale* are of course applicable to all who, though differing in name, are invested with the *like fiduciary character*, as executors and administrators (*e*), an executor in his own wrong (*f*), trustees for creditors (*g*), an agent (*h*), &c.; but a mortgagee may purchase from his mortgagor (*i*), [or one of several mortgagors from the mortgagee (*j*)], surviving partners may purchase from the representatives of a deceased partner (*k*), [the trustee in the

[(*a*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 27 Ch. D. (C.A.) 424; 11 App. Cas. 232.]

(*b*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601.

(*c*) *Campbell* v. *Walker*, 5 Ves. 681, 682, *per* Lord Alvanley.

(*d*) *Farmer* v. *Dean*, 32 Beav. 327.

(*e*) *Hall* v. *Hallet*, 1 Cox, 134; *Killick* v. *Flexney*, 4 B. C. C. 161; *Watson* v. *Toone*, 6 Mad. 153; *Kilbee* v. *Sneyd*, 2 Moll. 186; *Baker* v. *Carter*, 1 Y. & C. 250; and see *Naylor* v. *Winch*, 1 S. & S. 566; [*Re Pepperell*, 27 W. R. 410; *Gray* v. *Warner*, 42 L. J. Ch. 556; 28 L. T. N.S. 835; 21 W. R. 808; *Re Harvey*, 58 L. T. N.S. 449; W. N. 1888, p. 38; *Beningfield* v. *Baxter*, 12 App. Cas. 167].

(*f*) *Mulvany* v. *Dillon*, 1 B. & B. 408.

(*g*) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625, and the cases cited Id. 630, note (*b*); *Ex parte Bennett*, 10 Ves. 395, *per* Lord Eldon; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 346, *per* Lord Eldon; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Bage*, 4 Mad. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Pooley* v. *Quilter*, 2 De G. & J. 327.

(*h*) *King* v. *Anderson*, 8 I. R. Eq. 147; reversed Ib. 625; *Murphy* v. *O'Shea*, 2 Jon. & Lat. 422.

(*i*) *Knight* v. *Majoribanks*, 11 Beav. 322; 2 Mac. & G. 10.

[(*j*) *Kennedy* v. *De Trafford*, (1896) 1 Ch. (C.A.) 762; (1897) A. C. 180; and see *Nutt* v. *Easton*, (1899) 1 Ch. 873; (1900) 1 Ch. (C.A.) 29.]

(*k*) *Chambers* v. *Howell*, 11 Beav. 6. As to purchases by one partner under an execution against another partner, see *Perens* v. *Johnson*, 3 Sm. & G. 419; [And as to the duty of a partner, selling his share to a co-partner, to put

joint bankruptcy of surviving partners, who have a large claim against the estate of the deceased partner, may purchase from the representatives of the deceased partner (*a*),] and the creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff (*b*); [and a person named as executor, but who, in fact, never proves the will, may purchase from the executor who proves (*c*)].

Secondly. As to the *terms* upon which the sale will be set aside.

Cestuis que trust may recover the specific estate.

1. The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee (*d*), or, where the trustee has sold it with notice, by the party who purchased (*e*), the *cestui que trust* on the one hand repaying the price at which the trustee bought, with interest at 4 per cent. (*f*), and the trustee or purchaser on the other accounting for the profits of the estate (*g*), but not with interest (*h*), and, if he was in actual possession, being charged with an occupation rent (*i*). [But if the consideration passing from the trustee is not wholly pecuniary, and the *cestui que trust* has by subsequent dealings put it out of his power to restore to the trustee the benefits derived from him, he has lost his right to set aside the transaction (*j*).]

Allowances for repairs.

2. The trustee will have all just allowances made to him for *improvements and repairs* which are substantial and lasting (*k*), or such as have a tendency to bring the estate to a better sale (*l*), as in one case for a mansion house erected, plantations of shrubs,

the purchaser in possession of all material facts known to the vendor, see *Law* v. *Law*, (1905) 1 Ch. (C.A.) 140, ante, p. 310].

[(*a*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 27 Ch. D. (C.A.) 424; 11 App. Cas. 232.]

(*b*) *Stratford* v. *Twynam*, Jac. 418.

[(*c*) *Clark* v. *Clark*, 9 App. Cas. 733.]

(*d*) See *Ex parte James*, 8 Ves. 351; *Ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *York Buildings Company* v. *Mackenzie*, 8 B. P. C. 42; *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544.

(*e*) *Attorney-General* v. *Lord Dudley*, G. Coop. 146; *Dunbar* v. *Tredennick*, 2 B. & B. 304.

(*f*) *Watson* v. *Toone*, 6 Mad. 153; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Whelpdale* v. *Cookson*, stated from R. L., *Campbell* v. *Walker*, 5 Ves. 682; *Hall* v. *Hallett*, 1 Cox, 134, see 139; *York Buildings Company* v. *Mackenzie*, *ubi sup.*, &c. [As to the rate of interest, see *ante*, p. 397.]

(*g*) *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Ex parte Lacey*, 6 Ves. 630, *per eundem*; *Watson* v. *Toone*, 6 Mad. 153; *Whelpdale* v. *Cookson*, stated from R. L., *Campbell* v. *Walker*, 5 Ves. 682; *York Buildings Company* v. *Mackenzie*, 8 B. P. C. 42.

(*h*) *Macartney* v. *Blackwood*, 1 Ridg. L. & S. 602; [*Silkstone and Haigh Moor Coal Co.* v. *Edey*, (1900) 1 Ch. 167].

(*i*) *Ex parte James*, 8 Ves. 351, *per* Lord Eldon.

[(*j*) *Re Worssam*, 46 L. T. N.S. 584; 51 L. J. Ch. 669; *Dimsdale* v. *Dimsdale*, 3 Dr. 556, 577.]

(*k*) *Ex parte Hughes*, 6 Ves. 624, 625; *Ex parte James*, 8 Ves. 352; *Campbell* v. *Walker*, 5 Ves. 682; *Davey* v. *Durrant*, 1 De G. & J. 535; *King* v. *Anderson*, 8 I. R. Eq. 625, see 636.

(*l*) *Ex parte Bennett*, 10 Ves. 400.

&c. (*a*); and in estimating the improvements, the buildings pulled down, if they were incapable of repair, will be valued as old materials, but otherwise they will be valued as buildings standing (*b*). Should the property have been *deteriorated* by the acts of the trustee, his purchase-money will suffer a proportionate reduction (*c*). [And if the subject-matter of the sale be a business sold as a going concern, and the purchasing trustee carry it on under his own personal direction, on the sale being set aside he will be allowed to deduct from the profits all outgoings for wages of assistants, expenditure for stock, &c., but will not be allowed any salary for his own management of the business (*d*).]

Case of actual fraud.

3. Where the contract is vitiated by the presence of *actual fraud*, allowance will still be made to the trustee for necessary repairs (*e*), and in one case allowance was also made for improvements (*f*); but in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend the money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was *to improve the right owner out of the possession of his estate*" (*g*).

Trustee paying purchase-money into Court.

4. A trustee, the sale having taken place during the pendency of a suit, had paid part of his purchase-money into Court, which had been *invested in the funds*. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held that he was entitled only to his purchase-money with interest, for had there occurred a fall of the stock, he could not have been compelled to submit to the loss (*h*).

Trustee to be discharged from the sale immediately.

5. If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the Court will order an immediate reconveyance upon immediate repayment of the money (*i*).

Lessees not prejudiced.

6. The reconveyance of the estate will be without prejudice to the titles and interests of *lessees* and others who have contracted with the trustee *bonâ fide* before the pendency of the suit (*j*).

(*a*) *York Buildings Company* v. *Mackenzie*, 8 B. P. C. 42.
(*b*) *Robinson* v. *Ridley*, 6 Mad. 2.
(*c*) *Ex parte Bennett*, 10 Ves. 401.
[(*d*) *Re Norrington*, 13 Ch. D. (C.A.) 654.]
(*e*) *Baugh* v. *Price*, 1 G. Wils. 320.
(*f*) *Oliver* v. *Court*, 8 Price, 172.
(*g*) *Kenney* v. *Browne*, 3 Ridg. 518; and see *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 361.
(*h*) *Ex parte James*, 8 Ves. 337, see 351.
(*i*) See *Ex parte Bennett*, 10 Ves. 400, 401.
(*j*) *York Buildings Company* v. *Mackenzie*, 8 B. P. C. 42; see the decree.

Of submitting the estate to a resale.

7. But the *cestui que trust*, particularly where the assignee in bankruptcy has become the purchaser, may claim, not a reconveyance of the specific estate, but a *resale* of the property under the direction of the Court. The terms of the resale have not always been uniform. In *Whelpdale* v. *Cookson* (*a*), Lord Hardwicke said the majority of the creditors should *elect* whether the purchase should stand; so that should they elect to resell, and the estate should be sold at a still lower price, the creditors would suffer. The doctrine of Lord Thurlow appears to have been, that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, but if no bidding, the trustee should be held to his bargain (*b*). Lord Alvanley followed the authority of Lord Hardwicke, and directed an inquiry whether it was for the benefit of the infants that the premises should be resold, and, if for their benefit, that the sale should be made (*c*). "To this principle," said Lord Eldon, "the objection is, that a great temptation to purchase is offered to trustees, the question whether the resale would be advantageous to the *cestui que trust* being of necessity determined at the hazard of a wrong determination" (*d*). Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so he decreed in *Ex parte Hughes* (*e*), and *Ex parte Lacey* (*f*). Sir W. Grant, in a subsequent case (*g*), said he was not aware that Lord Eldon had laid down any general rule as to the terms; but a few days after, having consulted the Lord Chancellor upon the subject, and discovering his mistake, he framed his decree in conformity with the Lord Chancellor's decisions. The same principle has since been followed in numerous other cases (*h*), and the practice may be considered as settled.

Allowances for repairs, &c.

8. Should the trustee have *repaired or improved* the estate, the expense of the repairs and improvements, if allowed, will be added to the purchase-money, and the estate be put up at the accumulated sum (*i*).

Reselling in lots.

9. Where the trustee has purchased in one lot, the *cestuis que trust* cannot insist on a resale in different lots. If desirous of reselling the property in that mode, they must pay the trustee his

(*a*) Cited *Campbell* v. *Walker*, 5 Ves. 682.

(*b*) See *Lister* v. *Lister*, 6 Ves. 633; *Ex parte James*, 8 Ves. 351.

(*c*) *Campbell* v. *Walker*, 5 Ves. 678, see 682.

(*d*) *Sanderson* v. *Walker*, 13 Ves. 603.

(*e*) 6 Ves. 617.

(*f*) Id. 625; and see *Ex parte Reynolds*, 5 Ves. 707.

(*g*) *Lister* v. *Lister*, 6 Ves. 633.

(*h*) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Robinson* v. *Ridley*, 6 Mad. 2.

(*i*) *Ex parte Bennett*, 10 Ves. 400; *Ex parte Hughes*, 6 Ves. 625; *Robinson* v. *Ridley*, 6 Mad. 2.

principal and interest, and then, as the absolute owners, they may sell as they please (*a*).

Difficulty of Lord Hardwicke's rule.

10. In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a resale; but by the practice of Lord Eldon, the difficulty on that head is avoided (*b*), for as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment (*c*).

The remedy against the trustee who has sold the property.

11. If before the *cestui que trust* commences proceedings for relief, the trustee has passed the estate into the hands of a purchaser *without notice*, the *cestui que trust* may compel the trustee to account for the difference of *price* (*d*), or for the difference between the sum the trustee paid and the real *value* of the estate at the time of the purchase (*e*), with interest at 4 per cent. (*f*).

Purchase of shares by a trustee.

12. An administrator had become the purchaser of some shares in Scotch mines, part of the assets, and afterwards sold them to a stranger at a considerable advance of price, and Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the defendant to replace the shares. He conceived that the plaintiff, one of the next of kin, had no such *election* of choosing between the *specific thing* and the *advantage* made of it (*g*).

Costs.

13. The *costs of the suit* will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, unless his conduct was perfectly honourable and the sale is set aside on the mere dry rule of equity (*h*), he must pay the expenses he has himself occasioned (*i*); and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit (*j*); and, on the other

Delay.

(*a*) See *Ex parte James*, 8 Ves. 351, 352.

(*b*) *Ex parte Hughes*, 6 Ves. 624.

(*c*) *Ex parte James*, 8 Ves. 353; and see *Ex parte Lacey*, 6 Ves. 628.

(*d*) *Fox* v. *Mackreth*, 2 B. C. C. 400; *S. C.* 2 Cox, 320; *Hall* v. *Hallet*, 1 Cox, 134; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Ex parte Reynolds*, 5 Ves. 707; *Randall* v. *Errington*, 10 Ves. 423.

(*e*) See *Lord Hardwicke* v. *Vernon*, 4 Ves. 411.

(*f*) *Hall* v. *Hallet*, 1 Cox, 134, see 139.

(*g*) *Hall* v. *Hallet*, 1 Cox, 134.

(*h*) *Baker* v. *Carter*, 1 Y. & C. 250.

(*i*) *Whichcote* v. *Lawrence*, 3 Ves. 752; *Hall* v. *Hallet*, 1 Cox, 141; *Sanderson* v. *Walker*, 13 Ves. 601, 604; *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Dunbar* v. *Tredennick*, 2 B. & B. 304; *Smedley* v. *Varley*, 23 Beav. 358.

(*j*) *Attorney-General* v. *Lord Dudley*, G. Coop. 146.

hand, if the suit be dismissed, not because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the plaintiff to pay the costs of the defendant (*a*).

Where the sale is set aside after the purchaser's death.

14. If the *trustee devise the estate* purchased by him, and the purchase is set aside as against the devisee, it is conceived that, as the devise carried all the testator's interest in the property, the moneys repaid will belong to the devisee. But if the *trustee die intestate*, then whether moneys repaid shall belong to the next of kin or the heir of the trustee is a question of great difficulty. In favour of the former it may be urged, that as there is no equity between the heir-at-law and next of kin, the moneys repaid, being in fact personal estate, must belong to the next of kin: that the Court rescinds the transaction by taking an account of rents and allowing interest on the purchase-money from the time of the purchase, and that the rents and interest accrued during the life of the intestate must certainly be regarded as personal estate, and that the right of the next of kin is supported by *Lawes* v. *Bennett* (*b*), and other cases, where a lessee has an option of purchasing, and the option is exercised after the death of the lessor, in which case there is a retrospective conversion. On the other hand, it may be argued that a purchase by a trustee is not void but voidable only, that the heir is clearly not bound to account for the rents while he was in possession, and that the Court takes an account of rent and interest *ab initio*, not for the purpose of increasing the trustee's personal estate, but for measuring the price which the *cestui que trust* must pay for recovering the estate; that the heir takes all the title which the intestate could give him, subject to an equity subsisting in another, to wrest the estate from him upon certain terms, and that the moneys repaid are in fact the estate, after satisfying the outstanding claims: that the cases decided upon contract have no application, as the moneys are here repaid contrary to the contract: that a different doctrine would lead to great inconvenience in adjusting the accounts of rent and interest, and also from intermediate settlements or other dispositions by the heir; it would be very hard, for instance, that purchasers under a marriage settlement, with constructive notice, should, because they cannot have the whole benefit, be deprived of every benefit. The inclination of the author's opinion is in favour of the real representative, but the point remains to be decided.

(*a*) *Gregory* v. *Gregory*, G. Coop. 201. (*b*) 1 Cox, 167.

Thirdly. As to the time within which the sale may be set aside.

Cestui que trust must set aside the sale in reasonable time.

1. If the *cestui que trust* decide to set aside the purchase, he must make his application to the Court in *reasonable time*, or he will not be entitled to relief (*a*). A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted (*b*).

What considered a reasonable time.

2. A sale cannot, in general, be set aside after a lapse of twenty years (*c*); but in these cases the Court does not confine itself to that period by analogy to the Statute of Limitations, for relief has been refused after an acquiescence of eighteen years (*d*); and seventeen years (*e*); and it is presumed that even a shorter period would be a bar to the remedy, where the *cestui que trust* could offer no excuse for his *laches* (*f*). However, the sale has been opened after an interval of ten years (*g*), and eleven years (*h*); and even after a much greater lapse of time, where the executor had purchased in the name of trustees for himself, and the transaction was attended with circumstances of disguise and concealment (*i*).

Of persons under disability.

3. Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability (*j*). But *femes covert* as to property settled to their *separate use*, [or belonging to them as their separate property under the Married Women's Property Act, 1882 (*k*),] if their power of anticipation be not restricted, are regarded as *femes sole* (*l*).

Time allowed to a class of persons.

4. A *class* of persons, as *creditors*, cannot be expected in the

(*a*) *Campbell* v. *Walker*, 5 Ves. 680, 682, *per* Lord Alvanley; *Chalmer* v. *Bradley*, 1 J. & W. 59, *per* Sir T. Plumer; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Webb* v. *Rorke*, 2 Sch. & Lef. 672, *per* Lord Redesdale; *Randall* v. *Errington*, 10 Ves. 427, *per* Sir W. Grant. But see *Baker* v. *Peck*, 9 W. R. 186.

(*b*) *Parkes* v. *White*, 11 Ves. 226, *per* Lord Eldon; and see *Morse* v. *Royal*, 12 Ves. 374, 378.

(*c*) *Price* v. *Byrn*, cited *Campbell* v. *Walker*, 5 Ves. 681; *Barwell* v. *Barwell*, 34 Beav. 371.

(*d*) *Gregory* v. *Gregory*, G. Coop. 201; affirmed on appeal, see Jac. 631; *Champion* v. *Rigby*, 1 R. & M. 539; *Roberts* v. *Tunstall*, 4 Hare, 257; *King* v. *Anderson*, 8 Ir. R. Eq. 625.

(*e*) *Baker* v. *Read*, 18 Beav. 398.

(*f*) See *Oliver* v. *Court*, 8 Price, 167, 168.

(*g*) *Hall* v. *Noyes*, cited *Whichcote* v. *Lawrence*, 3 Ves. 748; [and see *Re Worssam*, 46 L. T. N.S. 584; 51 L. J. Ch. 669].

(*h*) *Murphy* v. *O'Shea*, 2 Jon. & Lat. 422.

(*i*) *Watson* v. *Toone*, 6 Mad. 153; [and see *Re Postlethwaite*, 59 L. T. N.S. 58; reversed on appeal, 37 W. R. 200; 60 L. T. N.S. 514].

(*j*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche* v. *O'Brien*, 1 B. & B. 330, see 339.

[(*k*) 45 & 46 Vict. c. 75.]

(*l*) See *post*, Chap. XXVIII. s. 6.

prosecution of their common interest to exert the same vigour and activity as *individuals* would do in the pursuit of their exclusive rights (*a*). Accordingly, creditors have succeeded in their suits after a *laches* of twelve years (*b*); but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years (*c*).

Time no bar where circumstances not known.

5. For *laches* to operate as a bar, it must be shown that the *cestui que trust knew* the trustee was the purchaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale (*d*).

Distress of *cestui que trust.*

6. The effect of the length of time may also be materially influenced by the continued *distress* of the *cestui que trust* (*e*), but poverty is merely an ingredient in the case, and will not alone displace the bar (*f*).

Confirmation of the sale.

7. Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual *confirmation* (*g*); and if the *cestui que trust* choose to confirm it, he cannot afterwards annul his own act on the ground of no adequate consideration (*h*). But—

Requisites of good confirmation.

a. The confirming party must be *sui juris* — not labouring under any disability, as infancy or coverture (*i*). But, in the case of real estate, a *feme covert* can, if it be not settled to her separate use without anticipation, confirm the purchase under the operation of the Fines and Recoveries Act (*j*). And in confirmation, as in acquiescence, a *feme covert* who has property whether real or personal, settled to her separate use, [or belonging to her as her separate property under the Married Women's Property Act, 1882, (*k*),] (provided her power of anticipation be

(*a*) *Whichcote* v. *Lawrence*, 3 Ves. 740, see 752; *Ex parte Smith*, 1 D. & C. 267; *Hardwick* v. *Mynd*, 1 Anst. 109; [*Boswell* v. *Coaks*, 27 Ch. D. (C.A.) 424;] and see *Kidney* v. *Coussmaker*, 12 Ves. 158; *York Buildings Company* v. *Mackenzie*, 8 B. P. C. 42.

(*b*) *Anon. case* in the Exchequer, cited *Lister* v. *Lister*, 6 Ves. 632.

(*c*) See *Hercy* v. *Dinwoody*, 2 Ves. jun. 87; *Scott* v. *Nesbitt*, 14 Ves. 446.

(*d*) *Randall* v. *Errington*, 10 Ves. 423, see 427; *Chalmer* v. *Bradley*, 1 J. & W. 51.

(*e*) *Oliver* v. *Court*, 8 Price, 127; see 167, 168; and see *Gregory* v. *Gregory*, G. Coop. 201; *Roche* v. *O'Brien*, 1 B. & B. 342.

(*f*) *Roberts* v. *Tunstall*, 4 Hare, 257; see p. 267.

(*g*) *Morse* v. *Royal*, 12 Ves. 355; *Clarke* v. *Swaile*, 2 Eden, 134; and see *Chesterfield* v. *Janssen*, 2 Ves. 125; *S. C.* 1 Atk. 301.

(*h*) *Roche* v. *O'Brien*, 1 B. & B. 353, *per* Lord Manners.

(*i*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche* v. *O'Brien*, 1 B. & B. 330, see 339; and see *Scott* v. *Davis*, 4 M. & Cr. 92; [and *Buckmaster* v. *Buckmaster*, 35 Ch. D. (C.A.) 21; *S. C. nom. Seaton* v. *Seaton*, 13 App. Cas. 61; *Harle* v. *Jarman*, (1895) 2 Ch. 419].

(*j*) 3 & 4 W. 4. c. 74; and see the Real Property Act, 1845 (8 & 9 Vict. c. 106).

[(*k*) 45 & 46 Vict. c. 75.]

not restrained), has to the extent of her interest in the property, all the capacity of a *feme sole* (*a*).

β. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter (*b*); and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence (*c*).

γ. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case (*d*).

δ. It has been laid down that the confirming party must not be ignorant of the *law*, that is, he must be aware that the transaction is of such a character that he could impeach it in a Court of Equity(*e*).

ε. The confirmation must be wholly distinct from and independent of the original contract (*f*)—not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance (*g*).

ζ. The confirmation must not be wrung from the *cestui que trust* by distress or terror (*h*).

(*a*) See *post*, Chap. XXVIII. s. 6.

(*b*) *Carpenter* v. *Heriot*, 1 Eden, 338; and see *Montmorency* v. *Devereux*, 7 Cl. & Fin. 188.

(*c*) *Morse* v. *Royal*, 12 Ves. 373, *per* Lord Erskine.

(*d*) See *Murray* v. *Palmer*, 2 Sch. & Lef. 486; *Baugh* v. *Price*, 1 G. Wils. 320; *Morse* v. *Royal*, 12 Ves. 373; *Cole* v. *Gibson*, 1 Ves. 507; *Roche* v. *O'Brien*, 1 B. & B. 338, and following pages; *Adams* v. *Clifton*, 1 Russ. 297; *Cockerell* v. *Cholmeley*, 1 R. & M. 425; *S. C.* Taml. 444; *Chesterfield* v. *Janssen*, 2 Ves. 146, 149, 152, 158; *Chalmer* v. *Bradley*, 1 J. & W. 51.

(*e*) *Cann* v. *Cann*, 1 P. W. 727; *Dunbar* v. *Tredennick*, 2 B. & B. 317; *Burney* v. *Macdonald*, 15 Sim. 15; *Molony* v. *L'Estrange*, 1 Beat. 413; *Crowe* v. *Ballard*, 2 Cox, 257; *S. C.* 1 Ves. jun. 220; *S. C.* 3 B. C. C. 120; *Watts* v. *Hyde*, 2 Coll. 377; *Cockerell* v. *Cholmeley*, 1 R. & M. 425; *Murray* v. *Palmer*, 2 Sch. & Lef. 486; *Roche* v. *O'Brien*, 1 B. & B. 339; *Ex parte James*, 9 L. R. Ch. App. 609. [It has been doubted how far the statement in the text is consistent with the doctrine that mistake of law, as distinguished from mistake of fact, forms no ground of relief, see] *Midland Great Western Railway of Ireland Company* v. *Johnson*, 6 H. L. Cas. 798; *Stafford* v. *Stafford*, 1 De G. & J. 202; *Re Saxon Life Assurance Company*, 2 J. & H. 412; [but it is "not accurate to say that relief can never be given in respect of a mistake of law," *Allcard* v. *Walker*, (1896) 2 Ch. 369, 381, *per* Stirling, J.; and as authorities for the proposition that, where there is a mistake as to a right of private ownership, the maxim "ignorantia juris non excusat" is not applicable, and such mistake may be a ground of relief, see *S. C.* and *Cooper* v. *Phibbs*, 2 L. R. H. L. 149, 170; *Rogers* v. *Ingham*, 3 Ch. D. (C.A.) 351, 356, 357; *Stone* v. *Godfrey*, 5 De G. M. & G. 76].

(*f*) See *Wood* v. *Downes*, 18 Ves. 128; *Morse* v. *Royal*, 12 Ves. 373; *Scott* v. *Davis*, 4 M. & Cr. 91, 92; *Roberts* v. *Tunstall*, 4 Hare, 267.

(*g*) *Roche* v. *O'Brien*, 1 B. & B. 330, see 338; *Wood* v. *Downes*, 18 Ves. 120, see 123; and see *Fox* v. *Mackreth*, 2 B. C. C. 400.

(*h*) See *Roche* v. *O'Brien*, 1 B. & B. 330; *Dunbar* v. *Tredennick*, 2 B. & B. 317; *Crowe* v. *Ballard*, 2 Cox, 257.

η. Where the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest, but the confirmation to be complete must be the joint act of the whole body (*a*).

(*a*) *Sir G. Colebrook's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited, Id. 630, note (*b*). *Whelpdale* v. *Cookson*, cited *Campbell* v. *Walker*, 5 Ves. 682, has been doubted by Lord Eldon, 6 Ves. 628.

CHAPTER XIX

DUTIES OF TRUSTEES FOR PURCHASE

A TRUST for *purchase* is not so frequent as a trust for *sale*, and yet occurs often enough to merit a separate consideration.

Trustees liable for consequences of breach of duty

1. The general rule is that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed, and, failing to do so, are answerable for the consequences; as if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestuis que trust* for the consequences (*a*).

May enter into a previous contract.

2. It is almost unnecessary to premise, that trustees for purchase are not confined to the mere act of *paying* the purchase-money, and taking a *conveyance*, but may, in the ordinary course of business, enter into a previous written *contract* as a preliminary to the purchase.

Must see to value

3. A material point to which trustees of this kind have to advert is the intrinsic *value* of the estate proposed to be bought, and, to arrive at a sound conclusion on this head, they must employ a valuer of their own (*b*), and must not rely upon any valuation made on behalf of the vendor; "Nothing," said Lord Romilly, "is more uncertain than a valuation, and the Court has constantly to observe upon the great discrepancy between valuations made by those persons who want to enhance, and by those persons who want to depreciate the value of the property. A man *bonâ fide* forms his opinion, but he looks at the case in a totally different way, when he knows on whose behalf he is acting"; and in reference to the case of a loan by trustees on mortgage (which is not on principle distinguishable from a purchase), he added, "a trustee cannot with propriety lend trust

(*a*) *Craven* v. *Craddock*, W. N. 1868, p. 229.

[(*b*) In *Fry* v. *Tapson*, 28 Ch. D. 268, it was held that the appointment of the valuer could not be left to the trustee's solicitor, but that the trustees were bound to exercise their own judgment as to the selection of a valuer; see *ante*, pp. 374, 375.]

money on mortgage upon a valuation made by or on behalf of the mortgagor. If he does so, and the valuer has *bonâ fide* valued the property at double its value, the trustee must take the consequences: he ought to have employed a valuer on his own behalf to see to it" (*a*).

[Prospective purchase.]

[Thus it is a breach of trust for a trustee, who has no money in hand, to contract for a purchase to be completed when he shall get the money, as this necessarily leaves it doubtful whether when the time for completion arrives the land purchased will be worth the money (*b*).]

There must be a good title.

4. Another question of importance is that of *title*. Every direction or authority to lay out trust money upon a purchase of real estate, carries with it the tacit condition that there shall be a good title. Whether, therefore, the trustees are proposing to purchase by *private contract* or by *auction*, they must take care not to bind themselves by any agreement which shall preclude them from requiring a good marketable title. If the intended contract or conditions of sale contain anything of a special character, the trustees should lay them before their counsel for his opinion as to whether the stipulations are consistent with their trust (*c*). Formerly a good marketable title was one traced back for a period of sixty years, but by the Vendor and Purchaser Act, 1874 (*d*), sect. 1, a forty years' title has been substituted. [And by sect. 8, sub-sect. 3, of the Trustee Act, 1893 (*e*), it is now provided that "a trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted."

[Trustee Act, 1893.]

[Conditions incorporated in the contract.]

5. The 2nd section of the Vendor and Purchaser Act, 1874, as to contracts for sale made after the 31st December, 1874, and the 3rd section of the Conveyancing and Law of Property Act, 1881 (*f*),

(*a*) *Ingle* v. *Partridge*, 34 Beav. 412-414; [but see *Re Godfrey*, 23 Ch. D. 483, where trustees were held not liable, though they had not made an independent valuation; and in all cases the true test seems to be whether the trustees have acted as prudent men would in dealing with their own property; see *ante*, p. 375].

[(*b*) *Ecclesiastical Comm.* v. *Pinney*, (1900) 2 Ch. (C.A.) 736.]

(*c*) See *Eastern Counties Railway Company* v. *Hawkes*, 5 H. L. Cas. 363.

[(*d*) 37 & 38 Vict. c. 78.]

[(*e*) 56 & 57 Vict. c. 53, replacing s. 4, sub-s. 3, of the Trustee Act, 1888, 51 & 52 Vict. c. 59.]

[(*f*) 44 & 45 Vict. c. 41.]

as to contracts for sale made after the 31st December, 1881, incorporate in such contracts various conditions and stipulations (*a*), unless the same are expressly excluded; and by sect. 15 of the Trustee Act, 1893 (*b*), and sect. 66 of the Act of 1881, trustees who are purchasers are authorised to buy without excluding the application of the Acts of 1874 and 1881. Sect. 66 of the Act of 1881 contains clauses expressly exonerating trustees and their solicitors from liability for adopting its provisions, but nothing in that Act is to be taken to imply that the adoption in connection with or application to any contract or transaction of any further or other provisions, stipulations, or words, is improper.

[Official searches.

6. Sect. 2 of the Conveyancing Act, 1882 (*c*), provides for an official search being made on the request of a purchaser for entries of judgments, Crown debts, and similar matters, and provides that when a solicitor acting for trustees obtains an office copy certificate of the result of the search under the section, the trustees shall not be answerable for any loss that may arise from error in the certificate (*d*); and by the Land Charges Registration and Searches Act, 1888 (*e*), the like protection is made applicable in the case of searches in the registries of writs and orders affecting land (*f*), deeds of arrangement (*g*), and land charges (*h*) established by that Act (*i*).

By the Land Charges Act, 1900 (*j*), the business relating to the registry of judgments is transferred to the office of Land Registry.

[Yorkshire Register.]

7. As to land situate in Yorkshire, the Yorkshire Registries Act, 1884 (*k*), provides for an official search of the register being made at the request of any person, and further exempts any trustee, executor, or other person in a fiduciary position who has obtained a certificate of the result of an official search or a certified copy of any document enrolled in the register, or of any entry in the register, from any loss, damage, or injury that may arise from any error in such certificate or copy. And where a

[(*a*) For these conditions and stipulations, see *ante*, pp. 518, *et seq.*]

[(*b*) 56 & 57 Vict. c. 53.]

[(*c*) 45 & 46 Vict. c. 39.]

[(*d*) For some observations as to the limited nature of this protection, see Elphinstone and Clark on Searches, pp. 166, *et seq.*]

[(*e*) 51 & 52 Vict. c. 51.]

[(*f*) Sects. 5, 6.]

[(*g*) Ss. 7, 8, 9, and see definition in s. 4.]

[(*h*) Ss. 10-14, and see definition in s. 4, and *Reg.* v. *Vice-Registrar of Land Registry*, 24 Q. B. D. 178.]

[(*i*) Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), a similar protection is extended to trustees in respect to searches under that Act; see s. 22, sub-s. 6 (*d*).]

[(*j*) 63 & 64 Vict. c. 26. See further as to these Acts, *post*, Chap. XXVIII., s. 7.]

[(*k*) 47 & 48 Vict. c. 54, ss. 20, 23.]

deed or will has been enrolled at full length, the comparison of an abstract with the copy so enrolled is to be a sufficient discharge of the duty to compare the abstract with the original document.]

Deposit.

8. As a *deposit* is almost invariably required upon a sale by auction, and not uncommonly upon a sale by private contract, it is conceived that trustees would be justified upon signing the contract in paying a deposit in part discharge *de bene esse* of the purchase-money. But generally the character of trustee is pleaded as an excuse for not paying a deposit, and is allowed.

Where purchase-money is in Court.

9. Where the money is in *Court* the trustee must enter into a *conditional contract*, that is "subject to the approbation of the Court," and then apply by summons at chambers for the Court's sanction, and the practice is to direct an inquiry whether the proposed purchase is fit and proper, and if so, whether a *good title* can be made. "As long," said Sir G. Jessel, "as an estate is under the administration of the Court, the Court does not allow a purchase or mortgage or any other investment to be made, without seeing to its safety. The Court has to protect the property for all claimants, and a reference is made to ascertain the propriety of the investment—that is to say, its propriety in all respects" (*a*). And the practice is not to inquire whether a good title can be made *subject to the conditions*, but whether a good title can be made *absolutely*, and if in the course of investigation an objection to the title arises, it is brought under the attention of the Judge, who then exercises his discretion (the whole title being before him), whether the objection can be waived with reasonable safety (*b*). "Much too great laxity," observed V. C. Wood, "has been gaining ground amongst the advisers of those who have to manage trust property, and there is a disposition to rest satisfied with imperfect titles. I cannot approve of such a practice, and cannot permit trustees to take a defective title, even though it may be in accordance with the contract" (*c*).

How purchase will affect the interest of *cestuis que trust.*

10. Trustees for purchase have to look not only to the adequacy of the *value* and the goodness of the *title*, but also to the effect which the purchase will have upon the *relative interests* of the *cestuis que trust.*

Purchase of houses.

Thus where the property is directed by the settlement to be held in trust for a person for life with remainders over, a trustee

(*a*) *Bethell* v. *Abraham*, 17 L. R. Eq. 27.

(*b*) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 166.

(*c*) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 168.

might no doubt purchase an estate with a suitable *house* upon it, but (without saying that he could not legally do so) he ought not to purchase a house merely. This is a property of a wasting nature, and the tenant for life could not be compelled to preserve it against natural decay. A power to invest on *Government Annuities* would not justify the purchase of *Long Annuities*, and there is a similar difference between land and houses, the former being worth about thirty years' purchase, and the latter much less, so that the tenant for life would be benefited at the expense of the remainderman (*a*).

Ground-rents.

11. Even a purchase of *ground-rents* of houses, though coming under the description in the trust deed of "hereditaments," is not free from objection, for the object would of course be to procure for the tenant for life a higher income, but this would be at the cost of the remainderman in point of security. Should the houses be burnt down, and should the lessee have neglected to insure or the insurance moneys not be forthcoming, the trustee might have nothing to show for the purchase but a worthless site, and then the remainderman might seek to hold him responsible as for a fraudulent execution of his trust in equity, though the purchase was within the words of the trust according to the letter (*b*). However, it has been held that the purchase of freehold ground-rents reserved upon building leases for ninety-nine years is justifiable under a power to purchase "hereditaments in fee-simple in possession" (*c*).

A timbered estate.

12. Again, if a sum be given to be laid out in the purchase of an estate to be settled on a person for life *without impeachment of waste*, with remainders over, trustees should not purchase a *wood estate*, as the tenant for life, on being put into possession could by a fall of the timber possess himself of a great part of the capital or *corpus* of the fund (*d*); and, on the contrary, if the tenant for life were *impeachable for waste*, he would lose the fruit of so much as was the value of the timber (*e*). But trustees may purchase an estate where the timber forms no overwhelming proportion of the value, for it cannot be supposed that the trustees were meant to purchase land without trees upon it.

(*a*) See *Moore* v. *Walter*, 8 L. T. N.S. 448; 11 W. R. 713.

(*b*) See *Read* v. *Shaw*, Sugd. Powers Append. 953; and see Ib. p. 864, 8th ed.; and *Middleton* v. *Pryor*, Amb. 393.

(*c*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

(*d*) See the subject discussed in *Burges* v. *Lamb*, 16 Ves. 174.

[(*e*) But see now the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35 under which a tenant for life impeachable for waste in respect of timber may cut and sell ripe timber, and will be entitled to one-fourth of the proceeds.]

Mines.

13. Trustees again, should not purchase *mines;* for if the mines be open, the tenant for life might exhaust them, and leave nothing to the remainderman; and if not open, the tenant for life, if impeachable for waste, would get nothing, and the remainderman would take the whole (*a*). But under *special circumstances* the Court has sanctioned the purchase of mines (*b*).

Advowsons.

14. *Advowsons*, again, would be very undesirable as a purchase, for though the advowson or any particular presentation (before a vacancy) might be sold, there would be no annual or regular fruit. The remainderman, *after* the tenant for life's death, might sell the advowson, and get back all he was entitled to; but in the meantime the tenant for life would be reaping no benefit.

Copyholds for lives.

15. Copyholds for *lives*, if customarily renewable, might substantially be equal to freeholds, but they would not fall within the terms of a trust to purchase estates of *inheritance* (*c*).

Trustees buying from one of themselves.

16. Trustees having a trust or power to purchase must exercise a *joint* discretion as to the propriety of the purchase, and, therefore, as no man can be judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly proceeding for obtaining the sanction of the Court.

Consent of tenant for life.

17. A trust or power to purchase is sometimes accompanied with a condition that it shall be with the *consent of the tenant for life*. In such a case can the trustees purchase from the tenant for life himself? It is now settled that trustees with a similar power of sale and exchange can either sell to or exchange with the tenant for life (*d*), but this has always been regarded as hardly defensible on principle, and as an exception to the general rule. An exchange is in substance nothing more than a mutual sale, and when the simple case of a purchase by trustees from a tenant for life with power of consenting comes before the Court, it may be upheld, but in the meantime it would not be prudent for trustees, before actual decision, to incur the risk.

Equity of redemption.

18. Trustees, without a special power for the purpose, ought not

[(*a*) But see now the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6-11, under which the tenant for life, whether impeachable for waste or not, may grant mining leases, and will be entitled to one-fourth or three-fourths of the mineral rents, as the case may be.]

(*b*) *Bellot* v. *Littler*, W. N. 1874, p. 156; 22 W. R. 836; 30 L. T. N.S. 861.

(*c*) *Trench* v. *Harrison*, 17 Sim. 111. *N.B.*—The words "of inheritance" in the marginal note, do not occur in the statement of the settlement in the body of the report, but seem to be implied.

(*d*) *Howard* v. *Ducane*, T. & R. 81.

to purchase an *equity of redemption* merely (*a*), for the mortgagee might seek to foreclose, when there might be a difficulty of redeeming, or might sell over the heads of the trustees under the power of sale, or might, [unless prevented by sect. 17 of the Conveyancing and Law of Property Act, 1881 (*b*),] consolidate his mortgage with some other mortgage on another estate of the mortgagor, and so oblige the trustees to redeem both. [Nor will the trustees be justified in purchasing an equity of redemption merely because their investments comprise a second mortgage on the property, and they are empowered to invest upon freehold, leasehold, and chattel real securities, "including equitable mortgages by deposit," with the usual power to vary investments (*c*).]

Should always get the legal estate.

19. It would not be too much to lay down the rule broadly that trustees should never purchase without getting the *legal estate.*

Repairs and improvements.

20. A trust to buy an estate will not justify the investment of part of the trust fund upon a purchase, and the expenditure of a further part upon *repairs and improvements,* however substantial, either of the purchased estate (*d*), or of an estate settled to the like uses (*e*). But in a case where money was bequeathed to be laid out on a purchase of land to be annexed to a settled estate, and part of the settled estate was the advowson of a rectory of which the parsonage house was so dilapidated as to require rebuilding, which the testator had contemplated, V. C. Malins held that the proposed expenditure was within the spirit of the trust, and that the trustees would be justified in

[(*a*) *Worman* v. *Worman*, 43 Ch. D. 296; and see *Ex parte Craven*, 17 L. J. N.S. Ch. 215; *Re Galbraith*, 10 Ir. R. Eq. 368, where the Court held that moneys paid into Court under the Lands Clauses Consolidation Act, 1845, ought not to be re-invested in the purchase of an equity of redemption.]

[(*b*) 44 & 45 Vict. c. 41.]

[(*c*) *Worman* v. *Worman*, 43 Ch. D. 296.]

(*d*) *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364.

(*e*) *Dunne* v. *Dunne*, 3 Sm. & G. 22; *Brunskill* v. *Caird*, 16 L. R. Eq. 493. But the Court by a liberal construction of the Lands Clauses Consolidation Act, and the Leases and Sales of Settled Estates Act, has assumed the jurisdiction of applying money stamped with a trust for purchase of real estate, in the improvement of estates settled to the uses of the estates directed to be purchased. See *Re Clitheroe's Trust*, W. N. 1869, p. 26; *Re Johnson's Trust*, 8 L. R. Eq. 348; *Re Incumbent of Whitfield*, 1 J. & H. 610; *Re Dummer's Will*, 2 De G. J. & S. 515; *Ex parte Rector of Claypole*, 16 L. R. Eq. 574; [*Re Speer's Trust*, 3 Ch. D. 262; *Ex parte Rector of Newton Heath*, 44 W. R. 645;] and see *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Newman's Settled Estates*, 9 L. R. Ch. App. 681; *Drake* v. *Trefusis*, 10 L. R. Ch. App. 366; *Re Hurle's Settled Estates*, 2 H. & M. 196. [But see *Re Venour's Settled Estates*, 2 Ch. D. 522, 526; and that this liberality of construction will not be extended to cases arising under s. 21, sub-s. 7, of the Settled Land Act, 1882, see *Re Lord Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252, 257, *per* Lindley, L. J.]

applying a competent part of the trust fund for the purpose (*a*). And moneys liable to be laid out on a purchase of lands to be settled to certain uses may be laid out in the erection of *new buildings*, though not in the *repair of old buildings* on the lands settled to those uses (*b*), [or in draining the lands in settlement (*c*). In one case, where there was a trust for sale, and the circumstances were special, the Court, in the exercise of its general jurisdiction, by a prospective application of the doctrine of *Vyse* v. *Foster* (*d*), whereby a trustee is allowed sums expended for the benefit of the estate, sanctioned the expenditure of settled money in repairs necessary for the preservation of real estate settled in the same way (*e*); but this case was exceptional, and in general this jurisdiction will only be exercised in cases amounting to what has been termed "actual salvage" (*f*), as, for example, where a mansion-house is coming down owing to the foundations giving way (*g*), or has been condemned by the authorities as a dangerous structure (*h*); but not where parts of the mansion-house require to be rebuilt in order to prevent the destruction of the whole by dry rot (*i*).

[Settled Land Act.]

21. Now, by the Settled Land Act, 1882, sect. 33, money in the hands of trustees, and liable to be laid out in the purchase of land to be made subject to the settlement, may, at the option of the tenant for life, be invested or applied as capital money arising under the Act, and under this enactment it may be made applicable for the improvements authorised by the Act (*j*). And

(*a*) *Re Lord Hotham's Trusts*, 12 L. R. Eq. 76; *Re Curzon's Trust*, V. C. Malins, 8th May, 1874. But see *Brunskill* v. *Caird*, 16 L. R. Eq. 495; and *Re Nether Stowey Vicarage*, 17 L. R. Eq. 156.

(*b*) *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364; [*Re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Re Lytton's Settled Estates*, W. N. 1884, p. 193; *Re Stock's Devised Estates*, 42 L. T. N.S. 46; and see *Donaldson* v. *Donaldson*, 3 Ch. D. 743; *Vine* v. *Raleigh*, (1891) 2 Ch. (C.A.) 13; *Re Mason*, (1891) 3 Ch. 467; *ante*, p. 101].

[(*c*) *Re Leslie's Settlement Trusts*, 2 Ch. D. 185. As to improvements under the Settled Land Act, see *post*, Chap. XXII.]

[(*d*) 8 L. R. Ch. App. 309; affirmed 7 L. R. H. L. 318, see *post*, Chap. XXIV. s. 1.]

[(*e*) *Conway* v. *Fenton*, 40 Ch. D. 512; and see *Re De Teissier*, (1893) 1 Ch. 153, 164; *Re Hawker's Settled Estates*, 66 L. J. Ch. 341, 344; *Re Montagu*, (1897) 1 Ch. 685, 691.]

[(*f*) *Re Jackson*, 21 Ch. D. 786; *Re De Teissier*, (1893) 1 Ch. 153; *Re Montagu*, (1897) 1 Ch. 685; 2 Ch. (C.A.) 8; *Re Hawker's Settled Estates*, 66 L. J. Ch. 341; *Hurst* v. *Hurst*, 29 L. R. Ir. 219; *Re Lord De Tabley*, W. N. (1896) 12.]

[(*g*) See *Frith* v. *Cameron*, 12 L. R. Eq. 169; *Re Montagu*, (1897) 2 Ch. (C.A.) 8.]

[(*h*) See *Re De Teissier*, (1893) 1 Ch. 153, 161, 162, *per* Chitty, J.; approved in *Re Willis*, (1902) 1 Ch. (C.A.) 15.]

[(*i*) *Re Legh's Settled Estates*, (1902) 2 Ch. 274.]

[(*j*) See *post*, Chap. XXII. These provisions do not exclude the application of the general jurisdiction of the Court, though they may usefully guide the Court in the exercise of it; see *Re De Teissier*, (1893) 1 Ch. 153;

[Extraordinary Tithe Rent-charge Act.]

under the Extraordinary Tithe Rent-charge Act, 1886 (*a*), money applicable to the purchase of land to be settled to or on any uses or trusts, is applicable in or towards the redemption of an "extraordinary charge" (*b*), or a rent-charge under the Act on land settled to or on the like uses or trusts.]

Estates in possession.

22. Where the trust is to purchase an estate "*in possession*," it would not be competent to trustees to buy an *estate in reversion;* but, as already observed, under a power to purchase "hereditaments in fee-simple in possession," trustees may buy ground-rents reserved upon building leases for ninety-nine years (*c*). But where the leases are of short duration, and the ground-rents are low as compared with the rental of the property when it falls into possession, the purchase of the ground-rents would be for the advantage of the remainderman at the expense of the tenant for life.

Fund in Court.

23. Where the trust fund is in Court, it is still the duty of the trustees to watch the administration, and see that the purchase is a proper one, unless all the beneficiaries, whether under disability or not, are before the Court, and then the *cestuis que trust* by themselves or their guardians can look after their own interests, and the trustees are exonerated (*d*).

Costs.

24. The *costs* of the purchase are to be considered as part of it, and will come out of the same fund. The trustees, therefore, should provide for the costs as well as for the purchase-money, though, if this were not done, they would still have a lien for the costs properly incurred upon the estate purchased (*e*).

Whether trust to be disclosed.

25. The trustees, where the money is not under administration by the Court, need not *disclose the trust* to the vendor, either in the contract or in the conveyance. If they do so, it may embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust.

Declaration of trust.

26. Where the legal estate is required to be vested in the *trustees*, they should, contemporaneously with the completion of

Re Montagu, (1897) 1 Ch. 685; *Re Hawker's Settled Estates*, 66 L. J. Ch. 341. On the other hand, the protection afforded to purchasers by s. 70 of the Conveyancing and Law of Property Act, 1881, will not make the Court less careful in the exercise of the jurisdiction; *Re Montagu*, (1897) 2 Ch. (C.A.) 8, 11, *per* Rigby, L. J. Where there are legal tenants for life and legal remainders, or equivalent limitations, as where the trustees have a bare legal estate, the Settled Land Acts form, as it were, a code, and where the case is not brought within that code there is no general jurisdiction enabling expenditure on repairs to be made: *Re Willis*, (1902) 1 Ch. (C.A.) 15, 23, *per* Romer, L. J.]

[(*a*) 49 & 50 Vict. c. 54, s. 6 (1).]

[(*b*) See preamble to Act.]

(*c*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

(*d*) *Davis* v. *Combermere*, 9 Jur. 76.

(*e*) *Gwyther* v. *Allen*, 1 Hare, 505.

the purchase, execute a formal declaration of trust, either by indorsement on the conveyance, or by a separate instrument with notice of it indorsed on the conveyance, as otherwise the survivor would have it in his power to deal with the property as his own. Where notice of the trust to the vendor cannot be avoided, the declaration of trust may be embodied in the conveyance itself. This to some extent lengthens the conveyance, and the vendor might in strictness claim the extra costs; but such a claim is very seldom, if ever, heard of in practice.

Consequences of no declaration of trust.

27. *A declaration of trust,* or some notice tantamount to it, not only obviates fraud on the part of the trustee, but is also desirable on another account. If the estate purchased be not ear-marked at the time as subject to the trust, serious questions might afterwards arise between the *cestuis que trust* and the representatives of the trustee, who are the persons entitled to the property, viz. whether the estate was purchased with the trust fund or from the trustee's private resources, and the evidence upon this issue might entail infinite expense (*a*).

[Trustee providing part of purchase-money.]

[28. Where an estate is purchased by trustees, but, the trust funds being insufficient to provide the whole purchase-money, one of the trustees provides the sum necessary to complete the purchase, the trust estate is entitled to a first charge upon the estate for the amount of the trust fund, and subject to such charge the trustee is entitled to be indemnified out of the estate in respect of the sum provided by him, and subject to such indemnity the real estate belongs to the trust (*b*).]

Whether the settlement should be in the conveyance.

29. Where the legal estate is not required to be vested in the trustees, but is to be limited *to the use of the beneficiaries,* the first question is, whether the limitations should be inserted in the conveyance itself, or whether the conveyance should be to the trustees, and a settlement executed subsequently. The answer must depend on the particular circumstances of each case, and whether the vendor will or not offer any objection, though it is conceived that on the purchaser undertaking to pay any extra costs to be thereby occasioned, the vendor could not object.

Whether to be referential.

30. Another practical question is, whether the limitations of the settlement to which the new purchase is to be subjected should be set out at length, or be *incorporated by reference.* In either case the trustees must be careful to ascertain the facts, as,

(*a*) See *Mathias* v. *Mathias,* 3 Sm. & G. 552; *Price* v. *Blakemore,* 6 Beav. 507, and see *post,* Chap. XXXI. s. 2.

[(*b*) *Re Pumfrey,* 22 Ch. D. 255.]

for instance, whether the owners of the successive estates have in any and what way dealt with their respective interests.

Form of referential settlement.

31. If it be proposed to settle the property by *referential* words, caution must be used so as to preserve the rights of the beneficiaries intact. Suppose, for instance, the trustees of a marriage settlement of real estate had disposed of it under a power of sale, and had laid out the proceeds in the purchase of another estate, and then granted the new property to A. and his heirs "to the uses and upon the trusts," &c., of the original settlement. If in this case a term of years was limited by the original settlement to trustees, who have subsequently died, no new term will be created, or if any tenant for life or remainderman had sold his interest, he would, nevertheless, take the like estate again, and the purchaser could have only an equity. It is impossible to provide *a priori* any form that would adapt itself to all cases; but the following, which was settled by two eminent conveyancers, in a case where part of the settled estates had been sold and the proceeds re-invested, may be usefully inserted. The *habendum* was "to such uses as under and by virtue of the said indenture of settlement are now subsisting in the thereby settled hereditaments (now remaining unsold), and so that the said hereby assured hereditaments shall upon the execution of these presents be vested in the persons in whom the said thereby settled hereditaments (now remaining unsold) are now vested, and for the same estates and interests as are now vested in those persons respectively in the same hereditaments under or in consequence of that indenture, and shall be subject to the same trusts, powers, and provisions as the said thereby settled hereditaments (now remaining unsold) are now subject to or affected by, under or in consequence of the same indenture, and so as to give effect to, but so as not to multiply or increase, any charge subsisting under that indenture or thereby authorised to be created" (*a*).

Directions for settlement.

32. It has hitherto been assumed that the directions for the limitations in the settlement are clear in themselves, but it often happens that the trustees are involved in considerable perplexity from the ambiguity of the language in which the directions are given. We have to some extent anticipated this subject in a former page, under the general head of "executory trusts" (which comprise trusts for purchase and settlement) (*b*), but some further observations may here be introduced, with reference to the particular branch of executory trusts now under consideration.

(*a*) See *ante*, p. 148. (*b*) See *ante*, pp. 128 *et seq.*

Impeachment for waste.

33. When trustees have to settle the estate upon a person for life, with remainders over or in strict settlement, the question at once suggests itself whether the tenant for life is or not to be made *impeachable for waste*. *The primâ facie* rule appears to be that he shall (*a*), but there are important exceptions. Thus, where a larger estate than for life is given in the first instance, but it is afterwards cut down by directions for a strict settlement, the Court does not consider itself justified in reducing the interest first taken beyond the clear intention, but limits a life estate without impeachment for waste (*b*). Again, where a testator directed a settlement to be made on A. and the heirs of his body (which would have left him tenant in tail), and then added that "it was never to be in the power of A. to dock the entail during his life," A. was declared to be tenant for life without impeachment of waste (*c*). And the like construction prevailed where a testator constituted A. "his heir," but desired that it should "be secured for the benefit of A.'s family" (*d*). Again, where a testator directed the property to be "closely entailed," the Court cut it down to a tenancy for life with remainder to the issue, but exempted the tenant for life from impeachment for waste (*e*).

"To be strictly settled."

34. In another case, where the direction was that the estate should be "*strictly settled*," the limitation to the tenant for life was without impeachment for waste (*f*), and V. C. Wood observed, with reference to this decision, that it was sustainable on the ground that the term "strict settlement" without more was understood, in accordance with the common form of such instruments, to imply estates for life without impeachment of waste (*g*).

Concurrence of all the *cestuis que trust*.

35. If the parties beneficially interested are under no disability, and can agree together as to the disposition of the fund before investment or of the estate after investment, the trustees will be bound to obey their joint wishes, and must deal with the property in the manner directed by their joint order.

[Purchase in breach of trust.]

36. [Where a purchase is made in breach of trust, the trustee has

(*a*) *Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthurst*, 10 L. R. Eq. 259.

(*b*) *Davenport* v. *Davenport*, 1 H. & M. 779, *per* V. C. Wood; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

(*c*) *Leonard* v. *Sussex*, 2 Vern. 526. See 1 H. & M. 778.

(*d*) *White* v. *Briggs*, 15 Sim. 17 & 300.

(*e*) *Woolmore* v. *Burrows*, 1 Sim. 512. See 1 H. & M. 778.

(*f*) *Banks* v. *Le Despencer*, 10 Sim. 576; 11 Sim. 508; and see *Loch* v. *Bagley*, 4 L. R. Eq. 122.

(*g*) *Davenport* v. *Davenport*, 1 H. & M. 779.

no right of indemnity to which the vendor can be subrogated, so as to give him a remedy, in respect of unpaid purchase-money, against the persons beneficially entitled to the settled estate; his only remedy is by a lien on the land sold (*a*).]

[(*a*) *Ecclesiastical Comm.* v. *Pinney*, (1900) 2 Ch. (C.A.) 736; as to resale of land purchased in breach of trust, see *ante*, p. 555.]

CHAPTER XX

DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS

UNDER this head we shall treat—*First*, Of the *validity* of a trust for payment of debts; *Secondly*, What creditors' deeds are *revocable;* and *Thirdly*, Of the *duties* of trustees for payment of debts.

SECTION I

OF THE VALIDITY OF THE TRUST

1. A trust for payment of debts may be created either by *will* or by act *inter vivos.*

Validity of a trust for payment of debts.

2. A trust created by *will* for payment of debts out of *personal estate* is so far a nullity, that the executor is bound, at all events, to provide for the payment of debts out of the assets in a due course of administration, and would not be justified in the breach of this legal obligation by pleading any expression of intention on the part of the testator. It is only as respects any *surplus* personal estate after payment of debts that the executor ought to regulate his administration by the directions of the will. A devise, however, of *real estate* for payment of debts is in all cases unimpeachable, for the Debts Recovery Act, 1830, avoiding devises as against specialty creditors (*a*), and the Administration of Estates Act, 1833, avoiding them as against simple contract creditors (*b*), have expressly excepted devises for payment of debts.

(*a*) 11 G. 4. & 1 W. 4. c. 47; see *post*, Chap. XXVIII. s. 12. [In the case of a person dying on or after 1st January, 1898, it is provided by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 2, sub-s. 3, that the real estate is to be administered in the same manner and subject to the same liabilities for debt as if it were personal estate, but nothing therein contained is to alter or affect the order in which real and personal assets respectively are applicable in or towards payment of debts.]

(*b*) 3 & 4 W. 4. c. 104.

Trust created by act *inter vivos* attended with fraud.

3. As to trusts created by act *inter vivos*, a trust for payment of debts will in all cases be void, if vitiated by *actual fraud*, as if the debtor by an understanding between him and his trustees be left in possession of the estate so as to obtain a fictitious credit (*a*).

Person not a trader might create trust for payment of debts.

4. Under the old bankruptcy laws, a broad distinction was made between non-traders and traders. If the settlor was *not a trader* he was not amenable to the bankrupt laws, and therefore was at perfect liberty to dispose either of the whole (*b*), or of *part* of his property (*c*) for payment of *all* (*d*), or *any number* of his creditors (*e*). The argument formerly urged for the invalidity of such a trust was that 13 Eliz. c. 5 (*f*) avoided "all alienations contrived of *fraud*, to delay creditors and others of their just debts," &c. But with respect to a trust for the satisfaction of creditors *generally*—"How," said Le Blanc, J., "can it be fraudulent for a person not the object of the bankrupt laws to make the same provision voluntarily for the benefit of all his creditors which the law compels to be done in the case of a bankrupt trader?" (*g*); and if the settlor direct the payment of *particular* debts only, "It is neither illegal nor immoral," said Lord Kenyon, "to prefer one set of creditors to another" (*h*). Nor did the creation of such a trust fall within the scope of the Act; for "it is not every feoffment, judgment, &c.," said Lord Ellenborough, "which will have the *effect* of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors: every assignment of a man's

(*a*) *Twyne's case*, 3 Rep. 80 a; *Wilson* v. *Day*, 2 Burr. 827; *Hungerford* v. *Earle*, 2 Vern. 261; *Tarback* v. *Marbury*, 2 Vern. 510; *Law* v. *Skinner*, 2 W. Bl. 996; and see *Worseley* v. *De Mattos*, 1 Burr. 467; *Stone* v. *Grantham*, 2 Buls. 218; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Dutton* v. *Morrison*, 17 Ves. 197.

(*b*) *Ingliss* v. *Grant*, 5 T. R. 530; *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Leonard* v. *Baker*, 1 M. & S. 251; see *Meux* v. *Howell*, 4 East, 1. As to what property will pass by general words in a creditors' deed, and whether the trustees can disclaim any part which is a *damnosa possessio*, see *How* v. *Kennett*, 3 Ad. & Ell. 659; *Carter* v. *Warne*, Moo. & Ma. 479; *West* v. *Steward*, 14 M. & W. 47.

(*c*) *Estwick* v. *Caillaud*, 5 T. R. 420; *Goss* v. *Neale*, 5 Taunt. 19; see *Meux* v. *Howell*, 4 East, 1.

(*d*) *Meux* v. *Howell*, 4 East, 1; *Ingliss* v. *Grant*, 5 T. R. 530; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Leonard* v. *Baker*, 1 M. & S. 251.

(*e*) *Estwick* v. *Caillaud*, 5 T. R. 420; *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Goss* v. *Neale*, 5 Taunt. 19; *Wood* v. *Dixie*, 7 Q. B. 892.

(*f*) Perpetuated 29 Eliz. c. 5, [repealed with the usual saving by 42 & 43 Vict. c. 59].

(*g*) *Meux* v. *Howell*, 4 East, 9.

(*h*) *Estwick* v. *Caillaud*, 5 T. R. 424; [*Alton* v. *Harrison*, 4 L. R. Ch. App. 622; *Boldero* v. *London and Westminster Discount Company*, 5 Ex. D. 47; *Maskelyne* v. *Smith*, (1903) 1 K. B. (C.A.) 671].

property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice, fraud*, or the like, to bring it within the statute: the Act was meant to prevent deeds, &c., fraudulent in the *concoction*, and not merely such as in their *effect* might delay or hinder other creditors" (*a*).

Fraudulent conveyance.

5. If the settlor was a *trader*, then by the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), sect. 67 (being a re-enactment of the previous statutes), it was declared that "any *fraudulent* conveyance, with intent to defeat or delay creditors, should be deemed an act of bankruptcy"; and it was adjudged fraudulent, within the meaning of this clause, if a person assigned the *whole* of his property (*b*), whether expressed to be the whole or not in the deed (*c*), or all but a *colourable* part (*d*), or all the stock, without which he could not carry on his trade (*e*).

Grounds of the rule.

6. It was immaterial whether the trust was for any *particular* creditor (*f*), or a *certain number* of them (*g*), or *all* the creditors at large (*h*), for by the assignment of his whole substance the

(*a*) *Meux* v. *Howell*, 4 East, 13, 14; [and see *Spencer* v. *Slater*, 4 Q. B. D. 13].

(*b*) *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Hooper* v. *Smith*, 1 W. Bl. 441, *per eundem*; *Wilson* v. *Day*, 2 Burr. 827; *Rust* v. *Cooper*, Cowp. 632, *per* Lord Mansfield; *Leake* v. *Young*, 5 Ell. & Bl. 955; *Bowker* v. *Burdekin*, 11 M. & W. 128; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Smith* v. *Cannan*, 2 Ell. & Bl. 35. But see *Ex parte Gass*, 2 Ir. R. Eq. 284, in which it was held (though the decision rested on other grounds), that the question of fraud is one of fact, and therefore if under the peculiar circumstances the Court is satisfied that the conveyance of the bankrupt's *whole* property was *bonâ fide*, and with a view to pay his creditors rather than to defeat them, the deed will be supported.

(*c*) See *Dutton* v. *Morrison*, 17 Ves. 193; *Lindon* v. *Sharp*, 6 Man. & Gr. 905. But the assignment of all his property at a certain place is not an act of bankruptcy, unless it be proved that he had no other property; *Chase* v. *Goble*, 2 Man. & G. 930.

(*d*) *Law* v. *Skinner*, 2 W. Bl. 996; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Wilson* v. *Day*, 2 Burr. 832, *per eundem*; *Alderson* v. *Temple*, 4 Burr. 2240, *per eundem*; *Estwick* v. *Caillaud*, 5 T. R. 424, *per* Lord Kenyon; *Gayner's case*, cited 1 Burr. 477; *Compton* v. *Bedford*, 1 W. Bl. 368; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Ex parte Foxley*, 3 L. R. Ch. App. 515.

(*e*) *Hooper* v. *Smith*, 1 W. Bl. 442; *Law* v. *Skinner*, 2 W. Bl. 996; *Siebert* v. *Spooner*, 1 M. & W. 714; *Porter* v. *Walker*, 1 Man. & Gr. 686; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Taylor*, 5 De G. M. & G. 392; *Lacon* v. *Liffen*, 4 Giff. 75; and see *Ex parte Hawker*, 7 L. R. Ch. App. 214.

(*f*) *Wilson* v. *Day*, 2 Burr. 827; *Hassell* v. *Simpson*, 1 B. C. C. 99; *S. C.* Doug. 89, note; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Worseley* v. *De Mattos*, 1 Burr. 467; *Newton* v. *Chantler*, 7 East, 138.

(*g*) *Ex parte Foord*, cited *Worseley* v. *De Mattos*, 1 Burr. 477; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Butcher* v. *Easto*, Doug. 282; *Devon* v. *Watts*, Doug. 86; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield.

(*h*) *Kettle* v. *Hammond*, 1 Cooke's B. L. 108, 3rd edit.; *Eckhardt* v.

bankrupt became utterly insolvent; and if the trust was for one or some only of his creditors, it was a fraud upon the rest, and if it was for all the creditors, it was a fraud upon the spirit of the bankruptcy laws, which require a bankrupt's estate to be under the management of certain commissioners and assignees appointed as prescribed by the legislature—not of persons nominated by the debtor himself, and so more likely to further his views than promote the interest of the creditors (*a*).

Where deed could be supported.

7. But in order to avoid the deed, there must have been in existence a debt due at the time of its execution (*b*); and the assignment, though void as against creditors and the assignees in bankruptcy (*c*), was good as between the parties themselves (*d*). And assignments for valuable consideration at the full price, where the purchaser was not party or privy to the fraudulent designs of the vendor (*e*), or for less than the full price, if the transaction was *bonâ fide* (*f*), and mortgages made *bonâ fide* for fresh advances (*g*), or to secure payment of old debts and further advances combined (*h*), were not acts of bankruptcy and could not be impeached; and a conveyance and assignment by a trader *bonâ fide* of all his property substantially to trustees upon trust to convert into money and hold the proceeds upon trust for the settlor, or his appointees, was not an act of bankruptcy (*i*).

What concomitant circumstances would not vary the rule.

8. A fraudulent deed was an act of bankruptcy, notwithstanding a proviso declaring it void *if the trustees thought fit* (*j*), or *if all the creditors should not execute* (*the acts of the trustees to be good in the meantime*) (*k*); or *if all the creditors to a certain amount should not execute by such a time, or a commission of bankruptcy should issue* (*l*). So it was an act of bankruptcy, though the *trustees* at the time of the execution of the deed did not intend to act upon it (for the fraud was to be referred to the

Wilson, 8 T. R. 140; *Tappenden* v. *Burgess*, 4 East, 230; *Dutton* v. *Morrison*, 17 Ves. 199, *per* Lord Eldon; *Simpson* v. *Sikes*, 6 M. & S. 312.

(*a*) See *Dutton* v. *Morrison*, 17 Ves. 199; *Worseley* v. *De Mattos*, 1 Burr. 476; *Simpson* v. *Sikes*, 6 M. & S. 312.

(*b*) *Ex parte Taylor*, 5 De G. M. & G. 392; *Ex parte Thomas*, De Gex, 612; *Ex parte Louch*, De Gex, 463; *Oswald* v. *Thompson*, 2 Exch. 215.

(*c*) *Doe* v. *Ball*, 11 M. & W. 531.

(*d*) *Bessey* v. *Windham*, 6 Q. B. 166.

(*e*) *Baxter* v. *Pritchard*, 1 Ad. & Ell. 456; *Rose* v. *Haycock*, Ib. 460; *Smith* v. *Hurst*, 10 Hare, 30.

(*f*) *Lee* v. *Hart*, 10 Exch. 555.

(*g*) *Bittlestone* v. *Cooke*, 6 Ell. & Bl. 296; *Hutton* v. *Cruttwell*, 1 Ell. & Bl. 15; *Harris* v. *Rickett*, 4 H. & N. 1; *Re Colemere*, 1 L. R. Ch. App. 128.

(*h*) *Whitmore* v. *Dowling*, 2 Foster & Finlason, 134.

(*i*) *Greenwood* v. *Churchill*, 1 M. & K. 546; and see *Berney* v. *Davison*, 1 Brod. & B. 408; 4 Moore, 126.

(*j*) *Tappenden* v. *Burgess*, 4 East, 230.

(*k*) *Back* v. *Gooch*, 4 Camp. 232; *S. C.* Holt, 13.

(*l*) *Dutton* v. *Morrison*, 17 Ves. 193.

animus of the trader) (*a*); and though the trustees induced the debtor to execute it, with the object of making it an act of bankruptcy (*b*); and though the debtor himself meant it to be taken as an act of bankruptcy (*c*).

No act of bankruptcy, if deed could not be enforced.

9. But if A., B., and C. agreed to execute an assignment as a joint transaction, and A. executed, but B. and C. refused, then, as the assignment of A. was made on the footing and faith of B. and C.'s concurrence, and therefore could not be enforced against A. individually and solely, it was no act of bankruptcy (*d*).

Assignment executed abroad.

10. An assignment executed abroad was at one time held to be no act of bankruptcy in England (*e*); but in this respect the law has been altered by statute (*f*).

Creditors concurring or acquiescing could not treat it as an act of bankruptcy.

11. If any creditors either *concurred* in the assignment (*g*), or subsequently *acquiesced* in it (*h*), they could not afterwards treat it as an act of bankruptcy, for it was not fraudulent as to them. And a trust deed which, as concurred or acquiesced in by all the creditors, could not have been impeached under a fiat sued out by a creditor, could not be impeached under the bankrupt's own fiat (*i*).

Trader might assign *part* in trust for his creditors.

Unless he contemplated bankruptcy.

12. If a person assigned *part* only of his property in trust for creditors, then, if the transaction was *fair* and *bonâ fide*, and in the ordinary course of business, or upon the pressure of the creditors, it was not open to objection (*j*); but if the settlor contemplated bankruptcy (*k*), or even thought it probable, though

(*a*) *Tappenden* v. *Burgess*, 4 East, 230.

(*b*) *Tappenden* v. *Burgess*, 4 East, 230.

(*c*) *Simpson* v. *Sikes*, 6 M. & S. 295.

(*d*) *Dutton* v. *Morrison*, 17 Ves. 193, see 202; and see *Bowker* v. *Burdekin*, 11 M. & W. 128.

(*e*) *Norden* v. *James*, 2 Dick. 533; *Ingliss* v. *Grant*, 5 T. R. 530.

(*f*) 6 G. 4. c. 16, s. 3, repealed and re-enacted by the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 67, re-enacted in effect by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, [and now by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4].

(*g*) *Eckhardt* v. *Wilson*, 8 T. R. 142, *per Cur.*; *Bamford* v. *Baron*, 2 T. R. 594, note (*a*); *Tappenden* v. *Burgess*, 4 East, 230, *per* Lord Ellenborough; *Ex parte Cawkwell*, 1 Rose, 313.

(*h*) *Ex parte Crawford*, 1 Chris. B. L. 97, 140; *Ex parte Low*, 1 G. & J. 84, *per* Lord Eldon; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Mad. 598; *Back* v. *Gooch*, 4 Camp. 232; *S.C.* Holt, 13.

(*i*) *Ex parte Philpot*, De Gex, 346; *Ex parte Louch*, Id. 463; *Ex parte Thomas*, Id. 612.

(*j*) *Hale* v. *Allnutt*, 18 C. B. 505; *Wheelwright* v. *Jackson*, 5 Taunt. 109; *Hartshorn* v. *Slodden*, 2 B. & P. 582; *Fidgeon* v. *Sharp*, 5 Taunt. 539; *Small* v. *Oudley*, 2 P. W. 427; *Cock* v. *Goodfellow*, 10 Mod. 489; *Compton* v. *Bedford*, 1 W. Bl. 362, *per* Lord Mansfield; *Hooper* v. *Smith*, 1 W. Bl. 441; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Wilson* v. *Day*, 2 Burr. 830, *per eundem;* Ib. 831, *per* Foster and Wilmot; *Jacob* v. *Shepherd*, cited *Worseley* v. *De Mattos*, 1 Burr. 478; *Harman* v. *Fisher*, Cowp. 123, *per* Lord Mansfield; *Rust* v. *Cooper*, Cowp. 634, *per eundem; Ex parte Scudamore*, 3 Ves. 85; and see *Estwick* v. *Caillaud*, 5 T. R. 424; *Newton* v. *Chantler*, 7 East, 144; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Ex parte Gass*, 2 Ir. R. Eq. 284.

(*k*) *Linton* v. *Bartlet*, 3 Wils. 47;

not inevitable (*a*), and wished to give an undue preference to certain creditors over others, it was *fraudulent*, and constituted an act of bankruptcy.

13. Although the deed was void for any reason at law, yet it might be supported in equity as to creditors who had assented to it, or acquiesced in it, though without actual execution (*b*). Assent or acquiescence.

14. On the other hand, a creditor was not bound by the arrangement, but might recover his whole debt, if the terms of the composition were not strictly and literally fulfilled, for *cujus est dare ejus est disponere*, and the creditor has a right to prescribe the conditions of his indulgence (*c*). Where trust valid, the terms must be strictly observed.

[15. The question whether, under a trust deed in favour of creditors, there is a resulting trust for the settlor is one of intention. In a recent case where the business and property of a firm were assigned to trustees upon trust to carry on the business, or sell and dispose of the assets and pay and divide the clear residue of the profits and moneys among the creditors in rateable proportions, it was held by the House of Lords (reversing the decision of the Court of Appeal) that by the form of the deed there was no resulting trust of any possible surplus in favour of the asssignors (*d*). [Resulting trust of surplus.]

16. By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which repealed 12 & 13 Vict. c. 106, and the subsequent Bankruptcy Act of 1861, the law of bankruptcy was put upon a new footing. But this Act was repealed by the Bankruptcy Act, 1883 (*e*), which has again introduced a new law of bankruptcy. All persons, whether *traders or otherwise*, are now amenable to the bankruptcy laws. By the 4th section of the Act of 1883, the following acts (amongst others) are made acts of bankruptcy, viz.:— [Bankruptcy Act, 1883.]

(1.) That the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. [Acts of bankruptcy.]

(2.) That the debtor has in England or elsewhere made a

Morgan v. *Horseman*, 3 Taunt. 241; *Alderson* v. *Temple*, 4 Burr. 2238; *Round* v. *Byde*, 1 Cooke B. L. 114, 3rd ed.; *Devon* v. *Watts*, Doug. 86; *Pulling* v. *Tucker*, 4 B. & Ald. 382; *Harman* v. *Fisher*, Cowp. 117.

(*a*) *Poland* v. *Glyn*, 2 D. & R. 310; *Guthrie* v. *Crossley*, 2 C. & P. 301.

(*b*) *Spottiswood* v. *Stockdale*, G. Coop. 102; *Re Baber's Trust*, 10 L. R. Eq. 554.

(*c*) *Sewell* v. *Musson*, 1 Vern. 210; *Mackenzie* v. *Mackenzie*, 16 Ves. 374, *per* Lord Eldon; *Leigh* v. *Barry*, 3 Atk. 583, *per* Lord Hardwicke; *Ex parte Bennett*, 2 Atk. 527, *per eundem*; and see *Fuller* v. *Lance*, 7 Vin. Ab. 136.

[(*d*) *Cooke* v. *Smith*, 45 Ch. D. (C.A.) 38; *S. C.* in D. P. *nom. Smith* v. *Cooke*; *Storey* v. *Cooke*, (1891) A. C. 297.]

[(*e*) 46 & 47 Vict. c. 52.]

fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.

(3.) That the debtor has in England or elsewhere made any conveyance or transfer of his property or any part thereof, or created any charge thereon which would, under that or any other Act, be void as a fraudulent preference if he were adjudged bankrupt (*a*).

[Limitation of time.]

But by the 6th section a creditor is not to be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy has occurred within *three months* before the presentation of the petition for adjudication. Until the expiration, therefore, of these three months, the trustees of a creditors' deed must forbear to act, or their proceedings may be overridden by a subsequent adjudication of bankruptcy. However, the trustees may begin the exercise of their office at an earlier day if they can only satisfy themselves, either that all the creditors have concurred or acquiesced in the deed, or that such as have not cannot either collectively or individually prove a debt or debts in the requisite amount to support an adjudication of bankruptcy.

If the trustee of a creditors' deed take possession of the debtor's property, and carry on his business under the provisions of the deed, and the debtor is subsequently adjudicated a bankrupt on the act of bankruptcy committed by the execution of the deed, the trustee in the bankruptcy must elect whether he will treat the trustee of the deed as a trespasser or as his agent (*b*).]

17. Now that the distinction between traders and non-traders has substantially been abolished, what before was a fraudulent conveyance as to traders only, will be a fraudulent conveyance as to non-traders also (*c*).

SECTION II

WHAT CREDITORS' DEEDS ARE REVOCABLE

Irrevocable trusts.

1. The existence of a debt is always a sufficient consideration to support an assurance as valid and irrevocable as against the

[(*a*) As to what constitutes a fraudulent preference under the Act, see s. 48; and as to deeds fraudulent under 13 Eliz. c. 5, see *ante*, p. 82; and as to registration of deeds of arrangement, see *post*, p. 614.]

[(*b*) *Ex parte Vaughan*, 14 Q. B. D. 25.]

(*c*) *In re Wood*, 7 L. R. Ch. App. 302; [and see *Re Hughes*, (1893) 1 Q. B. 595].

grantor (*a*); indeed the assurance will almost always assume the form, either of a conveyance in satisfaction or part satisfaction of the debt (in which case the extinction or partial extinction of the debt forms the consideration), or of a security accompanied with a forbearance to sue (*b*). Thus, if A. be indebted to B., and convey an estate to him by way of security, the deed, though no money passed at the time, and there was no previous arrangement, cannot be revoked by A., but B. may insist on the benefit of it (*c*). And if the creditor be not a party to the deed, yet if, by arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust (*d*). Even where a debtor entered into an arrangement with three of his creditors, and in pursuance thereof, by a deed between himself of the first part, the three creditors of the second part, and his other creditors of the third part, conveyed all his real and personal estate to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to make the creditors *cestuis que trust*, and that the deed was irrevocable; and no distinction was taken between the three creditors and the other creditors, although the latter apparently had not been in communication with the debtor previous to the deed, and had not executed it until some time afterwards (*e*).

Revocable trusts.

2. On the other hand, if a debtor, without communication with his creditors, and, indeed, only from motives of personal convenience, as on going abroad (*f*), vest an estate in trustees upon trust to pay his debts, the trustees are mere *mandatories*, and the deed confers no right upon the creditors who are neither parties nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trusts, or call for the retransfer of the property (*g*). And if two persons have different interests in the

(*a*) See *Rice* v. *Rice*, 2 Drew. 84. But a conveyance by way of security from a debtor to his creditor, where there is no pressure, may be a fraudulent preference within the meaning of the Bankruptcy Acts; *Goodricke* v. *Taylor*, 2 H. & M. 380; and, if the debtor's whole property be included, an act of bankruptcy; *Ex parte Trevor*, 1 Ch. D. 297; [and see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48].

(*b*) It has been suggested, however, that a *mere agreement* to give a mortgage for a bygone debt, unaccompanied by any express stipulation as to forbearance, cannot be enforced. See *Crofts* v. *Feuge*, 4 Ir. Ch. Rep. 316; *Woodroffe* v. *Johnston*, 4 Ir. Ch. Rep. 319.

(*c*) *Siggers* v. *Evans*, 5 Ell. & Bl. 367; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; *Morris* v. *Venables*, 15 W. R. 2.

(*d*) *Wilding* v. *Richards*, 1 Coll. 661.

(*e*) *Mackinnon* v. *Stewart*, 1 Sim. N.S. 76.

(*f*) *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552.

(*g*) *Walwyn* v. *Coutts*, 3 Sim. 14; 3 Mer. 707; *Smith* v. *Keating*, 6 C. B. 136; *Acton* v. *Woodgate*, 2 M. & K. 492; *Henriques* v. *Bensusan*, 20 W. R. 350; *Browne* v. *Cavendish*, 1 Jon. & Lat.

same estate, and they, by arrangement between themselves, but without communication with any creditor, convey the property to trustees, upon trust to pay the debts of either party, here, though each may enforce the trust as against the other, yet the deed is revocable by both, and the creditor, as he neither required the security, nor was an object of bounty, cannot, while the deed remains revocable, compel the execution of the trust in his own favour (*a*). And *a fortiori* this is the case if the payment of the debt is to be made only on the request of the settlor (*b*). But, of course, the trust cannot be revoked by the settlor, so as to defeat or prejudice what the trustees may have done previously in the due execution of the trust (*c*).

Garrard *v.* Lauderdale.

3. In *Garrard* v. *Lauderdale*, the Duke of York, by indenture between himself of the first part, trustees of the second part, and the creditors of the third part, conveyed certain property to trustees upon trust for his creditors, and upon the execution of the deed a circular to that effect was sent to each of the creditors. Here there was ground for contending that, as the creditors had been induced by the notice to forbear suing the settlor, they had acquired a right to the execution of the trust, but Sir L. Shadwell, observing that the receipt of the circular was not admitted, and that, if received, yet the creditors had not refrained from suing, as they had proved in an administration suit against the Duke's estate, decided that the creditors had no equity to enforce the trust (*d*), and the decree, on appeal to Lord Brougham, was affirmed (*e*). The authority, [which is now well established (*f*),] of this case was on several occasions questioned (*g*); and Lord St Leonards observed he should be sorry to have it understood that a man may create a trust for creditors, communicate it to them, and

606; [*Johns* v. *James*, 8 Ch. D. (C.A.) 744; *Re Sanders' Trusts*, 47 L. J. N.S. Ch. 667; *Priestley* v. *Ellis*, (1897) 1 Ch. 489; *New & Co.'s Trustee* v. *Hunting*, (1897) 1 Q. B. 607; 2 Q. B. (C.A.) 19; *S. C.* in H. L. *nom. Sharp* v. *Jackson*, (1899) A. C. 419; *Re Ashby*, (1892) 1 Q. B. 872;] and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121.

(*a*) *Gibbs* v. *Glamis*, 11 Sim. 584; *Simmonds* v. *Palles*, 2 Jon. & Lat. 489; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121; [*Re Ashby*, (1892) 1 Q. B. 872].

(*b*) *Evans* v. *Bagwell*, 2 Conn. & Laws. 612.

(*c*) *Wilding* v. *Richards*, 1 Coll. 655, see 659; and see *Kirwan* v. *Daniel*, 5 Hare, 493.

(*d*) 3 Sim. 1, 13.

(*e*) 2 R. & M. 451; and see *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552; *Stone* v. *Van Heythuysen*, Kay, 727.

[(*f*) See *Johns* v. *James*, 8 Ch. D. (C.A.) 744; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; *Henderson* v. *Rothschild*, 33 Ch. D. 459; *New & Company's Trustee* v. *Hunting*, (1897) 1 Q. B. 607; 2 Q. B. (C.A.) 19; *S. C.* in H. L. *nom. Sharp* v. *Jackson*, (1899) A.C. 419; *Priestley* v. *Ellis*, (1897) 1 Ch. 489.]

(*g*) See *Acton* v. *Woodgate*, 2 M. & D. 495; *Kirwan* v. *Daniel*, 5 Hare, 499; *Simmonds* v. *Palles*, 2 Jon. & Lat. 495, 504; *Siggers* v. *Evans*, 5 Ell. & Bl. 367.

obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power (*a*). There can be little doubt that upon the general principles of equity the settlor, by giving notice to the trustees, and by subsequent conduct, may confer on the creditors a right which they did not originally possess (*b*); and indeed it as now been decided that if property be assigned to a trustee, and he takes possession of it, and communicates with certain of the creditors, who express their satisfaction, the trust is irrevocable (*c*).

Trustee one of the creditors.

4. If the trustee be himself a creditor, the debt forms a sufficient consideration on behalf of the creditor, and the deed is irrevocable (*d*); and in one case, where property was vested in a trustee for creditors, and the trustee was a *surety* for some of the debts, it was held that, though the trust was revocable as to the general creditors, yet the trustee himself was not bound to reconvey the estate until the suretyship was satisfied (*e*).

Nature of the revocable trust.

5. It does not clearly appear from the authorities what is the precise nature of a *revocable* trust of this kind (*f*). The instrument is sometimes called a *deed of agency*, and if so, the trust must be considered at an end at the death of the settlor, and the property, so far as it has not been applied, must be administered as part of the settlor's assets (*g*). The trust is not regarded as revocable only during the life of the settlor, so as to give a vested interest to the creditor after his death, for it has been held that the creditor has no more equity to enforce the trust after a settlor's death than in his lifetime (*h*).

(*a*) *Browne* v. *Cavendish*, 1 Jon. & Lat. 635; 7 Ir. Eq. Rep. 388.

(*b*) See *Smith* v. *Hurst*, 10 Ha. 30, 47. Perhaps the old case of *Langton* v. *Tracey*, 2 Ch. Rep. 30, was decided on this principle, for it appears that Tracey, the trustee, declared to the creditors that he would pay the debts, and that some of the debts were actually paid under the deed. The creditors may also have been privies, though not parties, to the execution of the trust, for it is stated that the settlor executed the deed to avoid prosecution against him by his creditors.

(*c*) *Harland* v. *Binks*, 15 Q. B. 713; *Nicholson* v. *Tutin*, 2 K. & J. 18; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121; *Cosser* v. *Radford*, 1 De G. J. & S. 585; [*Johns* v. *James*, 8 Ch. D. (C.A.) 744].

(*d*) *Siggers* v. *Evans*, 5 Ell. & Bl. 367. [See *Johns* v. *James*, 8 Ch. D. (C.A.) 744.]

(*e*) *Wilding* v. *Richards*, 1 Coll. 655; and see *Gurney* v. *Oranmore*, 4 Ir. Ch. Rep. 470; *S. C.* 5 Ir. Ch. Rep. 436.

[(*f*) See *Smith* v. *Hurst*, 10 Ha. 30, 47; *New & Co.'s Trustee* v. *Hunting*, (1897) 2 Q. B. (C.A.) 19, 25; *S. C.* in H. L. *nom. Sharp* v. *Jackson*, (1899) A.C. 419.]

(*g*) *Wilding* v. *Richards*, 1 Coll. 655.

(*h*) *Garrard* v. *Lauderdale*, 3 Sim. 1; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 139.

[Exceptions to doctrine of Garrard *v.* Lauderdale.]

6. [In considering whether, in the absence of communication to creditors, a deed of this kind is to be treated as a mandate for the convenience of the debtor, regard must be had to the scope and tenour of the deed; and in a recent case, where the purpose of the debtor in executing the deed was not to provide for the payment of his debts generally, but to shield himself from the consequences of certain breaches of trust, by providing a fund to repair the breaches, it was held that the doctrine of *Garrard* v. *Lauderdale* was not applicable, and that the deed created an irrevocable trust (*a*). The circumstances that the deed conferred a power on the trustee to appoint new trustees, and purported to charge a specific sum of money on the property conveyed by it, were considered to be material. It was questioned whether the *cestuis que trust* of the trust estates ought to be considered as creditors within the doctrine (*b*), and it was intimated by Lord Esher, M.R., on the authority of *Smith* v. *Hurst* (*c*), that the fact that the deed was not applicable to all the creditors, but only to a particular class of persons, was sufficient to exclude the doctrine (*d*). So where a trustee, having defrauded the trust estate of a sum of money, by entries in his books purported to appropriate a mortgage debt of his own to answer his liability, but did not communicate the appropriation either to his co-trustee or his *cestuis que trust*, who were *sui juris*, it was nevertheless held that there was a good appropriation (*e*).

[*Post obit* trusts.]

A further exception to the doctrine of revocability appears to be established in cases where there is a provision in favour of creditors which is to come into operation only after the death of the settlor (*f*); and, where, by a deed of family arrangement, an estate was settled by father and son, after a life interest to the father, upon trust, with the consent of the settlors, and after the death of the survivor at the discretion of the trustees, to sell and apply the proceeds in payment of the father's debts, and subject thereto to be held to the uses of a settlement, it was held that the case fell within the authority of *Synnot* v. *Simpson*, and not of *Garrard* v. *Lauderdale*, and that after the death of the father, whatever might have been the case in his lifetime, the trust in favour of creditors was irrevocable (*g*).

[Where ultimate trust irrevocable.]

And a deed containing a trust in favour of creditors and an

[(*a*) *New & Co.'s Trustee* v. *Hunting*, (1897) 1 Q. B. 607; (1897) 2 Q. B. (C.A.) 19; *S. C.* in H. L. *nom. Sharp* v. *Jackson*, (1899) A. C. 419.]

[(*b*) See (1897) 1 Q. B. 615, 616.]

[(*c*) 10 Ha. 30.]

[(*d*) See (1897) 2 Q. B. 26.]

[(*e*) *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231.]

[(*f*) *Re Fitzgerald's Settlement*, 37 Ch. D. (C.A.) 18, 25; *Synnot* v. *Simpson*, 5 H. L. Cas. 121, 141.]

[(*g*) *Priestley* v. *Ellis*, (1897) 1 Ch. 489.]

ultimate trust for the wife and children of the settlor was held to be irrevocable (*a*).]

Voluntary trust.

7. Suppose there is no fraud, but the trust deed is a mere *voluntary* settlement, not founded on any arrangement with the creditors, but for the mere convenience of the debtor himself, so that it is revocable by the debtor at any time until communicated to some creditor (*b*)—in that case can a *creditor*, taking out execution, levy his debt upon the property subject to the trust? It seems, though the deed is *voluntary*, yet it is not to be considered as fraudulent within the statute 13 Eliz. c. 5, and if so, the creditor cannot reach the property at *law* (*c*). However, the deed might perhaps be held to be invalid as against the creditor in a Court of Equity (*d*).

Doctrine not likely to be extended.

8. The Courts at the present day consider the doctrine under which these deeds have been held revocable to have been carried far enough, and have expressed a disinclination to extend it (*e*).

SECTION III

OF THE DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS

Duties of trustees.

Upon this subject we shall consider, *First, What debts* are to be paid; *Secondly*, In what order as regards *priority;* and *Thirdly*, What *interest* is to be allowed.

First. What debts are within the scope of the trust.

Debts to be paid are *primâ facie* those at date of deed or death of testator.

1. If the trust be created by *deed*, then, unless a contrary intention be expressed, the debts only at the *date* of the deed will be intended (*f*); but if the provision be contained in a will, the direction will include all debts at the testator's death; unless he specially restrict his meaning to the debts at the making of his *will* (*g*).

[(*a*) *Godfrey* v. *Poole*, 13 App. Cas. 497.]

(*b*) *Walwyn* v. *Coutts*, 3 Mer. 707; *S. C.* 3 Sim. 14; *Garrard* v. *Lauderdale*, 3 Sim. 1; *Acton* v. *Woodgate*, 2 M. & K. 492; *Kirwan* v. *Daniel*, 5 Hare, 500; *Harland* v. *Binks*, 15 Q. B. 713.

(*c*) *Pickstock* v. *Lyster*, 3 M. & S. 371; *Estwick* v. *Caillaud*, 5 T. R. 420. But see *Owen* v. *Boyd*, 5 Ad. & Ell. 28.

(*d*) See *Mackinnon* v. *Stewart*, 1 Sim. N.S. 90, 91; *Smith* v. *Hurst*, 1 Coll. 705.

(*e*) *Wilding* v. *Richards*, 1 Coll. 659; *Kirwan* v. *Daniel*, 5 Hare, 499; *Simmonds* v. *Palles*, 2 Jon. & Lat. 495, 504; *Browne* v. *Cavendish*, 1 Jon. & Lat. 635; *Evans* v. *Bagwell*, 2 Conn. & Laws. 616.

(*f*) *Purefoy* v. *Purefoy*, 1 Vern. 28.

(*g*) *Loddington* v. *Kime*, 3 Lev. 433.

"Debts affecting the estate."

2. Where a settlor by deed conveyed all his real and personal property upon trust to pay "all debts then owing by him, and which *affected the estates* thereby conveyed," the trust, as the settlor had no *judgment* debts at the time, was extended to *bond* debts, but not to *simple contract* debts (*a*). But this distinction was taken upon a deed dated before the Acts making real estates assets for payment of simple contract debts.

Father providing for debts of son.

In another case a testator directed his trustees to apply 1000*l.* in releasing his son from his liabilities, should the testator not have done so in his lifetime. The son was an uncertificated bankrupt, and the Court, considering that debts subsequently to the testator's death were not contemplated, discharged the debts up to that period out of the 1000*l.*, and gave the surplus to the testator's residuary legatee (*b*).

Debts barred by the Statute of Limitations.

3. A general direction for payment of debts will not *revive* a debt barred by the Statute of Limitations (*c*), though the trustee or executor may have advertised for *all* creditors to come in and prove their debts (*d*); and, if a debt might with due diligence have been established, but there has been *laches* which under ordinary circumstances would be a bar to relief, the mere fact of the creation and existence of a trust for payment of debts will not justify the *laches* and enable the claimant to obtain relief (*e*). But a will may be so specially worded as to create a trust for creditors generally, notwithstanding any bar from the Statute of Limitations, for the debts still subsist though the remedy is gone (*f*); and if there be a debt in fact not barred at the date of the deed, or at the death of the testator, the statute will not run afterwards (*g*); for it is not to be inferred that a man abandons his debt because he does not enforce payment at law when he has a trustee to pay him (*h*). Besides, unless delayed of

(*a*) *Douglas* v. *Allen*, 1 Conn. & Laws. 367; 2 Dru. & War. 213.

(*b*) *Re Landon's Will*, W.N. 1871, p. 240.

(*c*) *Burke* v. *Jones*, 2 V. & B. 275, where the previous cases are collected; *Hargreaves* v. *Michell*, 6 Mad. 326; *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

(*d*) *Jones* v. *Scott*, 1 R. & M. 255; 4 Cl. & Fin. 382, *nom. Scott* v. *Jones* (overruling *Andrews* v. *Brown*, Pr. Ch. 385); and see *O'Connor* v. *Haslam*, 5 H. L. Cas. 177; [*Re Stephens*, 43 Ch. D. 39, 44].

(*e*) *Harcourt* v. *White*, 28 Beav. 303.

(*f*) *Williamson* v. *Taylor*, 3 Y. & C. 208; [and see *Re Hepburn*, 14 Q. B. D. 394, 399].

(*g*) *Hughes* v. *Wynne*, T. & R. 307; *Crallan* v. *Oulton*, 3 Beav. 1; *Hargreaves* v. *Michell*, 6 Mad. 326; *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 107; and see *Morse* v. *Langham*, cited *Burke* v. *Jones*, 2 V. & B. 286; *O'Connor* v. *Haslam*, 5 H. L. Cas. 178; [and as to the right of a trustee, not retaining trust property nor having converted it to his own use, to plead the Statute of Limitations under the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, *vide post*, Chap. XXXI. s. 3].

(*h*) *Hughes* v. *Wynne*, T. & R. 309, *per Cur.*

necessity, the trustee ought to discharge the debt at once, and the universal rule is, that the *cestui que trust* ought not to suffer for the *laches* of the trustee (*a*). If a testator create a trust for payment of the debts of *another person deceased*, the debts to be paid are those which were not barred by the Statute of Limitations at the death of the person so deceased (*b*).

[A devise of real estate upon trust to pay debts does not prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust (*c*). [Where no real estate to support trust.]

Where real and personal estate are given together upon trust for sale and conversion and payment of debts thereout, the period of limitation as to the real estate will be twelve years (*d*).] [Blended fund.]

4. If a person who has been a bankrupt direct payment of twenty shillings in the pound upon the debts proved in the bankruptcy, the creditors are legatees, and pay *legacy duty*, but there is *no lapse* though a creditor die in the testator's lifetime (*e*). Legacy duty.

5. Where a testatrix had devised an estate to trustees *upon trust to sell and pay debts*, but no part of the produce of sale had been set apart for that purpose, the right of the creditor was held by the late V.C. of England not to be within the exception of the 25th section of the Real Property Limitation Act, 1833 (3 & 4 W. 4. c. 27), but to fall under the 40th section; but inasmuch as the debt had been acknowledged by the surviving trustee, the case was held to be taken out of the statute (*f*). However, the opinion of the Vice-Chancellor that the case was not within the 25th section would not, it is thought, now prevail, but the right of the creditor would subsist until adverse possession had run against his trustee (*g*). Statute of Limitations.

6. The rule that the creation of a trust keeps alive a debt not barred at the testator's death does not apply to a trust declared of *personal estate* by will, for the personalty vests in the executor upon trust for the creditors by act of law, so that the words of the will are nugatory (*h*). As regards testator's personalty.

(*a*) See *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 110.

(*b*) *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

[(*c*) *Re Hepburn*, 14 Q. B. D. 394.]

[(*d*) *Re Stephens*, 43 Ch. D. 39.]

(*e*) *Turner* v. *Martin*, 7 De G. M. & G. 429; *Re Sowerby's Trust*, 2 K. & J. 630; *Philips* v. *Philips*, 3 Hare, 281.

(*f*) *Lord St John* v. *Boughton*, 9 Sim. 219.

(*g*) As to the Statutes of Limitation, and the modifications introduced by recent legislation, see *post*, Chap. XXXI.

(*h*) *Jones* v. *Scott*, 1 R. & M. 255; reversed, 4 Cl. & Fin. 382, *sub nom.* *Scott* v. *Jones*; *Freake* v. *Cranefeldt*, 3 M. & Cr. 499; *Evans* v. *Tweedy*, 1 Beav. 55; *Crallan* v. *Oulton*, 3 Beav. 1; [*Re Hepburn*, 14 Q. B. D. 394]. *N.B.*—In *Moore* v. *Petchell*, 22 Beav.

Debt contracted by infant for necessaries.

7. The terms of the trust will extend to the repayment of a sum of money borrowed by the settlor when an *infant* for the purchase of necessaries (*a*).

Case of a mortgagee with covenant for payment.

8. Shall a *mortgagee*, who has a covenant for payment of his debt, be allowed to prove and receive a dividend upon the whole amount of his debt *pari passu* with the other creditors, or shall he prove only for the excess of the debt beyond the value of the security, or what rule is to govern the case? In bankruptcy, the mortgagee proves only for the excess of the mortgage debt over the value of the security, so that he must first dispose of the estate (with the concurrence, if he has no power of sale, of the trustee in bankruptcy), [or assess the value of it,] and then prove for the difference. In the administration of assets in Courts of Equity, a mortgagee [was until recently] allowed to prove for his whole debt without being put on terms as to his security (*b*); [but by the Judicature Act, 1875 (*c*), the rule in equity has in insolvent estates been assimilated to that in bankruptcy]. A trust deed for creditors usually provides for the case of persons having specific liens, and ingrafts the principle established in bankruptcy. If there be no such clause, and if the deed provide that the creditor shall release his debt and all securities for the same, the mortgagee, by executing the deed, binds himself to the other creditors, notwithstanding any private arrangement with the debtor to the contrary, that he will not take advantage of his specific lien, but will bring it into the common stock and prove for his whole debt, and accept a dividend *pari passu* with the rest (*d*). "The moment," observed Lord Lyndhurst, "a creditor releases his debt, which he does by executing a deed of this kind, there is, of course, an end of any lien he may have for it" (*e*). But though the word "released" be used in the deed, it will not necessarily operate as an absolute and unconditional release, if

172, the doctrine established by *Jones* v. *Scott* appears to have escaped notice.

(*a*) *Marlow* v. *Pitfield*, 1 P. W. 558.

(*b*) See *Greenwood* v. *Taylor*, 1 R. & M. 185; *Mason* v. *Bogg*, 2 M. & Cr. 433; *Rome* v. *Young*, 4 Y. & C. 204; *Hanman* v. *Riley*, 9 Hare, App. XLI.; *Ex parte Middleton*, 3 De G. J. & Sm. 201. The rule in equity was also held to apply to liquidations of joint stock companies, under the Companies Act, 1862; *Kellock's case*, 3 L. R. Ch. App. 769. [By the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, the rule in bankruptcy has been adopted both in administrations of insolvent estates in Courts of Equity and in liquidations under the Companies Acts, 1862 & 1867, of joint stock companies. By the Bankruptcy Acts, 1883, s. 125, and 1890, s. 21, the estate of a person dying insolvent can now be administered in bankruptcy.]

[(*c*) 38 & 39 Vict. c. 77, s. 10; see *Re M'Murdo*, (1902) 2 Ch. (C.A.) 684.]

(*d*) *Cullingworth* v. *Loyd*, 2 Beav. 385; *Buck* v. *Shippam*, 1 Ph. 694; 14 Sim. 239.

(*e*) *Buck* v. *Shippam*, 1 Ph. 697.

the whole contents of the instrument, when taken together, show that such was not the intention (*a*).

Trust for creditors who come in within certain time.

9. It was held in *Dunch* v. *Kent* (*b*) that where there is a trust for payment of such creditors as shall *come in within a year*, a creditor who delays beyond the year is not therefore precluded from taking advantage of the trust; and in *Raworth* v. *Parker* (*c*), V. C. Wood, after observing that there was no *modern* authority in which relief had been given after the time fixed for the execution of the deed had expired, added, that if it were to be held that creditors are not admissible after the prescribed period, *Dunch* v. *Kent* must be overruled. And in a more recent case, where the trust was for the benefit of creditors who should execute or accede within three months, the Vice-Chancellor held, and the decision was affirmed by the Lord Chancellor on appeal, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust (*d*).

Adoption of deeds.

10. It is not necessary that a creditor, to entitle himself to the benefit of the deed, should execute it, but it will be sufficient if he assent to it, or acquiesce in it, or act upon its provisions, and comply with its terms (*e*). But the creditor must do some act to testify his acceptance of the deed, and not merely stand by and remain passive (*f*).

Disputed debt.

11. If the trustees permit a person to sign the deed as creditor in a certain sum specified in the schedule, they cannot afterwards contest the debt (*g*). But where there has been fraud, forgery, or perjury by the creditor, the trustees can apply to the Court to have the execution by the creditor set aside (*h*).

Trustee cannot arbitrarily admit a creditor who has repudiated the deed.

12. A creditor who repudiates the deed by his acts, as by suing the debtor contrary to the provisions of the deed, will not be allowed afterwards (more particularly after a long lapse of

(*a*) *Squire* v. *Ford*, 9 Hare, 47.

(*b*) 1 Vern. 260.

(*c*) 2 K. & J. 170, 171; and see *Collins* v. *Reece*, 1 Coll. 675; *Jolly* v. *Wallis*, 3 Esp. 228; *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Johnson* v. *Kershaw*, 1 De G. & Sm. 260.

(*d*) *Whitmore* v. *Turquand*, 1 J. & H. 444; 3 De G. F. & J. 107. V. C. Wood rested his judgment, not on the authority of *Dunch* v. *Kent*, but upon general reasoning, and thought that the decision in that case might be accounted for on special grounds; but the L.C., in affirming the judgment of the V.C., said that he considered the doctrine of the Court, since *Dunch* v. *Kent*, to have been that a creditor might come in after the time prescribed, and that the time was not of the *essence* of the deed, and that, in his opinion, the view of *Dunch* v. *Kent* originally taken in *Raworth* v. *Parker* by V. C. Wood was the correct one.

(*e*) *Field* v. *Lord Donoughmore*, 1 Dru. & War. 227; *Biron* v. *Mount*, 24 Beav. 642; *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Jolly* v. *Wallis*, 3 Esp. 228.

(*f*) *Biron* v. *Mount*, 24 Beav. 642.

(*g*) *Lancaster* v. *Elce*, 31 Beav. 325.

(*h*) *Lancaster* v. *Elce*, 31 Beav. 328, *per* M.R.

time) to retrace his steps and take the benefit of the deed; and though the trustees should admit him to sign the deed, the other creditors will not be bound by the act of the trustees (*a*).

Discretion in trustees to admit creditors' claims.

13. A *discretion* is sometimes given to the trustees to admit or exclude such creditors as they shall think proper. The Court will endeavour, if possible, to withdraw the rights of the creditors from the caprice of the trustees (*b*); but if the settlement clearly give such a discretionary power, and the trustees are willing to exercise it, and no fraud be found, the Court cannot interfere to compel the admission of any particular creditor (*c*).

Relief in equity.

14. If the trustees have power of enlarging the time, and advertise to that effect, but do not exercise the power, and so exclude a person who desires to come in, but could not do so before the day named in the deed, the creditor will be relieved in equity (*d*).

Resumption by trustees of possession after parting with it.

15. If there be trustees for payment of debts and legacies, and subject thereto upon trust for A. for life, with remainder over, and the Court has taken an account of debts and legacies, and declared A. entitled to the possession, who is put into possession accordingly, it is not competent for the trustees afterwards to make an admission of some further debt, and to resume the possession in order to discharge it (*e*).

Secret agreements.

16. If the debtor agree, behind the back of the general creditors, to give an extra benefit to one particular creditor, such agreement is a fraud upon the general creditors, and illegal and void (*f*).

[A creditors' deed, or composition deed, which some creditors have been induced to execute by means of a secret bargain for an additional payment to them, is void as against any creditor who was not aware of the bargain when he executed the deed (*g*), even though the payment be made at the expense of a third party, and the secret bargain be made after the execution of the deed by the creditor who challenges it, provided the bargain be made with the debtor's knowledge (*h*).

[Deeds of Arrangement Act, 1887.]

17. By the Deeds of Arrangement Act, 1887 (*i*), the expression

(*a*) *Field* v. *Donoughmore*, 1 Dru. & War. 227; reversing the decision of Lord Plunket, 2 Dru. & Walsh, 630; [*Re Meredith*, 29 Ch. D. 745].

(*b*) See *Nunn* v. *Wilsmore*, 8 T. R. 521; *Cosser* v. *Radford*, 1 De G. J. & S. 585.

(*c*) *Wain* v. *Egmont*, 3 M. & K. 445; *Drever* v. *Mawdesley*, 16 Sim. 511.

(*d*) *Raworth* v. *Parker*, 2 K. & J. 163. See *ante*, p. 613.

(*e*) *Underwood* v. *Hatton*, 5 Beav. 36.

(*f*) *Mare* v. *Sandford*, 1 Giff. 288; [*Cockshott* v. *Bennett*, 2 T. R. 763].

[(*g*) *Dauglish* v. *Tennent*, 2 L. R. Q. B. 49.]

[(*h*) *Ex parte Milner*, 15 Q. B. D. (C.A.) 605; *Knight* v. *Hunt*, 5 Bing. 432.]

[(*i*) 50 & 51 Vict. c. 57, s. 4.]

"deed of arrangement" is to include "any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor (*a*) for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say, an assignment of property (*b*), a deed of or agreement for a composition," and certain other instruments in cases where creditors of a debtor obtain any control over his property or business. A deed of arrangement is to be void, unless registered within seven clear days after the first execution thereof by the debtor or any creditor, where the execution takes place in England or Ireland (*c*). By the Land Charges Registration and Searches Act, 1888 (*d*), it is provided that a register of deeds of arrangement is to be kept at the Land Registry Office (*e*), and purchasers for value are protected against unregistered deeds affecting land (*f*).]

Secondly. As to the order of payment.

Creditors paid before legatees.

1. Where the trust is created by *will*, the direction generally is for payment of "debts and legacies." As regards the administration of assets, creditors take precedence of legatees; but here, as both take under the will and the testator has made no distinction, it seems upon strict principle, as was formerly held, that creditors and legatees ought to be paid *pari passu* (*g*). However, there can be little doubt that the testator, although he may not have explicitly declared it, meant the creditors to precede, and the Courts accordingly (rather straining a point, that a man might not "sin in his grave") have now indisputably established that creditors shall have the priority (*h*).

[(*a*) The word "debtor" means debtor subject to the Bankruptcy Acts, so that a deed of assignment executed by a foreign debtor in the country of his domicile, and valid by the law of that country, does not require registration as against an execution creditor in respect of goods of the debtor in this country: *Dulany* v. *Merry*, (1901) 1 K. B. 536.]

[(*b*) The meaning of this expression is defined by the Bankruptcy Act, 1883, s. 168. The Act does not apply to arrangements made by limited companies: *Re Rileys, Limited*, (1903) 2 Ch. 590.]

[(*c*) Sect. 5. The deed is not void because the affidavit of the debtor, required by s. 6, sub-s. 1, to be filed upon registration, does not contain the names and addresses of all the creditors: *Maskelyne & Cooke* v. *Smith*, (1903) 1 K. B. (C.A.) 671.]

[(*d*) 51 & 52 Vict. c. 51.]

[(*e*) Sect. 7.]

[(*f*) Sect. 9.]

(*g*) *Hixon* v. *Wytham*, 1 Ch. Ca. 248; *Gosling* v. *Dorney*, 1 Vern. 482; *Anon.* 2 Vern. 133; *Powell's case*, Nels. 202; *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; and see *Walker* v. *Meager*, 2 P. W. 552.

(*h*) *Greaves* v. *Powell*, 2 Vern. 248; 302, Raithby's ed.; *Bradgate* v. *Ridlington*, Mose. 56; 1 Eq. Ca. Ab. 141, pl. 3; *Walker* v. *Meager*, 2 P. W. 550; *Martin* v. *Hooper*, Rep. *t.* Hardwicke, by Ridg. 209; *Whitton* v. *Lloyd*, 1 Ch. Ca. 275; *Foly's case*, 2 Freem. 49; *Kidney* v. *Coussmaker*, 12 Ves. 154,

All creditors to be paid *pari passu*.

2. As amongst the creditors themselves, the Court acts upon the well-known principle that "equality is equity," and, therefore, whether the trust be created by deed (*a*) or will (*b*), the specialty debts, in the absence of express directions to the contrary, will have no advantage over simple contract debts, but all will be paid in rateable proportions; and, of course, the trustees will not be allowed to break in upon the rule of equality by first discharging their own debts (*c*).

Specialty creditors.

3. It was formerly ruled, that where a testator *charged* his freehold estates with debts, and the estate, subject to the charge, descended to the *heir*, the specialty creditor had precedence, for it was argued that he had his remedy at law against the heir independently of the will, and therefore ought not to be put on a level with those taking under the will (*d*). The answer is, that the specialty creditor has no *lien* upon the estate, but can only recover the debt from the heir personally to the extent of the assets descended. If the estate be subject to the charge, the heir takes not beneficially, but only as trustee, and then there are no legal assets in consideration of equity, and the bond creditor may be enjoined from pursuing his legal right. And on these grounds it was decided that specialty debts are not entitled to a preference (*e*).

Case of trustee being also executor.

4. It was also thought at one time, that if the estate charged with the debts was to be administered by the *executor*, the testator must have meant that the executor should, as in his executorial capacity, observe the *legal* priorities (*f*); however, there was no reason, in fact, why the characters of trustee and executor should not be united in the same person without confusion, and so it has since been determined (*g*). But where the trust was expressly to pay the settlor's debts "according to their priority, nature, and

per Sir W. Grant; *Peter* v. *Bruen*, cited 2 P. W. 551; *Lloyd* v. *Williams*, 2 Atk. 111, *per* Lord Hardwicke.

(*a*) *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; *Hamilton* v. *Houghton*, 2 Bligh, 187, *per* Lord Eldon; *Child* v. *Stephens*, 1 Vern. 101.

(*b*) *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; *Anon.* 2 Ch. Ca. 54.

(*c*) *Anon.* 2 Ch. Ca. 54.

(*d*) *Fremoult* v. *Dedire*, 1 P. W. 429; *Young* v. *Dennett*, 2 Dick. 452; *Blatch* v. *Wilder*, 1 Atk. 420; *Allan* v. *Heber*, Str. 1270; *S. C.* 1 W. Bl. 22; and see *Plunket* v. *Penson*, 2 Atk. 290; [*Delany* v. *Delany*, 15 L. R. Ir. 55].

(*e*) *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Pope* v. *Gwyn*, cited Ib. 28, note; *Bailey* v. *Ekins*, 7 Ves. 319; *Batson* v. *Lindegreen*, 2 B. C. C. 94; *Hargrave* v. *Tindal*, cited *Newton* v. *Bennet*, 1 B. C. C. 136, note.

(*f*) *Girling* v. *Lee*, 1 Vern. 63; *Cutterback* v. *Smith*, Prec. Ch. 127; *Bickham* v. *Freeman*, Ib. 136; *Masham* v. *Harding*, Bunb. 339; *Foly's case*, 2 Freem. 49; [*Delany* v. *Delany*, 15 L. R. Ir. 55].

(*g*) *Prowse* v. *Abingdon*, 1 Atk. 482; *Newton* v. *Bennet*, 1 B. C. C. 135; *Silk* v. *Prime*, Ib. 138, note, *S. C.* 1 Dick. 384; *Lewin* v. *Okeley*, 2 Atk. 50; *Barker* v. *Boucher*, 1 B. C. C. 140 note.

specialty," a bond debt with interest was payable before a simple contract debt (*a*). But now, since the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), all debts of persons who may have died on or after 1st January, 1870, are payable *pari-passu*. Hinde Palmer's Act.

5. If there be a remnant of *unclaimed dividends* left in the hands of the trustees, it does not belong to the trustees for their own benefit, but will be divisible amongst the unpaid creditors who do claim (*b*). Unclaimed dividends.

Thirdly. As to allowance of interest.

1. Whether the trust be created by deed (*c*), or will (*d*), and though the fund has been making interest (*e*), the trustees will not be justified in paying interest upon *simple contract debts* not carrying interest; and *a fortiori*, this is the case where interest is expressly directed as to some particular debts (*f*). Where the trust was *by deed*, but the creditors had not been made parties, Lord Eldon observed: "The mere direction to pay a debt does not infer either contract or trust to pay interest upon debts by simple contract. As to *contract*, the creditors did not execute the deed, and there was nothing to prevent their suing the debtor after the execution; and no *consideration* was given to the debtor by charging the land and discharging the person" (*g*). Even where the debts did in their nature carry interest, and the direction in a will was to pay "the debts owing by the testatrix's brother at the time of his death," but forty years had elapsed since the death of the brother, so that the interest if allowed would have amounted to more than double the principal, the Court thought the direction could not have been intended to include interest as well as principal (*h*). Interest not allowed on simple contract debts.

2. It was once suggested by Lord Abinger that "if a man execute a trust of a term for the benefit of his creditors, the deed makes them mortgagees *if they execute it*, and so gives them a right The trust deed does not make the debts specialties.

(*a*) *Passingham* v. *Selby*, 2 Coll. 405.

(*b*) *Wild* v. *Banning*, 12 Jur. N.S. 464.

(*c*) *Hamilton* v. *Houghton*, 2 Bligh, 169, see 186; *Car* v. *Burlington*, 1 P. W. 228, as corrected in Cox's ed.; *Barwell* v. *Parker*, 2 Ves. 364; *Shirley* v. *Ferrers*, 1 B. C. C. 41; and see *Stewart* v. *Noble*, Vern. & Scriv. 536; *Creuze* v. *Hunter*, 2 Ves. jun. 165; *S. C.* 4 B. C. C. 319.

(*d*) *Lloyd* v. *Williams*, 2 Atk. 108; *Stewart* v. *Noble*, Vern. & Scriv. 528; *Dolman* v. *Pritman*, 3 Ch. Rep. 64; Nels. 136; Freem. 133; *Bath* v. *Bradford*, 2 Ves. 588, *per* Lord Hardwicke; and see *Tait* v. *Northwick*, 4 Ves. 816. *Bothomly* v. *Fairfax*, 1 P. W. 334, note; *Maxwell* v. *Wettenhall*, 2 P. W. 26, ed. by Cox, are overruled.

(*e*) *Shirley* v. *Ferrers*, 1 B. C. C. 41; but see *Pearce* v. *Slocombe*, 3 Y. & C. 84.

(*f*) *Jenkins* v. *Perry*, 3 Y. & C. 178.

(*g*) *Hamilton* v. *Houghton*, 2 Bligh, 186; and see *Barwell* v. *Parker*, 2 Ves. 364; *Bath* v. *Bradford*, 1b. 588.

(*h*) *Askew* v. *Thomson*, 4 K. & J. 620.

to interest" (*a*); and it was held in some old authorities, that even in *a deed to which the creditors were not parties*, or in a trust created by *will* for payment of debts, the creditors were to be regarded as mortgagees, and were entitled to interest (*b*); but the doctrine in the latter cases has long since been overthrown, and it is apprehended that the distinction taken by the Chief Baron cannot at the present day be supported (*c*). Again, it was said by Lord Hardwicke that "if a man *by deed* in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a *specialty*, it will make these, though simple contract debts, carry interest" (*d*). But this dictum also is not in conformity with the law as now established, and cannot be maintained (*e*).

Pearce *v.* Slocombe.

3. But where A. and B. assigned their *joint property* to C., D., and E. upon trust, in the first place to pay the *joint* debts at the expiration of a year from the date of the assignment, and then as to a moiety to pay the *separate* debts of A., and at the end of a year sufficient assets were realised to have discharged the joint debts, but the money, instead of being so applied, was invested in the funds and the interest accumulated, it was held, that as the fund applicable to the payment of the joint debts had been making interest from the time the debts should have been paid, the joint creditors, though on simple contract, were entitled to interest at 4 per cent. before the separate creditors were paid their principal. The separate creditors would otherwise try to impede the general settlement, in order that, in the meantime, they might enjoy the interest from the joint creditors' fund (*f*).

Creditors may stipulate for interest.

4. The creditors may stipulate for payment of interest, or the settlor, if so minded, may insert such a direction (*g*). But a trust for payment of specialty and simple contract debts and *all interest thereof*, will not amount to such a direction, but the words will be taken to have reference to the debts carrying interest of their own nature (*h*).

Specialty debts.

5. *Specialty* debts, though actually released by a creditors' deed

(*a*) *Jenkins* v. *Perry*, 3 Y. & C. 183.
(*b*) *Maxwell* v. *Wettenhall*, 2 P. W. 27; *Car* v. *Burlington*, 1 P. W. 229.
(*c*) *Barwell* v. *Parker*, 2 Ves. 364. It must be borne in mind, however, that the practice of the Court in the Chancery Division gives simple contract creditors a right to interest from the date of the decree out of any *surplus* assets after paying all debts, and the interest of such as by law carry interest; see Rules of Supreme Court, Ord. 55, R. 63.
(*d*) *Barwell* v. *Parker*, 2 Ves. 364.
(*e*) *Stone* v. *Van Heythuysen*, Kay, 721; *Clowes* v. *Waters*, 16 Jur. 632.
(*f*) *Pearce* v. *Slocombe*, 3 Y. & C. 84
(*g*) See *Bath* v. *Bradford*, 2 Ves. 588; *Barwell* v. *Parker*, Ib. 364. *Stewart* v. *Noble*, Vern. & Scriv. 536.
(*h*) *Tait* v. *Northwick*, 4 Ves. 816.

will carry interest up to the *time of payment.* It might be urged, indeed, that as regards specialty debts, the amount of the debt is the principal and interest, and therefore in a trust for payment of debts interest as well as principal must be taken into calculation to ascertain what the debt is at the date of the deed or the death of the testator; but that interest ought not to run beyond the date of the trust deed or the death of the testator, for that principal and interest together are then regarded as one sum, not as a debt, but the *claim* of a *cestui que trust.* And some principle of this kind appears to have been acted upon in the case of *Car* v. *Burlington* (*a*), where a person vested estates in trustees upon trust to pay all such debts as he should owe at his death, and the Court directed the master to calculate interest on such of the debts as carried interest *up to the death of the settlor;* but the master was not to carry on any interest on any security beyond the settlor's decease, but in case there were assets to pay the simple contract debts as well as the specialty debts, the question of ulterior interest was reserved. At the present day, however, the rule is to consider the specialty debt as subsisting up to the time of payment, *i.e.* to calculate interest on *the principal,* not only up to the date of the deed or the death of the testator, but up to the day of payment (*b*).

6. Bond creditors, it must be observed, will in no case be entitled to receive more for principal and interest than the amount of the penalty (*c*).

Bond creditors not entitled to interest beyond the penalty.

(*a*) 1 P. W. 228, as corrected in Cox's ed. from Reg. Lib.

(*b*) *Bateman* v. *Margerison*, 16 Beav. 477.

(*c*) *Hughes* v. *Wynne*, 1 M. & K. 20; *Anon.* 1 Salk. 154; *Clowes* v. *Waters*, 16 Jur. 632.

CHAPTER XXI

THE DUTIES OF TRUSTEES OF CHARITIES

1. CHARITIES may either be established by charter, as *eleemosynary corporations*, or may be placed under the management of *individual trustees*.

Charities by Charter.

2. Before entering upon the duties of trustees for charities, it may be proper to introduce a few preliminary remarks upon the subject of the Court's (*a*) *jurisdiction* over charities established by *charter*.

Visitor.

3. On the institution of such a charity a *visitatorial* jurisdiction arises of common right to the founder (whether the Crown or a private person), or to those whom the founder has substituted in the place of himself (*b*); and the office of visitor is *to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed* (*c*). The visitor must take as his guide the statutes originally propounded by the founder (*d*); but so long as he does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal (*e*).

Jurisdiction of the Court over corporate bodies.

4. With this *visitatorial* power the Court has nothing to do: it is only as respects the administration of the corporate *property* that equity assumes to itself any right of interference (*f*).

[(*a*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, causes and matters for the execution of charitable trusts are to be assigned to the Chancery Division of the High Court of Justice.]

(*b*) *Eden* v. *Foster*, 2 P. W. 326, resolved; *Attorney-General* v. *Gaunt*, 3 Sw. 148.

(*c*) See *Philips* v. *Bury*, Skin. 478; *Attorney-General* v. *Crook*, 1 Keen, 126; *Attorney-General* v. *Archbishop of York*, 2 R. & M. 468; *Re Birmingham School*, Gilb. Eq. Rep. 180, 181.

(*d*) *Green* v. *Rutherforth*, 1 Ves. 469, *per* Sir J. Strange; Id. 472, *per* Lord Hardwicke.

(*e*) *St. John's College, Cambridge* v. *Todington*, 1 Burr. 200, *per* Lord Mansfield; *Attorney-General* v. *Lock*, 3 Atk. 165, *per* Lord Hardwicke; *Attorney-General* v. *The Master of Catherine Hall, Cambridge*, Jac. 392, *per* Lord Eldon.

(*f*) See the observations of Lord Commissioner Eyre in *Attorney-General* v. *The Governors of the Foundling Hospital*, 2 Ves. jun. 47. But Chief

5. Upon the ground of this distinction between the visitatorial power and the management of the revenue, an information for the *removal of governors or other corporators*, as having been irregularly appointed, would be dismissed with costs (*a*); but wherever the administration of the *property* by the governors can be shown to have a tendency to pervert the end of the institution, the Court will immediately interpose, and put a stop to such wrongful application (*b*). Informal election. Mal-administration.

6. An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder; and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by necessary implication (*c*). If a legal or equitable interest be given to a body corporate, and *no special purpose* be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property (*d*): but if a *particular and special trust* be annexed to the gift, *that* excludes the visitatorial power of the original founder: and the Court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions as would have fallen under its jurisdiction had the administration of the fund been intrusted to the hands of individuals (*e*). [Where a charity is supported by voluntary How property newly given is affected by the visitatorial power.

Baron Richards once observed, he had been of counsel in the *Foundling Hospital case*, and he remembered some of the first men of the bar were not satisfied with the decision: *Re Chertsey Market*, 6 Price, 272. See also the observations of Lord Hardwicke in *Attorney-General* v. *Lock*, 3 Atk. 165; and see upon this subject generally *Ex parte Berkhampstead Free School*, 2 V. & B. 138; *The Poor of Chelmsford* v. *Midway*, Duke, 83; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 499; *Eden* v. *Foster*, 2 P. W. 326; *Attorney-General* v. *Dixie*, 13 Ves. 533, 539; *Attorney-General* v. *Corporation of Bedford*, 2 Ves. 505; 5 Sim. 578; *Attorney-General* v. *Browne's Hospital*, 17 Sim. 137; *Attorney-General* v. *Dedham School*, 23 Beav. 350; *Daugars* v. *Rivaz*, 28 Beav. 233.

(*a*) *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 498; *Whiston* v. *Dean and Chapter of Rochester*, 7 Hare, 532; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Attorney-General* v. *Middleton*, 2 Ves. 327, see 330; *Attorney-General* v. *Dulwich College*, 4 Beav. 255; *Attorney-General* v. *Magdalen College, Oxford*, 10 Beav. 402; *Attorney-General* v. *Corporation of Bedford*, 2 Ves. 505; *Re Bedford Charity*, 5 Sim. 578.

(*b*) See *Attorney-General* v. *St Cross Hospital*, 17 Beav. 435; *Attorney-General* v. *The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 499.

(*c*) *Green* v. *Rutherforth*, 1 Ves. sen. 472, *per* Lord Hardwicke.

(*d*) Id. 473, *per eundem*; *Ex parte Inge*, 2 R. & M. 596, *per* Lord Brougham; *Attorney-General* v. *Clare Hall*, 3 Atk. 675, *per* Lord Hardwicke.

(*e*) *Green* v. *Rutherforth*, 1 Ves. sen. 462.

subscriptions, those intrusted with the money must, *primâ facie*, be deemed to have implied authority on behalf of the donors to declare the trusts by deed, and the deed, until set aside or rectified, must be treated as decisive of the trusts (*a*).]

Private foundation with a charter.

7. Where a private person founds a charity, and then the Crown grants a charter, the presumption is that the Crown meant to carry out the founder's intentions, and the jurisdiction of the Court which existed before will be continued (*b*).

Cases where the visitatorial power may be exercised by the Lord Chancellor.

8. Even the *visitatorial* power may, under particular circumstances, and in a special manner, be exercised by the Lord Chancellor; for the Crown may be visitor by the terms of the foundation; and, if the heir of the founder cannot be discovered (*c*), or become lunatic (*d*), the visitatorial power, rather than that the corporation should not be visited at all, will result to the Crown. And while in *civil* corporations the Crown is visitor through [the High Court of Justice (*e*)] (for corporate bodies, which respect the public policy of the country and the administration of justice, are necessarily better regulated under the superintendence of a Court of Law), yet, as regards *eleemosynary* corporations, the Crown's visitatorial power is committed to the Lord Chancellor, as in matters of charity the more appropriate supervisor (*f*). And the mode of application to the Lord Chancellor in these cases is by petition to the Great Seal (*g*).

Fund must be applied to the charity prescribed.

We now proceed to the consideration of the *duties* of trustees of charities.

9. It is of course imposed upon the trustees, whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor, so long as

[(*a*) *Attorney-General* v. *Mathieson*, (1907) 2 Ch. (C.A.) 383.]

(*b*) *Attorney-General* v. *Dedham School*, 23 Beav. 350.

(*c*) *Ex parte Wrangham*, 2 Ves. jun. 609; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 498, *per* Sir W. Grant; *Attorney-General* v. *Black*, 11 Ves. 191; *Case of Queens' College, Cambridge*, Jac. 1.

(*d*) *Attorney-General* v. *Dixie*, 13 Ves. 519, see 533.

[(*e*) This visitatorial power was formerly exercised through the Court of Queen's Bench, but by the Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction of the Court of Queen's Bench was transferred to the High Court of Justice, and by s. 34 of that Act, matters which were formerly within the exclusive cognisance of the Court of Queen's Bench were assigned to the Queen's Bench Division of the Court.]

(*f*) *Rex* v. *St Catherine's Hall*, 4 T. R. 233, see 244; and see *Ex parte Wrangham*, 2 Ves. jun. 619. [By 36 & 37 Vict. c. 66, s. 17, the visitatorial jurisdiction of the Lord Chancellor is reserved to him, and is not transferred to the High Court of Justice or the Court of Appeal.]

(*g*) See the cases cited in notes (*c*) and (*d*); and *Ex parte Inge*, 2 R. & M. 594; *Re Queens' College, Cambridge*, 5 Russ. 54; *Re University College, Oxford*, 2 Ph. 521.

those uses are capable of execution (*a*). Thus if a gift be to find a preacher in Dale, it would be a breach of trust to provide one in Sale; if it be to find a preacher, it would be a breach of trust to apply it to the poor (*b*): if the trust be for the poor of O., it would be a breach of trust to extend it to other parishes (*c*): if the trust be to repair a chapel, the rents must not be mixed up with the poor-rate for parochial purposes (*d*): if a fund be raised for erecting a hospital, it cannot be diverted to lighting, paving, and cleansing the town (*e*).

Chapel for school.

10. A chapel was granted to the trustees of a *school* for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was held that, as the chapel was for the exclusive benefit of the school, the trustees had no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants (*f*).

Chapel pulled down.

11. The trustees for maintaining a *chapel* had pulled down the edifice, converted the burial ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said: "It was an enormous breach of trust, and such as could not have been expected in a Christian country"; and directed an inquiry what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel to the state in which it stood at the time of its destruction (*g*).

Charity in aid of rates.

12. A fund in aid and relief of "*poor citizens* who often were grievously burdened by the imposts and taxes of the city" was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions; nor to be distributable to such of the poor as received parish relief, for that would be so much in

(*a*) See *Attorney-General* v. *Sherborne School*, 18 Beav. 256; *Attorney-General* v. *Calvert*, 23 Beav. 248; *Attorney-General* v. *Corporation of Rochester*, 5 De G. M. & G. 797; *Re Stafford Charities*, 25 Beav. 28; *Attorney-General* v. *Boucherett*, 25 Beav. 116; *Attorney-General* v. *Gould*, 28 Beav. 485; *Ward* v. *Hipwell*, 3 Giff. 547; and see *post*, p. 627, cases cited in note (*c*).

(*b*) Duke, 161; *Attorney-General* v. *Newbury Corporation*, C. P. Coop. Cases, 1837-38, 72; *Attorney-General* v. *Goldsmith's Company*, Ib. 292; and see *Wivelescom case*, Duke, 94

(*c*) *Attorney-General* v. *Brandreth*, 1 Y. & C. C. C. 200.

(*d*) *Attorney-General* v. *Vivian*, 1 Russ. 226, see 237.

(*e*) *Attorney-General* v. *Kell*, 2 Beav. 575.

(*f*) *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 501.

(*g*) *Ex parte Greenhouse*, 1 Mad. 92; reversed on technical grounds, 1 Bligh, N.S. 17.

aid of the ratepayers; but ought to have been administered for the exclusive benefit of the poor (*a*).

Poor of a parish.

13. Where a trust is created for the "*poor of a parish*," it was for a long time doubted what class of persons was entitled to the benefit. Lord Eldon thought that the fund should be administered without reference to parochial relief; for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates—to the relief, which the law had provided, further relief might be added, which the parish was not bound to afford (*b*): besides the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate (*c*). However, it has been determined in several cases, and seems, therefore, to be now settled, that the charity must be confined to those *not in receipt of parochial relief* (*d*) (1).

(*a*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 45; *S. C.* 3 Russ. 395; and see *Attorney-General* v. *Wilkinson*, 1 Beav. 372; *Attorney-General* v. *Bovill*, 1 Ph. 762; *Attorney-General* v. *Blizard*, 21 Beav. 233. [As to a gift for a "medical charity or charities" being limited to charities within the jurisdiction, see *Re Mirrlees Charity*, (1910) 1 Ch. 163.]

(*b*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 51-54.

(*c*) See *S. C.* 3 Russ. 397.

(*d*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 47; *S. C.* 3 Russ. 395; *Attorney-General* v. *Wilkinson*, 1 Beav. 372; *Attorney-General* v. *Bovill*, M. R. 1st July, 1839. But see *Attorney-General* v. *Bovill*, 1 Ph. 768, where Lord Cottenham is reported to have said, "I am inclined to think that the right course is, to administer the charity, and leave to chance to what extent it may operate to the relief of the poor-rates." The decree, however, seems in the main to be in accordance with the previous decisions; and see *Attorney-General* v. *Blizard*, 21 Beav. 233.

Poor Relief Act, 1819.

(1) As to *parish property*; by the effect of the decisions on 59 Geo. 3. c. 12, s. 17, all hereditaments belonging to the parish at the time of the Act, or subsequently acquired, whether for a chattel (*Alderman* v. *Neate*, 4 M. & W. 704) or freehold interest, and though originally conveyed to express trustees for parish purposes, if it be unknown or uncertain in whom the legal estate is vested (*Doe* v. *Hiley*, 10 B. & C. 885; and see *Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394), or generally where it is unascertained in whom the legal estate is outstanding, but the parish have exercised all the rights of ownership, and the property belongs to them in the popular sense (*Doe* v. *Terry*, 4 Ad. & Ell. 274; *Doe* v. *Cockell*, Ib. 478), were transferred to the churchwardens and overseers of the parish, not indeed as a corporation and having a common seal (*Ex parte Annesley*, 2 Y. & C. 350), but as persons taking, by parliamentary succession, in the nature of a corporation (*Smith* v. *Adkins*, 8 M. & W. 362).

The Act does not extend to *copyholds* (*Attorney-General* v. *Lewin*, 8 Sim. 366; *Re Paddington Charities*, Ib. 629), nor to freeholds of which the trusts are not exclusively for the parish, but also embraces other objects (*Allason* v. *Stark*, 9 Ad. & Ell. 255; *Attorney-General* v. *Lewin*, 8 Sim. 366; *Re Paddington Charities*, Ib. 629); nor to lands vested in existing trustees, and who are actually in discharge of their duties in that character (*Churchwardens of*

Trust for maintaining "the worship of God."

14. If land or money be given for maintaining "*the worship of God*" (*a*), or the promotion of "*Godly learning*" (*b*), and nothing more is said, the Court will execute the trust in favour of the established form of religion; and dissenters cannot be appointed trustees (*c*). But though the *trustees* of a Church of England school must be members of the Established Church, it does not follow that the children of dissenters are not to be admitted into the *school*, or even that the *master* may not be a dissenter, though the latter appointment could only be justified by peculiar circumstances (*d*). If it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of *dissenting* doctrines, the Court, provided such doctrines be not contrary to law, will execute the intention (*e*). [Where the charity is eleemosynary, the religion of the founder is not, as a general rule, regarded (*f*).

[Trusts relating to services of the Church.]

15. As preaching in a black gown is not illegal, a condition that a black gown should be used in preaching, attached to a bequest for endowment of a church, does not make the gift void for illegality (*g*). And a trust for the purchase of advowsons in order to provide for services conducted according to the views of the section of the Church of England known as "Evangelical," was held by the Court of Appeal to be a good charitable trust (*h*); but the decision was reversed in the House of Lords upon the ground of the uncertainty of the terms of the gift (*i*). A trust of an

(*a*) *Attorney-General* v. *Pearson*, 3 Mer. 409.

(*b*) *Re Ilminster School*, 2 De G. & J. 535.

(*c*) *Re Stafford Charities*, 25 Beav. 28; *Re Ilminster School*, 2 De G. & J. 535; *S. C. nom. Baker* v. *Lee*, in D. P. 8 H. L. Cas. 495; *Attorney-General* v. *Clifton*, 32 Beav. 596.

(*d*) *Attorney-General* v. *Clifton*, 32 Beav. 596; [and see *Attorney-General* v. *Calvert*, 23 Beav. 248, 261; *Re Perry' Almshouses*, (1898) 1 Ch. 391; (1899) 1 Ch. (C.A.) 21].

(*e*) *Attorney-General* v. *Pearson*, 3 Mer. 409, *per* Lord Eldon; see *S. C.* 7 Sim. 290.

[(*f*) *Re Ross's Charity*, (1897) 2 Ch. 397; (1899) 1 Ch. (C.A.) 21, citing *Attorney-General* v. *Calvert*, 23 Beav. 248; and see *ante*, p. 43.]

[(*g*) *Re Robinson*, (1897) 1 Ch. (C.A.) 85.]

[(*h*) *Re Hunter*, (1897) 1 Ch. 518; (1897) 2 Ch. (C.A.) 105.]

[(*i*) *Hunter* v. *Attorney-General*, (1899) A. C. 309. So a gift "for such purposes, civil or religious," as the

Deptford v. *Sketchley*, 8 Q. B. 394, overruling *Rumball* v. *Munt*, Ib. 382; and see *Gouldsworth* v. *Knight*, 11 M. & W. 337). However, though *all* the trusts must be for the parish, they may be directed to some special trust, if exclusively parochial, as a trust for aiding the church rates (*Doe* v. *Hiley*, 10 B. & C. 885; *Doe* v. *Terry*, 4 Ad. & Ell. 274; and see *Allason* v. *Stark*, 9 Ad. & Ell. 266, 267; *Doe* v. *Cockell*, 4 Ad. & Ell. 478), or furnishing a poorhouse (*Alderman* v. *Neate*, 4 M. & W. 704), or for the relief of the poor of the parish, whether the objects of the charity be or be not held to include those in the receipt of parochial relief; for if non-recipients only of parochial relief are to be admitted, the parish is still benefited by keeping that class of poor, by means of the charity, off the parish books (*Ex parte Annesley*, 2 Y. & C. 350; *Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394).

advowson apparently designed to secure a presentation of clergymen of a particular type of religious thought, but so worded that it merely provided for the due performance of the duty cast by law upon every legal owner of an advowson to appoint a duly qualified person, was held not be a charitable trust (*a*); but a bequest to vicar and churchwardens "to be applied by them in such manner as they shall in their sole discretion think fit" is a good charitable gift for ecclesiastical purposes in the parish (*b*). It seems, however, that a trust of an advowson for presentation of clergymen of a particular type of religious thought might, if carefully worded, be a good charitable trust (*c*).

[Local Government Act, 1894.]

16. Under the Local Government Act, 1894 (*d*), parish councils are authorised to appoint trustees in the place of churchwardens, who are the only trustees of a charity other than an ecclesiastical charity (*e*), and the Act contains a definition of the expression "ecclesiastical charity" which includes any charity the endowment of which is held "for the benefit of any particular church or denomination, or of any members thereof as such" (*f*). A charity for gifts to poor widows, with a preference to those who were "most constant in their attendance on the public service of the Church," was held to be a parochial charity, and not an ecclesiastical charity within this enactment (*g*). On the other hand, where the objects of the charity were to be persons who had regularly attended divine service at the parish church, lived a godly, righteous, and sober life, and *been partakers of the Holy Communion*, it was held that the endowment was for the benefit of the members of the Church of England as such, and that the charity was an ecclesiastical one within the Act (*h*).]

["Ecclesiastical charity."]

Numerous contributors.

17. Where a fund has been raised for the purpose of founding a chapel or any other charity, and the contributors were so numerous as to preclude the possibility of their all concurring in any instrument declaring the trust, and a declaration of trust was made by the persons in whom the property was vested at

subscribers to a school or assembled members of a religious body should appoint was held void for uncertainty: *Re Friends' Free School*, (1909) 2 Ch. 675; but where, upon the construction of a gift for "charitable, educational or other institutions," it appeared from the context that the purposes were limited to general or public purposes for the benefit of a town and its inhabitants, the gift was a good charitable bequest: *Re Allen*, (1905) 2 Ch. 400.]

[(*a*) *Re Church Patronage Trust*, (1904) 2 Ch. (C.A.) 643.]

[(*b*) *Re Garrard*, (1907) 1 Ch. 382.]

[(*c*) *Re Church Patronage Trust*, (1904) 1 Ch. 41.]

[(*d*) 56 & 57 Vict. c. 73.]

[(*e*) S. 14; *Re Ross's Charity*, (1897) 2 Ch. 397; (1899) 1 Ch. (C.A.) 21.]

[(*f*) Sect. 75.]

[(*g*) *Re Ross's Charity*, (1897) 2 Ch. 397; (1899) 1 Ch. (C.A.) 21.]

[(*h*) *Re Perry Almshouses*, (1898) 1 Ch. 391; (1899) 1 Ch. (C.A.) 21.]

or about the time when the sums were raised, that declaration may reasonably be taken *primâ facie* as a correct exposition of the minds of the contributors (*a*).

The trust originally intended will be preserved.

18. Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the Court will then inquire what has been the *usage* of the congregation; and, if such usage do not contravene public policy, will be guided by it as evidence of the intention in the administration of the trust. And by 7 & 8 Vict. c. 45, s. 2, if the instrument of trust do not in express terms, or by reference to some book or other document, define the religious doctrines, twenty-five years' usage immediately preceding any suit is made conclusive evidence thereof (*b*). But if the purpose of the settlors appear clearly upon the instrument, the Court, in that case, though the usage of the congregation may have run in a different channel, cannot change the nature of the original institution: it is not competent for the majority of the congregation, or for the managers of the property, to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves" (*c*).

Noncomformists Chapels Act, 1844.

Appointment of new trustees.

19. If the deed of endowment neither provide for the succession of *trustees*, nor the election of the *minister*, an inquiry will be directed, who, acccording to the nature of the establishment, are entitled to propose trustees, and to elect the minister (*d*);

(*a*) *Attorney-General* v. *Clapham*, 4 De G. M. & G. 626.

(*b*) See *Attorney-General* v. *Hutton*, Drur. 530; [*Attorney-General* v. *Anderson*, 57 L. J. Ch. 543, 546]. As to Roman Catholic charities, see The Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 5.

(*c*) *Attorney-General* v. *Pearson*, 3 Mer. 400, *per* Lord Eldon; *Foley* v. *Wontner*, 2 J. & W. 247, *per eundem*; *Craigdallie* v. *Aikman*, 1 Dow's P. C. 1; *Milligan* v. *Mitchell*, 3 M. & Cr. 73; *Broom* v. *Summers*, 11 Sim. 353; *Attorney-General* v. *Murdoch*, 7 Hare, 445; 1 De G. M. & G. 86; *Attorney-General* v. *Munro*, 2 De G. & Sm. 122; *Attorney-General* v. *Corporation of Rochester*, 5 De G. M. & G. 797; [*Attorney-General* v. *Anderson*, 57 L. J. Ch. 543, 550; and in *Free Church of Scotland* v. *Lord Overtoun*, (1904) A. C. 515 (H. L. Sc.), the House of Lords have recently, in the case of a Scottish charitable trust, applied the principles enunciated by Lord Eldon in *Craigdallie* v. *Aikman*, *sup.* and *A. G.* v. *Pearson*, *sup.*].

(*d*) *Davis* v. *Jenkins*, 3 V. & B. 151, see 159; and see *Leslie* v. *Birnie*, 2 Russ. 114. The Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), seems to confer a power of appointing new trustees, for the *special purposes of that Act*, where there is no power or the power has elapsed. [The Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 3, sub-s. 1, enacts that the power of appointing new trustees conferred by the Conveyancing Act, 1881, or any other statutory power for the same purpose for the time being in force, shall apply to all land acquired and held on trust for any purpose to which the 13 & 14 Vict. c. 28, or the Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26), or the Act of 1890 applies.]

and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation (*a*). The appointment of the minister cannot, in such a case, belong to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew (*b*).

Notices.

For the valid election of a minister due notice of the meeting for the purpose must be given, and no persons must take part in the proceedings who are not entitled to attend (*c*).

Minister of a meeting-house.

20. A minister in possession of a meeting-house is tenant at will to the trustees, and his estate is determinable by demand of possession without any previous notice (*d*). But this merely tries the *legal* right without affecting the question whether in *equity* the minister was properly deprived (*e*), and if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of a Court of Equity to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed), and the Court will pay him his salary (*f*). If a minister be removable by the decision of the congregation regularly convened at a meeting, the charges intended to be brought against the minister must be specified in the notice calling the meeting, and the minister himself must be apprised of the nature of the charges (*g*).

Minister may be removable at pleasure.

21. It is the policy of the Established Church by giving the minister an estate for life in his office to render him in some degree independent of the congregation; but if it be the usage amongst any particular class of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a Court of Equity might not struggle hard in support of such a plan, there is no principle upon which the Court would not be bound to give it effect (*h*). And, accordingly, where a decided majority of the congregation passed a resolution for the removal of their pastor, the Court granted an injunction against his officiating (*i*).

(*a*) *Davis* v. *Jenkins*, 3 V. & B. 155; and see *Leslie* v. *Birnie*, 2 Russ. 114.

(*b*) *Davis* v. *Jenkins*, 3 V. & B. 155.

(*c*) *Perry* v. *Shipway*, 4 De G. & J. 353, see 360.

(*d*) *Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *M'Kaeg*, 10 B. & C. 721; *Perry* v. *Shipway*, 1 Giff. 10; and see *Brown* v. *Dawson*, 12 Ad. & Ell. 624. See *post*, p. 631.

(*e*) See *Doe* v. *Jones*, 10 B. & C. 721.

(*f*) *Foley* v. *Wontner*, 2 J. & W. 247, *per* Lord Eldon. By the Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15, the powers of the Charity Commissioners, as to the appointment and removal of trustees, are extended to "buildings registered as places of meeting for religious worship."

(*g*) *Dean* v. *Bennett*, 6 L. R. Ch. App. 489; [and see *Fisher* v. *Jackson*, (1891) 2 Ch. 84].

(*h*) *Attorney-General* v. *Pearson*, 3 Mer. 402, 403, *per* Lord Eldon.

(*i*) *Cooper* v. *Gordon*, 8 L. R. Eq. 249.

Original intention cannot be defeated by bye-laws.

22. To every corporation there belongs of common right the power of establishing *bye-laws* for the government of their own body; but this privilege cannot authorise the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity (*a*). And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended (*b*).

Mistake.

23. It is not the custom of the Court to remove objects of a charity who have been elected under a *mistake*, where the election was *bonâ fide* and without any fraud or corruption (*c*).

Authority necessary for the purpose of changing the trust.

24. The charity funds cannot be diverted into a *different* channel without the authority of Parliament (*d*), or through the Charity Commissioners, who are now, by the Charitable Trusts Acts, empowered to make orders for the establishment of schemes for the administration of charities in certain cases (*e*).

Expenses of an Act.

25. Formerly trustees, before applying to the legislature, were in the habit of procuring the sanction of the Court of Chancery for their greater security; for if they took such a step upon the mere suggestion of their own minds, and failed in obtaining the contemplated Act, they were not allowed the costs and expenses incurred in the proceeding (*f*); but if the application to Parliament was attended with success, the trustees were then allowed their costs, though the sanction of the Lord Chancellor had not been previously obtained; for the Court could not with propriety pronounce those measures to be imprudent which the legislature itself had enacted as prudent (*g*).

Letter may be broken and yet the spirit preserved.

26. The management of the trust may contravene the *letter* of the founder's will, and yet, on a favourable construction, be conformable to the intention.

(*a*) *Eden* v. *Foster*, 2 P. W. 327, resolved.

(*b*) *Attorney-General* v. *Pearson*, 3 Mer. 411, *per* Lord Eldon.

(*c*) *Re Storie's University Gift*, 2 De G. F. & J. 529, see 531, 540.

(*d*) *Attorney-General* v. *Market Bosworth School*, 35 Beav. 305.

(*e*) 16 & 17 Vict. c. 137, sects. 54-60; 23 & 24 Vict. c. 136, sect. 2. [And see the Endowed Schools Act, 1874 (37 & 38 Vict. c. 87), which transfers the powers of the late Endowed Schools Commissioners to the Charity Commissioners.]

(*f*) *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 519, *per* Lord Eldon.

(*g*) Ib. *per eundem*.

Free grammar school.

It was the opinion of Lord Eldon (*a*) and Sir T. Plumer (*b*), that if the wish of the founder was to establish a *free grammar school,* the Chancellor, though he felt perfectly convinced that a free grammar school (that is, a school for teaching the learned languages) could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. But it has since been held by Lord Lyndhurst (*c*), Sir John Leach (*d*), Lord Langdale (*e*), and Lord Cottenham (*f*), that the Court has jurisdiction to extend the application of the charity fund to purposes beyond the *literal* intention, and that *writing and arithmetic* may be well introduced into a scheme for the establishment or better regulation of a free grammar school.

Free school.

And this may of course be done in the case, not of a *free grammar school,* but of a *free school* (*g*).

Grammar School Act, 1840.

By 3 & 4 Vict. c. 77, the system of education in any *grammar school* was extended to other useful branches of literature and science, in addition to or in lieu of the Greek and Latin languages or such other instruction as might be required by the terms of the foundation, or the existing statutes.

32 & 33 Vict. c. 56.

27. By the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), the Commissioners appointed by Her Majesty to inquire into schools were empowered, by sect. 9, "in such manner as might render any educational endowment most conducive to the advancement of education, to *alter* and *add* to any existing, and to make any *new* trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions." But by sect. 14, the Act was not to apply to charities created less than fifty years before the commencement of the Act, unless the governing body of the endowment assented to the new scheme (*h*). By the Endowed Schools Act, 1874 (37 & 38 Vict. c. 87), the powers of the Endowed Schools Commissioners were transferred to the Charity Commissioners (*i*), [and now, under the Board of

(*a*) *Attorney-General* v. *Whiteley*, 11 Ves. 241; *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 501.

(*b*) *Attorney-General* v. *Dean of Christchurch*, Jac. 474.

(*c*) *Attorney-General* v. *Haberdashers' Company*, 3 Russ. 530.

(*d*) *Attorney-General* v. *Dixie*, 2 M. & K. 432; *Attorney-General* v. *Gascoigne*, Id. 652.

(*e*) *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Ladyman*, C. P. Coop. Cases, 1737-38, 180.

(*f*) *Attorney-General* v. *Stamford*, 1 Ph. 745.

(*g*) *Attorney-General* v. *Jackson*, 2 Keen, 541.

[(*h*) The effect of the section as to these endowments is to preserve them intact from interference by the Charity Commissioners, and to leave the jurisdiction of the Court wholly unaffected: *Attorney-General* v. *Christ's Hospital*, (1896) 1 Ch. 879.]

[(*i*) As to what educational endow-

Education Act, 1899 (62 & 63 Vict. c. 33), sect. 2 and Orders in Council, have become exercisable by the Board of Education (*a*).

[London Parochial Charities Act.]

28. By the City of London Parochial Charities Act, 1883 (*b*), the Charity Commissioners are empowered "to inquire into the nature, tenure, and value of all the property and endowments" of certain parochial charities of the City of London, and to prepare schemes for "the future application and management of the charity property and endowments." But by sect. 21, no scheme is to affect any endowment originally given to charitable uses less than fifty years before the commencement of the Act, unless the governing body assent to the scheme. By sect. 39, power is given to the Commissioners to direct the sale of any part of the charity property upon such terms and conditions, and to such purchasers, as they may think fit; and the trustees for the time being of such property are thereupon to effect such sale. By sect. 48, a new corporate governing body, to be called "The Trustees of the London Parochial Charities," is to be established, with perpetual succession and a common seal.]

Ejectment of person ceasing to be schoolmaster.

29. A schoolmaster or other officer of the trustees, whose appointment has been cancelled, or whose office has otherwise ceased, and who, in defiance of the trustees, continues to hold over the premises given up to him, cannot, as he was lawfully put in possession, be treated on the footing of a trespasser on another's lawful possession, so as to be removable with as little force as may be necessary; but he can be ejected in a summary way by application to two justices of the peace under the provisions of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), sect. 13.

"Finding a master."

30. Where the trustees were directed to apply the rents "towards the necessary *finding a master*, and for the pains of such master," and the trustees applied part of the revenue towards *rebuilding and repairing* the school-room and school-house, it

ments are within the Act, see *Attorney-General* v. *Christ's Hospital*, 15 App. Cas. 172.]

[(*a*) As to the powers of the Board to alter schemes and regulate procedure as to notices, and as to their duty to have "due regard" to the educational interests of privileged classes, see *Re Berkhampstead Grammar School*, (1908) 2 Ch. 25.]

[(*b*) 46 & 47 Vict. c. 36; as to what is "charity property" within the meaning of the enactment, see *Re St Botolph Parish Estates*, 35 Ch. D. 142; *Re St Bride's Parish Estates*, 35 Ch. D. 147 n.; *Re St Stephen, Coleman Street*, 39 Ch. D. 492; *Re St Nicholas Acons*, 60 L. T. N.S. 532; and as to what is a "vested interest," *Re St John the Evangelist*, 59 L. T. N.S. 617; *Re St Alphage, London Wall*, 59 L. T. N.S. 614; *Re St Edmund, King and Martyr*, 60 L. T. N.S. 622, where Kay, J., said that it would be a breach of trust for the trustees of a charity to appoint a clerk with a freehold office.]

was held to be a good execution of the trust, because a school-room and house were necessary, and if these were not provided by the trustees, they must have been provided by the master himself, and so it was in effect applied for the pains of the master (*a*).

"Relief of poor."

31. So a trust "for the *relief of the poor*" has been construed to authorise an application of the funds to the building of a *school-house*, and the *education of the poor* of the parish (*b*).

Repairing and rebuilding.

32. So where an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and the parish had taken down the chapel to erect a new one on a different site, it was determined that the trustees had not exceeded the line of their duty in expending the accumulated rents upon the *rebuilding* of the chapel; but it was held that the *rents* only, and not the *corpus* of the estate, could be so applied; and the Court had great doubt whether anything could be laid out upon the *fitting-up* of the chapel (*c*). But where there was a large surplus fund, and the objects of the charity were sufficiently provided for, the Court in a special case made repairs and improvements out of the *capital*, without any direction for recouping the capital out of the income (*d*).

[In regard to "reparations" of buildings for a charitable purpose the law is very wide, and it has been frequently laid down that the word "reparation" is not to be confined to the repairs of the old building, but may in a proper case be extended to the erection of a new building (*e*). Where the trust was for the reparations, ornaments, and other necessary occasions of a parish church, a scheme was sanctioned by which the trustees were allowed to provide for the cost of a spire to a new parish church, as being within the words "necessary occasions" (*f*).]

Augmentation of salaries.

33. Where the direction of the founder was that the master of a school should receive 50*l.* a year, and the usher 30*l.*, and the trustees had raised the salaries respectively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the Court refused to compel the trustees to refund the augmentations (*g*).

(*a*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592.

(*b*) *Wilkinson* v. *Malin*, 2 Tyr. 544, see 570.

(*c*) *Attorney-General* v. *Foyster*, 1 Anst. 116.

(*d*) *Re Willenhall Chapel*, 2 Dr. & Sm. 467.

[(*e*) *Re Palatine Estate Charity*, 39 Ch. D. 54, *per* Stirling, J., citing *Attorney-General* v. *Wax Chandlers' Company*, 6 L. R. H. L. 1.]

[(*f*) *S. C.*]

(*g*) *Attorney-General* v. *Dean of Christchurch*, 2 Russ. 321.

Reduction of salaries.

34. And, *vice versâ*, if a fund be given, not for the purposes of individual benefit, but for the discharge of certain duties, as for the support of a schoolmaster, and the fund increases to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose (*a*).

Loans.

35. Legacies had been left by several different testators (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest, and Sir J. Leach was of opinion that, regard being had to the alteration in the value of money, it was not inconsistent with the intention of the testators to raise the loans to sums varying from 100*l.* to 500*l.* (*b*).

"Parishioners."

36. Where the trust was to elect children, who or whose parents were *parishioners* of a certain parish, to Christ's Hospital, it was held by V.C. Malins that the word "parishioner" must be taken in an honest and *bonâ fide* sense, and could not be applied to a person who had taken a small house temporarily for the mere purpose of obtaining a qualification, and had been rated to the parish collusively, and that where a disqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away, and the opposing candidate, though he had a minority of votes, was duly elected (*c*). But on appeal Lord Justice James observed, that if the law allowed a man to be qualified, he was qualified however his qualification might have been gained—that men constantly acquired qualifications for voting in counties by buying a 40*s.* freehold for the sole purpose of giving themselves votes, and the decree of the Court below was reversed (*d*).

Retainer of the charity fund.

37. It need scarcely be remarked that a trustee would be guilty of a gross breach of trust, should he keep the charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust (*e*).

Alienation of the charity estate.

38. Trustees of charities could not, as a general rule, even before the restrictions recently imposed, have made an absolute disposition of the charity estate: they could not, for instance, have parted with *lands* to a purchaser, and have substituted instead

(*a*) *Attorney-General* v. *Master of Brentwood School*, 1 M. & K. 376, 394.
(*b*) *Attorney-General* v. *Mercers' Company*, 2 M. & K. 654; and see *Attorney-General* v. *Holland*, 2 Y. & C. 683; *Morden College case*, cited Ib. 701, 702.
(*c*) *Etherington* v. *Wilson*, 20 L. R. Eq. 606.
(*d*) *Etherington* v. *Wilson*, 1 Ch. D. (C.A.) 160.
(*e*) Duke, 116.

the reservation of a *rent* (*a*). And as the trustees could not have aliened absolutely, so they could not have accomplished the same end indirectly by demising for long terms of years, as for 999 years (*b*); or for terms of ordinary duration, with covenants for perpetual renewal (*c*); or by granting reversionary terms (*d*).

Where allowable.

39. But there was no positive rule that in *no* instance could an absolute disposition be made, for then the Court itself could not have authorised such an act — a jurisdiction which, it is acknowledged, has from time to time been exercised in special cases. "I do not doubt," observed Sir J. Wigram, "the existence of this power in the Court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of Equity that can recall the property, and if that Court should sanction a sale it would be bound to protect the purchaser" (*e*). The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity (*f*). And the transaction was strongly assumed to be improvident as against a purchaser until he had established the contrary (*g*).

Recent charity Acts.

40. Now under the provisions of the Charitable Trusts Acts, the Charity Commissioners are empowered, on application made to them, to authorise the *sale* or *exchange* of any part of the charity property (*h*), and the trustees are restricted from [making,

(*a*) *Attorney-General* v. *Kerr*, 2 Beav. 420; *Blackston* v. *Hemsworth Hospital*, Duke, 49; *Attorney-General* v. *Brettingham*, 3 Beav. 91; and see *Attorney-General* v. *Buller*, Jac. 412; *Attorney-General* v. *Magdalen College*, 18 Beav. 223.

(*b*) *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Pargeter*, 6 Beav. 150.

(*c*) *Lydiatt* v. *Foach*, 2 Vern. 410; *Attorney-General* v. *Brooke*, 18 Ves. 326.

(*d*) See *Attorney-General* v. *Kerr*, 2 Beav. 420.

(*e*) *Attorney-General* v. *Mayor of Newark*, 1 Hare, 400; and see *Re Ashton Charity*, 22 Beav. 288; *Anon. case*, cited *Attorney-General* v. *Warren*, 2 Sw. 300, 302.

(*f*) See *Attorney-General* v. *Warren*, 2 Swans. 302; *S. C.* Wils. 411; [*Re Mason's Orphanage*, (1896) 1 Ch. 54, 59; *S. C.* Ib. (C.A.) 596, 604; *Re Clergy Orphan Corporation*, (1894) 3 Ch. (C.A.) 145, 154;] *Attorney-General* v. *Hungerford*, 8 Bl. 437; *S. C.* 2 Cl. & Fin. 357; *Attorney-General* v. *Kerr*, 2 Beav. 428; *Attorney-General* v. *South Sea Company*, 4 Beav. 543; *Attorney-General* v. *Newark*, 1 Hare, 395; *Parke's Charity*, 12 Sim. 329; *Re Suir Island Female Charity School*, 3 Jon. & Lat. 171.

(*g*) *Attorney-General* v. *Brettingham*, 3 Beav. 91.

(*h*) 16 & 17 Vict. c. 137, s. 24; 18 & 19 Vict. c. 124, s. 32; see 23 & 24 Vict. c. 136, s. 16. The 16 & 17 Vict. c. 137, s. 21, authorises improvements with the sanction of the Charity Commissioners; and the 23 & 24 Vict. c. 136, s. 15, authorises the application of charity moneys to "any other purpose or object," which the Commissioners may think beneficial, and which is not inconsistent with the foundation.

otherwise than with the express authority of Parliament, or of a Court or Judge, or "according to a scheme legally established" (*a*)] any sale, mortgage or charge (*b*), *without the consent* of the Commissioners (*c*). But this does not interfere with the powers of trustees of charities to sell under *railway* and other *public Acts*, where the legislature has made proper provision for the due application of the purchase-moneys (*d*).

Sales to railway companies.

41. By the Charitable Trusts Act, 1860, "a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted, and *having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition* of any property of the charity," are empowered to pass the *legal estate* for giving effect to such disposition (*e*).

Power of trustees to pass the legal estate.

42. Where a sale or exchange is effected under the Charity Acts, the purchase or exchange moneys may be laid out with the consent of the Commissioners in the purchase of other lands *without a licence in mortmain* (*f*). But the Act is silent as to the requirement of 9 G. 2. c. 36 (repealed but substantially re-enacted by the Mortmain and Charitable Uses Act, 1888 (*g*)), and the conveyance should therefore be by deed attested by two witnesses, and enrolled in the Central Office of the Supreme Court within six calendar months (*h*).

Re-investment of sale moneys.

[When the statutory requirements (*i.e.* of the Charitable Uses Act, 1735, 9 Geo. 2. c. 36, sect. 3,) are not complied with, the deed is not only voidable but absolutely void, not merely as to the charitable trusts sought to be created, but as to the legal estate expressed to be conveyed (*i*).]

43. Where there are *accumulations* from a charity estate, the Court, considering the purchase of *land* with personal estate

Investment of accumulations in land.

[(*a*) These words do not include the instrument of foundation of the charity, but refer to schemes for administration sanctioned by some duly constituted legal authority; *Re Mason's Orphanage*, (1896) 1 Ch. (C.A.) 596.]

[(*b*) As to the effect of this prohibition in preventing trustees of charities from borrowing money in anticipation of future income, see *Fell* v. *Official Trustee of Charity Lands*, 14 Times L. R. 376; 78 L. T. N.S. 474.]

(*c*) The Charitable Trusts Act, 1855 (18 & 19 Vict. c. 124), s. 29. [The power of the Commissioners to authorise a sale of land falling under the provisions of the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), is not affected by that Act: *Parish of Sutton to Church*, 26 Ch. D. 173; and see the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13 (2).]

(*d*) See the language of the Charitable Trusts Act, 1855 (18 & 19 Vict. c. 124), s. 29; [and see *Re Mason's Orphanage*, *ubi sup.*].

(*e*) 23 & 24 Vict. c. 136, s. 16; and see the still later enactment of 32 & 33 Vict. c. 110, s. 12, *post*, p. 642.

(*f*) 18 & 19 Vict. c. 124, s. 35.

[(*g*) 51 & 52 Vict. c. 42; see *ante*, p. 104 *et seq.*]

(*h*) As to these requirements, see *ante*, pp. 104, 105.

[(*i*) *Churcher* v. *Martin*, 42 Ch. D. 312.]

belonging to a charity to be opposed to the general policy of the law, will not, as a general rule, sanction such an investment (*a*). But there is nothing *illegal* in such an investment, if accompanied with the required formalities; and therefore should a highly beneficial purchase offer itself, the trustees would, it is conceived, run no risk in so investing the accumulations (*b*). Indeed, the Court itself has made such orders where the purchase of the land was not the main object, but incidental to a general scheme, as for the enlargement of a school (*c*). But in every case where by conveyance *inter vivos* land *comes into mortmain for the first time*, such conveyance must be by deed executed in the presence of at least two witnesses, and enrolled within six calendar months from the execution (*d*). Even where the land of a charity, whether vested in the corporation or in trustees, is taken by a public company, and the purchase-money is laid out under the direction of the Court in the purchase of other lands upon the like trusts, the deed must be *enrolled* (*e*).

Enrolment.

Loans of charity money on mortgage.

44. Trustees of a charity may lend the trust fund upon a *mortgage* of real estate, though a legal condition is expressly reserved, and though after default an equity of redemption arises by the rules of equity, the statute (*f*), which avoids conveyances to a charity containing any reservation or condition for the benefit of the grantor, being held not to apply to such a case (*g*). But of course care should be taken that the mortgage is by indenture attested by two witnesses, and enrolled. The Court itself on one occasion, when its attention had been directed to the question, authorised the trustees of a charity to lend on mortgage (*h*).

Charitable Funds Investment Act, 1870.

45. Now by 33 & 34 Vict. c. 34, corporations and trustees holding moneys in trust for any *public or charitable purpose* may invest them on any real security authorised by, or consistent with, the trust, and the requirements of the Mortmain Act are dispensed with. But upon foreclosure or release of the equity of redemption, the land is to be held upon trust to be converted into money, and to be sold accordingly.

(*a*) *Attorney-General* v. *Wilson*, 2 Keen, 680.

(*b*) See *Vaughan* v. *Farrer*, 2 Ves. 188.

(*c*) *Attorney-General* v. *Mansfield*, 14 Sim. 601; *Honnor's Trust*, V. C. Kindersley, 3rd May, 1853.

(*d*) But see *Attorney-General* v. *Day*, 1 Ves. sen. 222.

(*e*) *Re Christ's Hospital*, V. C. Wood, 12 W. R. 669.

[(*f*) 9 Geo. 2. c. 36, repealed but substantially re-enacted by 51 & 52 Vict. c. 42.]

(*g*) *Doe d. Graham* v. *Hawkins*, 2 Q. B. 212.

(*h*) *Attorney-General* v. *Gibson*, *Ex parte Lushington*, *Re Lady Prior's Charity*, 21st July, 1853, M.R. The mortgage was for 50,000*l.* upon an estate in Northamptonshire.

[46. By the Compulsory Church Rate Abolition Act, 1868, a body of trustees may be appointed in any parish for the purpose of accepting by bequest, donation, contract or otherwise, and of holding any contributions which may be given to them for ecclesiastical purposes in the parish. The trustees are to consist of the incumbent and two householders or owners or occupiers of land in the parish, one to be chosen by the patron and the other by the bishop of the diocese; and the trustees so appointed are to be a body corporate with perpetual succession and a common seal (*a*).] [Church Trustees.]

47. Trustees of charities cannot grant *leases* to or in trust for *one of themselves*, for no trustee can be a tenant to himself, and the Court will charge him with an occupation rack-rent (*b*). Where two trustees were expressly authorised by the will to grant a lease to themselves, or either of them, with the consent of the tenant for life, and one of them took a lease with such consent accordingly, which was fair and proper, but it was found in effect that the relative characters of trustee and lessee were inconsistent, and led to inconveniences, the Court removed the trustee at the instance of the *cestuis que trust*, on the ground of the repugnant characters in this particular case of trustee and tenant; and though the trustee offered to surrender the lease, the Court, as it was beneficial to the *cestuis que trust*, held him to it, and dismissed him from the trust (*c*). Lease to a trustee.

48. Trustees should be cautious how they grant leases to their own *relations*, for that circumstance is calculated to excite a suspicion, which, if confirmed by any other fact, it might require a strong case to remove (*d*). Relations.

49. So a lease should not contain any covenant for the private advantage of the trustee; as where a corporation directed the insertion of a covenant that the lessee should grind at the corporation mill, in a suit for the establishment of the charity the corporation were, for this instance of misbehaviour, disallowed their costs (*e*). Covenant for advantage of trustee.

50. Where trustees have a power given to them in general terms to grant leases, it is said that they may take *fines* or Fines or rack-rent.

[(*a*) 31 & 32 Vict. c. 109, s. 9.]

(*b*) *Attorney-General* v. *Dixie*, 13 Ves. 519, see 534; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 500; [and see *Boyce* v. *Edbrooke*, (1903) 1 Ch. 836].

(*c*) *Passingham* v. *Sherborn*, 9 Beav. 424.

(*d*) *Ferraby* v. *Hobson*, 2 Ph. 261, *per* Lord Cottenham; and see *Ex parte Skinner*, 2 Mer. 457.

(*e*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592, 593.

reserve *rents* as, according to the circumstances of the case, may be most beneficial to the charity (*a*). If the trust estate held on lease increase in value upon the outlay of the *tenant*, the trustee is not called upon immediately to raise the tenant's rent, for such a practice would obviously prevent any improvement of the property (*b*). Nor if the value of the estate increase from the rise of agricultural produce will the trustee be personally liable because he neglects for a few months to raise the rent; but if he wilfully continues the old rent when clearly a much higher rent can be obtained, he may be held responsible (*c*).

Adequate consideration.

51. In granting leases of charity lands care must be taken that the lease be for an adequate consideration, and if this be not observed, the Court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants (*d*).

Leases at an under-value.

52. The lease may be annulled on the mere ground of *under-value* (*e*); but it must be an under-value satisfactorily proved and considerable in amount: it is not enough to show that a little more might have been got for the estate than has been actually obtained; still less is it sufficient to infer the under-letting from the value of the property at some subsequent period (*f*).

"Rent not to be raised."

53. Even where it was ordained at the creation of the trust that no lease should be made for above twenty-one years, and *the rent should not be raised*, it was held that the trustee would not be justified in granting leases from time to time at no more than the original reservation: that as the times alter and the price of provisions rises, the rent ought to be raised in proportion (*g*). The direction for leasing under the true value is no part of the charity, and in fact is *void in itself for perpetuity* (*h*).

Under-value must be fraudulent to render the lease impeachable.

54. In considering the question of value it must be remembered that the case of a charity estate is one in which, of all

(*a*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592. See now p. 642, *post*.

(*b*) *Ferraby* v. *Hobson*, 2 Ph. 258, *per* Lord Cottenham.

(*c*) See *Ferraby* v. *Hobson*, 2 Ph. 255.

(*d*) *Attorney-General* v. *Morgan*, 2 Russ. 306.

(*e*) *East* v. *Ryal*, 2 P. W. 284; *Attorney-General* v. *Lord Gower*, 9 Mod. 224, see 229; *Attorney-General* v. *Magwood*, 18 Ves. 315; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Poor of Yervel* v. *Sutton*, Duke, 43; *Eltham Parish* v. *Warreyn*, Duke, 67; *Wright* v. *Newport Pond School*, Duke, 46; *Rowe* v. *Almsmen of Tavistock*, Duke, 42; *Crouch* v. *Citizens of Worcester*, Duke, 33; *Attorney-General* v. *Foord*, 6 Beav. 288.

(*f*) *Attorney-General* v. *Cross*, 3 Mer. 541, *per* Sir W. Grant.

(*g*) *Watson* v. *Hinsworth Hospital*, 2 Vern. 596; and see *Lydiatt* v. *Foach*, Id. 410; *Attorney-General* v. *Master of Catherine Hall, Cambridge*, Jac. 381; *Attorney-General* v. *St John's Hospital*, 1 L. R. Ch. App. 92.

(*h*) *Hope* v. *Corporation of Gloucester*, 7 De G. M. & G. 647; *Attorney-General* v. *Greenhill*, 33 Beav. 193.

others, the *security* of the rent is the first point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance (*a*). And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive (*b*).

Compensation for the under-value.

55. When leases are set aside for under-value and the Court awards a *compensation* to the charity for the loss which has been sustained by the charity through the collusion of the trustees and the tenant, the burden will fall upon the trustees or the tenant according to the circumstances of the case (*c*). For whatever length of time renewals of leases of *charity* lands upon payment of fines certain may have been granted, and though in pursuance of a scheme settled by the Courts, the tenants have gained no right, and cannot insist upon any further renewals (*d*). But if money has been laid out in improvements upon the faith of renewals, and the lessees have not been recouped their outlay by any subsequent enjoyment of the property, the Court, in the charity scheme, will have regard to their claims (*e*).

Unreasonable extent of the lease.

56. A lease of charity lands may also be invalidated on the ground of the *unreasonable extent of the term*. The duration of the lease should be such only as is consistent with the fair and provident management of the estate (*f*). It was therefore always a direct violation of duty to grant a lease for one thousand years (*g*), not only on the ground before noticed that such a demise would in effect be an absolute alienation, but also on the principle that no private proprietor would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas Plumer observed: "The compensation which the trustees receive may be adequate at the date of the

(*a*) *Ex parte Skinner*, 2 Mer. 457, *per* Lord Eldon.

(*b*) *Ex parte Skinner*, 2 Mer. 457.

(*c*) See Duke, 116; *Poor of Yervel* v. *Sutton*, Id. 43; *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592, *per Cur.*; *Attorney-General* v. *Dixie*, 13 Ves. 540; *Rowe* v. *Almsmen of Tavistock*, Duke, 42.

(*d*) *Attorney-General* v. *St John's Hospital*, 1 L. R. Ch. App. 92.

(*e*) *S. C.*

(*f*) See *Attorney-General* v. *Owen*, 10 Ves. 560; *Attorney-General* v. *Brooke*, 18 Ves. 326; *Attorney-General* v. *Griffith*, 13 Ves. 575.

(*g*) *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Cross*, 3 Mer. 540; *Attorney-General* v. *Dixie*, 13 Ves. 531; *Attorney-General* v. *Brooke*, 18 Ves. 326.

contract, but they are precluded for one thousand years from any advantage of *increased* value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. At the same time," continued his Honour, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. In many cases in Duke's collection the Court acted on inadequacy of value, in none on mere extent of term" (*a*).

Husbandry leases.

57. *Husbandry* or *farm* leases should not be granted for a term certain exceeding *twenty-one years* (*b*). But neither is this rule to be taken as absolutely inflexible; and where the alienation is for any longer period, as for ninety-nine years, the Court will put it upon those who are dealing *for* and *with* the charity estate to show the reasonableness of such a transaction, for *primâ facie* it is unreasonable: there is no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances; the ordinary husbandry lease is for twenty-one years (*c*).

Leases determinable upon lives.

58. In *Attorney-General* v. *Cross* (*d*), the trustees had been in the habit of granting leases for ninety-nine years, *determinable on lives*, in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and which was proved to have been adopted by the founder himself. A bill was filed to set aside such a lease, but Sir W. Grant said: "I am not aware of any principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has, both in enabling and disabling statutes, considered *leases for three lives as on a footing with leases for twenty-one years absolute.* So have the founders of

(*a*) *Attorney-General* v. *Warren*, 2 Sw. 304. But see *Poor of Yervel* v. *Sutton*, Duke, 43, resolution 2; *Rowe* v. *Almsmen of Tavistock*, Id. 42; *Wright* v. *Newport Pond School*, Id. 46; *Crouch* v. *Citizens of Worcester*, Id. 33.

(*b*) See *Attorney-General* v. *Owen*, 10 Ves. 560; *Attorney-General* v. *Backhouse*, 17 Ves. 291; *Rowe* v. *Almsmen of Tavistock*, Duke, 42; *Wright* v. *Newport Pond School*, Id. 46; *Poor of Yervel* v. *Sutton*, Id. 43, resolution 2; *Attorney-General* v. *Pargeter*, 6 Beav. 150; [*Re Mason's Orphanage*, (1896) 1 Ch. 54, 60].

(*c*) *Attorney-General* v. *Owen*, 10 Ves. 560, *per* Lord Eldon; and see *Attorney-General* v. *Griffith*, 13 Ves. 575; *Attorney-General* v. *Backhouse*, 17 Ves. 291; *Attorney-General* v. *Brooke*, 18 Ves. 326; *Attorney-General* v. *Lord Hotham*, T. & R. 216; *Attorney-General* v. *Kerr*, 2 Beav. 421; *Attorney-General* v. *Hall*, 16 Beav. 388.

(*d*) 3 Mer. 524; see pp. 530, 539.

charities, who prohibited the letting on lease for more than three lives, or twenty-one years." And his Honour dismissed the bill, and allowed the trustees their costs out of the charity estate.

Leases for lives.

59. In a later case, where charity lands had for two hundred years been let for lives upon a fine or foregift at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there appeared no other ground for invalidating the leases, he refused to set them aside (*a*).

Building leases.

60. *Building* leases should be for a term not exceeding sixty, or ninety, or ninety-nine years (*b*). If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case.

Founder's intention.

61. What has been said as to the proper duration of leases is of course only applicable where the founder himself has not otherwise given directions, for in general the will of the settlor, where explicit, must be strictly followed; as if the terms of the endowment be that the charity estates shall be *let only for twenty-one years*, the trustees, though satisfied that leases for ninety-nine years would be more beneficial, could not make such a deviation from the directions of the trust *without the sanction of the Court*. It was said on one occasion, with reference to such variations from the founder's intention, that the Court itself could not give a good title to the lessee, but that it required the authority of an Act of Parliament (*c*). It is plain, however, that there is a wide distinction between a deviation from the founder's intention as to the *objects* of the charity, and a deviation from the directions as to *management*, which were no doubt originally meant to be governed by circumstances.

Improvements by lessees.

62. When there has been no actual fraud, and the lessee or assignee of the lease is ejected after having laid out money in the permanent improvement of the property, the Court will direct an inquiry to what extent the charity estate has been benefited, and will allow the holder of the lease the amount of the benefit found (*d*).

(*a*) *Attorney-General* v. *Crook*, 1 Keen, 121, see 126.

(*b*) See *Attorney-General* v. *Owen*, 10 Ves. 560; *Attorney-General* v. *Backhouse*, 17 Ves. 291; *Attorney-General* v. *Foord*, 6 Beav. 290; [*Re Mason's Orphanage*, (1896) 1 Ch. 54, 60].

(*c*) *Attorney-General* v. *Mayor of Rochester*, 2 Sim. 34.

(*d*) *Attorney-General* v. *Day*, V. C. Knight Bruce, March 9, 1847; and see *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Kerr*, 1 Beav. 420; *Swan* v. *Swan*, 8 Price, 518; *Attorney-General* v. *Balliol College*, 9 Mod. 411; *Savage* v. *Taylor*, Forr. 234; *Shine* v. *Gough*, 1 B. & B. 444.

Late Acts.

63. By the Charitable Trusts Acts the Charity Commissioners are empowered to authorise the grant by charity trustees of *building, repairing, improving, mining or other leases* (*a*), and the trustees are restricted from granting [otherwise than with the express authority of Parliament, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Commissioners] "any lease *in reversion* after more than *three years* of any existing term, or for any *term of life*, or in consideration wholly or in part of *any fine*, or for *any term of years exceeding twenty-one years*" (*b*). [A lease for more than twenty-one years made without the required consent does not enure for any purpose, but is absolutely void (*c*).

[Agricultural Holdings Act.]

64. The powers conferred by the Agricultural Holdings (England) Act, 1883, on a landlord in respect of charging the land are not to be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners (*d*).]

Power of majority to pass legal estate.

65. By the Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), sect 12, it is enacted that "where the trustees or persons acting in the administration of any *charity* have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, *a majority of those trustees or persons who are present at a meeting of their body duly constituted*, and vote on the question, shall have and be deemed *to have always had* full power to execute and do all such assurances, acts, and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect; and all such assurances, acts, and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being, and by the official trustee of charity lands" (*e*). The majority, therefore, in those cases of charity can bind the estate, not only in equity, but at law also, and that, whether the

(*a*) 16 & 17 Vict. c. 137, ss. 21, 26; 18 & 19 Vict. c. 124, s. 39.

(*b*) 18 & 19 Vict. c. 124, s. 29. [A deed founding a charity, and duly enrolled under 9 Geo. 2. c. 36, is not a "scheme legally established" within the enactment: *Re Mason's Orphanage*, (1896) 1 Ch. (C.A.) 596; nor is a royal charter incorporating a charity, though containing provisions for management, and a power to sell the charity lands: *Attorney-General* v. *National Hospital for Paralysed and Epileptic*, (1904) 2 Ch. 252; and see *Re Mason's Orphanage*, (1896) 1 Ch. 54, 59.]

[(*c*) *Bishop of Bangor* v. *Parry*, (1891) 2 Q. B. 277.]

[(*d*) 46 & 47 Vict. c. 61, s. 40.]

(*e*) And see the nearly similar enactment of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 16, and *ante*, p. 635.

legal estate be vested in the trustees or other the persons aforesaid, or in the official trustee of charity lands.

Charities may be incorporated.

66. By the Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24), it is enacted by sect. 1, that from the date of the Act the trustees or trustee for the time being of any charity, may apply to the Charity Commissioners for a *certificate of registration*, and the Commissioners may grant such certificate subject to such conditions and directions as they may think fit as to the qualifications and number of the trustees, their tenure, or avoidance of office, and the mode of appointing new trustees, and the custody and use of the common seal, and thereupon the trustees shall become *a body corporate, by the name described in the certificate*, and may sue and be sued in their corporate name, and hold, acquire, convey, assign, and demise any present or future property of the charity as the trustees might have done before the incorporation. But the Act is not to extend, modify, or control the Charitable Uses Act, 1735 (9 Geo. II. c. 36).

By sect. 2, the certificate of incorporation is to vest in the body corporate *all the real and personal estate* belonging to the charity, or held in trust for it; and persons in whose names any stocks, funds, or securities are standing in trust for the charity, are to transfer the same into the name of the body corporate; but if such property be *copyhold*, liable to the payment of a fine or heriot on the death or alienation of the tenant, the lord of the manor shall receive a corresponding fine or heriot on the granting of the certificate, and a like fine or heriot at the expiration of every subsequent period of *forty years*. But the certificate is not to vest in the body corporate any stocks, funds, or securities held by the *official trustees* of charitable funds, which are not to be transferable except under an order of the Commissioners, and by ordinary transfer or assignment.

By the 4th section, the Commissioners are to see that *proper trustees* have been appointed before they grant the certificate, and after the grant the *trusteeship is to be duly kept up*, and a return of the names of the trustees is to be made at the expiration of every five years.

By the 5th section, the *trustees* of the charity, notwithstanding their incorporation, shall *continue chargeable* for such property as shall come to their hands, and be answerable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity.

By the 10th section, *donations and dispositions* in favour of

the charity by deed, will, or otherwise, shall take effect as if the same had been made to the charity by its corporate name.

By the 11th section, *contracts by the trustees* of a charity which would have been valid and binding if no incorporation had taken place, shall be valid and binding though not made under the seal of the body corporate.

Exempted charities.

67. It should be noticed that the *Universities* and the *Colleges* thereof, and various other bodies of a charitable description, and charitable institutions wholly maintained by *voluntary contributions* (*a*) (which expression is used in contradistinction to the term *endowments* (*b*)), are excepted from the operation of the *Charitable Trusts Acts* (*c*).

Roman Catholic Charities Acts.

68. Charities the funds of which are applicable exclusively for the benefit of *Roman Catholics* were originally exempted

[(*a*) A charity is not "wholly maintained by voluntary contributions" if it has freehold premises used for the purposes of the charity and not producing income: *Attorney-General* v. *Mathieson*, (1907) 2 Ch. (C.A.) 383, but it is immaterial that the contributions are augmented by payments on behalf of scholars, and grants from the Board of Education, or from school boards out of local rates: *Re Society for Training Teachers of the Deaf and Whittle's Contract*, (1907) 2 Ch. 486.]

[(*b*) The word "endowment" was interpreted by Lord Romilly in the case of *The Corporation of the Sons of the Clergy* v. *Sutton*, 27 Beav. 651, as meaning property devoted to a specific and particular trust as distinguished from the general purposes of the charity, and this view was followed in subsequent cases; see *Re Royal Society of London and Thompson*, 17 Ch. D. 407; *Re Corporation of the Sons of the Clergy and Skinner*, (1893) 1 Ch. 178; *Re St John Street Chapel*, (1893) 2 Ch. 618; but in a recent case in the Court of Appeal this test of the meaning of the word was disapproved, see *In re Clergy Orphan Corporation*, (1894) 3 Ch. 145; and it was held that the effect of the section is to exempt from the jurisdiction of the Commissioners property which is given on such terms that the capital, and not merely the income, may be applied for the maintenance of the charity, and that the exemption is not taken away by reason of the investment of such money in the purchase of land; and see *Re Church Army*, W. N. (1906) 73 (C.A.); *Re Wesleyan Methodist Chapel in South Street, Wandsworth*, (1909) 1 Ch. 454. An endowment for the minor canons of a cathedral church, which is not part of the capitular estates, or under the control of or held in trust for the dean and chapter, is not an endowment of the cathedral church, so as to be exempt from the jurisdiction of the Charity Commissioners, even though the income indirectly relieves the capitular revenue *pro tanto* from payment of the minor canon's minimum statutory stipends: *Re Dod's Charity*, (1905) 1 Ch. 442; and property purchased with money applicable to the general purposes of a society is not an "endowment": *Re Society for Training Teachers of the Deaf and Whittle's Contract*, (1907) 2 Ch. 486. For the case of a charity which was not within the exemption, see *Re Gilchrist's Educational Trust*, (1895) 1 Ch. 367.]

(*c*) 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, s. 47; [The proviso at the end of s. 62 of 16 & 17 Vict. c. 137, that the exemption "shall not extend to any cathedral, collegiate, chapter, or other schools," does not exclude all schools from the exemptions in the section, but only cathedral, collegiate, chapter, and other schools of a similar kind: *Re Stockport Ragged, Industrial, and Reformatory Schools*, (1898) 2 Ch. (C.A.) 687].

for a period of two years, which was afterwards repeatedly extended, and by the latest of these Acts was extended to 1st July, 1860 (*a*). Roman Catholic charities have therefore now fallen within the operation of the Charitable Trusts Acts.

(*a*) 19 & 20 Vict. c. 76; 20 & 21 Vict. c. 76; 21 & 22 Vict. c. 51; 22 & 23 Vict. c. 50; see 23 & 24 Vict. c. 134.

CHAPTER XXII

OF TRUSTEES UNDER THE SETTLED LAND ACTS

[UNDER the Settled Land Act, 1882 (*a*), fundamental changes have been introduced in dealing with and disposing of settled estates, the powers which under the old law were usually given to the trustees of the settlement, and in some cases much more extensive powers, having been conferred on tenants for life and other limited owners. With a view to the protection of the remainderman, a class of trustees has been called into existence whose duties arise under the Act; but these duties are, with a few exceptions, to which attention will be drawn, principally of a ministerial nature, and do not involve the exercise of discretion. In the present chapter it is proposed to treat of the position and duties of these trustees; but incidentally to this it will be necessary to refer to the principal provisions of the Act, and the important changes which have been introduced by it.

[Definition of settlement.]

1. The term "settlement" is defined by sect. 2 of the Act, which provides by sub-sect. 1, that "*any* deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other *instrument, or* any number of *instruments,* whether made or passed before or after, or partly before and partly after, the commencement of this Act, *under* or by virtue of *which* instrument or instruments *any land or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession,* creates or is for the purposes of this Act a settlement." It is further provided by sub-sect. 2 that an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor, or descending to the testator's heir, is for the purposes of the Act

(*a*) 45 & 46 Vict. c. 38; amended by the Settled Land Acts, 1884, 1887, 1889, and 1890 (47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69), all which Acts together may (see sec. 2 of the Act of 1890) be cited as the Settled Land Acts, 1882 to 1890.

an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (*a*), and by sub-sect. 4 that "the determination of the question whether land is settled land for the purposes" of the Act, "or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect."

It is a matter of the first importance to ascertain precisely what instruments constitute "the settlement," as upon the determination of this question depends the power of the tenant for life to make a title, and the power of the trustees to give a valid receipt.

In order to constitute a settlement within the definition, the land or interest in land which forms the subject matter must "stand for the time being limited to, or in trust for persons by way of succession." Accordingly, where land was limited to a married woman in fee for her separate use, with a restraint on anticipation, it was held that as, according to the principle of *Taylor* v. *Meads* (*b*), there was only one estate vested in the *feme*, and no limitations thereof in existence by virtue of any settlement (for the possible curtesy of the husband would arise by the general law), there was no settlement within the definition (*c*); and where the limitations were upon trust for a *feme covert* for life, without power of anticipation, with remainder to such uses as she should by will appoint, and in default of appointment to the use of herself in fee, it was held that as, for the time being, the limitations were in favour of one person only, there was no settlement within the definition (*d*). An award under an Inclosure Act in respect of glebe land to a vicar "and his successors" was held not to be a settlement within the definition (*e*); and so where land was vested in a bishop in right of his see, and from time immemorial granted by him to a dignitary of his cathedral church for life so long as he should continue in his dignity; and the Court further intimated that the Act did not apply to ecclesiastical land (*f*); but where by a will property was directed to be set

(*a*) 45 & 46 Vict. c. 38, s. 2, sub-s. 2; see *Re Atherton*, W. N. (1891), p. 85, *post*, p. 657, note (*d*); and see *Re Hunter and Hewlett's Contract*, (1907) 1 Ch. 46, where under a settlement the trustees took only limited estates, and it was held that the reversion in fee left in the settlor was comprised in the "subject of the settlement," so that a person having the powers of a tenant for life under the Act could make a good title to the fee simple.

(*b*) 4 De G. J. & S. 597.

(*c*) *Bates* v. *Kesterton*, (1896) 1 Ch. 159.

(*d*) *Re Pocock and Prankerd's Contract*, (1896) 1 Ch. 302; as to this case, see further *post*, p. 659.

(*e*) *Ex parte Vicar of Castle Bytham*, (1895) 1 Ch. 348.

(*f*) *Re Bishop of Bath and Wells*, (1899) 2 Ch. 138, *per* North, J.

apart to answer an annuity thereby given and subject thereto was specifically given, it was held that the property, for the purposes of estate duty, stood "limited to or in trust for persons in succcession" (*a*). A jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them, are respectively limitations by way of succession within the above definition (*b*).

[Compound settlement.]

Again, it will be seen that a single "settlement" may, according to the definition, be created by several instruments, and it has been held that a settlement of land and a subsequent will devising other land to the uses of the settlement, and bequeathing money to be invested in the purchase of land to be settled to the same uses, constitute together one settlement (*c*). And where four estates were settled on the same tenant for life, with remainders to three different sets of uses, one estate being subjected to a long term of years for payment off of incumbrances on all four estates, and, subject to the term, being divided into moieties, which were respectively subjected to the same uses as two of the other estates, it was held that one of the last two estates, together with one of the moieties, constituted one settled estate, notwithstanding the interposition of the term (*d*). So where land was settled by will, and then, by deed, money was settled in trust to purchase land to be settled on limitations identical with, but not by reference to, those of the will (except for the interposition of two terms of years, which, however, had become satisfied), it was held that the will and deed constituted one "compound" settlement (*e*); and where an estate was settled by one instrument, and afterwards, by a separate instrument, another estate, which was subject to a mortgage, was settled on like trusts, the two settlements were held together to form one compound settlement (*f*). Where a testator by his will left valuable pictures to

(*a*) *Attorney-General* v. *Owen*, (1899) 2 Q. B. 253; and see *Re Campbell*, (1902) 1 K. B. (C.A.) 113.

(*b*) *Re Mundy and Roper*, (1899) 1 Ch. (C.A.) 275; but see *ibid. per* Vaughan Williams, L. J.

(*c*) *Re Mundy's Settled Estates*, (1891) 1 Ch. (C.A.) 399. The fact that the settlement comprises estates both in England and Ireland does not prevent its being treated as a single settlement: *Re Eyre Coote*, W. N. (1899) p. 222, where capital moneys arising in Ireland were applied in improvements in England.

(*d*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

(*e*) *Re Byng's Settled Estates*, (1892) 2 Ch. 219.

(*f*) *Re Lord Monson's Settled Estates*, (1898) 1 Ch. 427; and see *Re Phillimore's Estate*, (1904) 2 Ch. 460, where two deeds charging annuities on lands, and the will of the grantor settling the lands, were together held to constitute a compound settlement; and *Re Marshall's Settlement*, (1905) 2 Ch. 325, where notwithstanding the merger of the life estate in the fee simple, subject to jointure and portions term, the instrument was held to be a settlement within sec. 2, sub-sec. 1.

trustees to be held as heirlooms for the successive owners of an estate settled by deed, but not to vest absolutely in any tenant in tail male by purchase who should not attain the age of twenty-one years, the deed and the will, notwithstanding the difference in the limitations, were held to constitute one compound settlement (*a*), and this was followed in a case where there was first a settlement by will, and then a settlement by deed to the uses of the will, of land, most desirable for acquisition, purchased by the settlor for £7800, but subject to a mortgage by him for £7000 (*b*).

[Act of Parliament.]

It will be observed that amongst the instruments which may together constitute a settlement, an "Act of Parliament" is included. This expression is not confined to private Acts of Parliament, but includes general Acts; and where under a will a direction for accumulation was void under the Accumulations Act, 1800 (*c*), and the accumulations passed under that Act to the next of kin, it was held, having regard to the fact that the Act provided for the destination of accumulations, that the will and the Act together constituted a settlement (*d*). But a private Act which merely confers powers of management upon trustees of a will, but does not incorporate the will, nor create any limitations to or in trust for any persons by way of succession, is not part of the settlement (*e*).

[State of facts and limitations at time of settlement taking effect to be considered.]

The provision of sub-sect. 4, requiring that the determination of the question whether land is settled land, is to be governed by the state of facts and the limitations of "the settlement" (whatever the settlement may be) at the time of the settlement taking effect, is of very great importance (*f*). The effect of the provision may be shown by an illustration. Land is settled on A. for life, remainder to B. for life, remainders over; A. is dead, and B. as tenant for life desires to sell. But for sub-sect. 4, it might be thought that A. being dead, his life estate might be disregarded, and that B. was tenant for life, under a single instrument which constituted the settlement. If so, jointures and other charges created by previous instruments would necessarily be paramount to the settlement. But sub-sect. 4 requires that regard should be had to the state of the limitations at the time when the

(*a*) *Re Lord Stafford's Settlement and Will*, (1904) 2 Ch. 72.

(*b*) *Re Coull's Settled Estates*, (1905) 1 Ch. 712.

(*c*) 39 & 40 Geo. 3. c. 98, commonly known as the Thellusson Act, see *ante*, pp. 96, 100, 101.

(*d*) *Vine* v. *Raleigh*, (1896) 1 Ch. 37; and see *Ex parte Vicar of Castle Bytham*, (1895) 1 Ch. 348; *Re Meade's Settled Estates*, (1897) 1 I. R. 121.

(*e*) *Talbot* v. *Scarisbrick*, (1908) 1 Ch. 812.

(*f*) As to the origin of this provision, see judgment of Stirling, J., in *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345, 354.

instrument under consideration took effect. The life estate of A., therefore, cannot be disregarded, and on investigation it is found that that life estate was in fact limited by way of resettlement in continuation of his life estate under a previous instrument. That instrument, therefore, forms part of "the settlement," and jointures or other charges created under it may, under sect. 20 (*a*), be subject to the disposition of B. as tenant for life. In this way, it may be found that a series of instruments constitute "the settlement," and this was what, in fact, occurred in a recent case, where, upon grounds similar to those above indicated, it was held that a series of instruments beginning with a settlement in 1826, and ending with a settlement in 1885, together constituted the "compound" settlement, and that, on the trustees of the settlement of 1885 being appointed trustees of the compound settlement for the purposes of the Settled Land Acts, it was competent for the tenant for life to sell and convey free from jointure rent-charges created under powers contained in previous instruments, and for the trustees to give a receipt accordingly (*b*).

[Effect of resettlement.]

Where a father and son, in exercise of a general power of appointment conferred by a disentailing assurance previously executed by them, appointed lands to the use of the father for life, with remainders over, but the life estate of the father was not expressed to be in restoration or continuation of his former life estate under a previous settlement, and under that settlement the lands were charged with a jointure and portions, it was held that, notwithstanding the absence of any clause of restoration or continuation, the several instruments constituted one settlement within the Act, under which the tenant for life, upon trustees of the compound settlement being appointed, could sell and make a good title discharged from the jointure and portions (*c*).

In the same case it was intimated that there may be at the same time a more comprehensive settlement of land consisting of several deeds, and a less comprehensive settlement thereof constituted by one of the deeds only (*d*).

Accordingly where settled lands were resettled in such a way that the estate of the tenant for life was extinguished, but the original settlement, created by a will, was still subsisting in respect of a jointure and portions charged on the lands, it was held that the tenant for life could sell under the will alone, the fact that he

(*a*) See *post*, p. 663.
(*b*) *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345, 354.
(*c*) *Re Mundy and Roper*, (1899) 1 Ch. (C.A.) 275.
(*d*) *Re Mundy and Roper*, *sup.*, approving *Re Du Cane and Nettlefold*, (1898) 2 Ch. 96, on this point.

had parted with his life estate not preventing him from exercising his statutory powers, and that it was not necessary to appoint trustees of the compound settlement (*a*). But where the old life estate created by a will was restored by a resettlement, it was held that the tenant for life could not make a good title under the resettlement alone (*b*). [Restoration of former estate.]

Where there is an original settlement complete in itself, and derivative settlements have afterwards been made by persons who take interests which have not yet fallen into possession under the original settlement, the original settlement alone is the settlement for the purposes of the Act (*c*); but by the Settled Land Act, 1890 (*d*), it is specially provided that "every instrument whereby a tenant for life, in consideration of marriage, or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value" within the meaning or operation of sect. 50 of the Act of 1882 (*e*); and the enactment is to apply and have effect with respect to every disposition before as well as after the passing of the Act, unless inconsistent with the nature or terms of the disposition. Where the tenant for life under a will, which contained a power to her to charge the settled land, having married three times, on the occasion of each marriage executed deeds exercising the power, and also charging her own life estate, North, J., following a decision of the M. R. in Ireland (*f*), treated the deeds as constituting part of the settlement, and, on the application of the tenant for life, made an order appointing trustees of a compound settlement consisting of the will, the three deeds, and a subsequent resettlement (*g*). But in a more recent case, where there was a settlement by will, empowering successive tenants for life to create jointures, which powers had been exercised, but so that, in the events which had happened, there was no separate charge on the life estates, it was held by [Derivative settlement.] [Settled Land Act, 1890.]

(*a*) *Re Wimborne (Lord) and Browne's Contract*, (1904) 1 Ch. 537.

(*b*) *Re Cornwallis West and Munro*, (1903) 2 Ch. 150 (as explained in *Re Wimborne, &c., sup.*, at p. 542). Reliance appears to have been placed on the statement of Chitty, L.J., in *Re Mundy and Roper, sup.*, that the well-known object of this restoration (see Davidson, 3rd. ed. vol. iii. p. 594 *et seq.*) was to "keep alive the old powers annexed to the life estate."

(*c*) *Re Knowles' Settled Estates*, 27 Ch. D. 707.

(*d*) 53 & 54 Vict. c. 69, s. 4.

(*e*) See *post*, p. 664.

(*f*) *Re Meade's Settled Estates*, (1897) 1 I. R. 121.

(*g*) *Re Tibbit's Settled Estates*, (1897) 2 Ch. 149.

Stirling, J., that no appointment of trustees of any compound settlement was necessary, and that the existing tenant for life of the will could make a good title to a purchaser, and the trustees of the will could give a discharge for the purchase-money (*a*); and it has recently been held by the same learned judge, that sect. 4 of the Act of 1890 is limited to the purpose of excluding the operation of sect. 50 of the Act of 1882, that it is only for that purpose that the assignments therein referred are to "be deemed to be" part of the settlement, and that, therefore, upon a sale by a tenant for life who has made such an assignment, it is not necessary to appoint trustees of the settlement constituted by the original settlement and the instrument of assignment (*b*).

[Trustees of the settlement.]

2. The trustees for the purposes of the Settled Land Act may either be nominated by the settlement itself, or appointed by the Court; and sect. 2 of the Act of 1882 (*c*) provides that "the persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of this Act, are for the purposes of this Act trustees of the settlement." According to this definition, in the case of settlements created before the Act, trustees with a power of sale, or a power of consenting to or approving of a sale, if there are any such trustees, and they only, are "trustees of the settlement" within the meaning of the Act. But trustees to whom personal estate was bequeathed upon trust to convert it and invest the proceeds in the purchase of real estate to be settled strictly, were held not to be trustees of the settlement for the purposes of the Act (*d*); and trustees for a term of years created out of settled lands, with power to raise money by mortgage for specified purposes are not trustees of the settlement for the purposes of the Act (*e*); but where limited owners have joint absolute dominion over estates in strict settlement (*e.g.*, a tenant for life and a tenant in tail in immediate remainder free from charges), they can resettle as they

(*a*) *Re Keck and Hart*, (1898) 1 Ch. 617. In this case, Stirling, J., treated the two previous cases as simply deciding that there was jurisdiction to appoint trustees of the so-called compound settlement, and not that a good title could not be made in the absence of such an appointment; and see *Re Hayes Settled Estates*, (1907) 1 I. R. 88; *sed cf. Re Domville & Callwells Contract*, (1908) 1 I. R. 475.

(*b*) *Re Du Cane and Nettlefold*, (1898) 2 Ch. 96.

(*c*) Sub-sect. 8.

(*d*) *Burke* v. *Gore*, 13 L. R. Ir. 367.

(*e*) *Re Carne's Settled Estates*, (1899) 1 Ch. 324.

please, and if they choose can keep the settlement alive, and appoint Settled Land Act trustees of a compound settlement constituted by the settlement and a resettlement (*a*). A declaration in a deed of resettlement that the trustees of the deed shall be trustees of the compound settlement is insufficient, if some of the beneficiaries interested under the settlement contained in previous instruments are not parties to the deed nor bound thereby (*b*).

Trustees with a power of sale exercisable with the consent of the tenant for life are within the Act (*c*); but the power must be general, and not limited, that is, it must be a power exercisable at any time and for any purpose, and not merely in a contingency or for a particular purpose (*d*).

[Implied power.] Where personal estate is settled so that the trustees have authority to vary the investments, and after-acquired real estate is settled by reference upon the same trusts, the trustees, having an implied power of sale, fall within the definition of trustees of the settlement for the purposes of the Acts (*e*); and executors or trustees who, under a charge of debts, have an over-riding power to sell settled land, seem to be trustees for the purposes of the Acts.

[Executors with charge of debts.]

[As to heirlooms.] Trustees with a power of sale of the settled real estate are trustees of the settlement for all the purposes of the Act, including the sale of heirlooms, although the power of sale in the settlement does not extend to heirlooms (*f*).

In instruments since the Act it is usual and proper to appoint trustees of the settlement expressly for the purposes of the Act.

[Settled Land Act, 1890.] By the Settled Land Act, 1890 (*g*), where there are for the time being no trustees of the settlement within the meaning of and for the purposes of the Act of 1882, then the following persons

(*a*) *Re Spearman's Settled Estates*, (1906) 2 Ch. 502.

(*b*) *Re Spencer's Settled Estates*, (1903) 1 Ch. 75.

(*c*) *Constable* v. *Constable*, 32 Ch. D. 233. In a case in Ireland it has been held that trustees with a power of sale exercisable with the consent of a person whose consent cannot be obtained, are not within the Act, but the soundness of this decision may fairly be questioned: *Re Johnstone's Settlement*, 17 L. R. Ir. 172.

(*d*) *Re Coull's Settled Estates*, (1905) 1 Ch. 712.

(*e*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*f*) *Constable* v. *Constable*, 32 Ch. D. 233.

(*g*) 53 & 54 Vict. c. 69, s. 16. Before this Act trustees with a future power of sale were held not to be trustees for the purposes of the Act; see *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Bryant and Barningham*, 44 Ch. D. (C.A.) 218. In a case of *Re Cox and Yeadon*, noted 91 L. T. p. 241, it was held by Chitty, J., in chambers, that a tenant for life, who was also one of the trustees, with a power of sale not taking effect until the death of such tenant for life, could make a good title under s. 16 of the Act of 1890.

shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely, (1) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale, of any other land comprised in the settlement, and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such power of sale; or, if there be no such persons, then (2) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not. This provision is applicable although the sale is not to take place until after the death of one of the persons who are appointed trustees (*a*).

[Trustees of land comprised in the settlement and subject to the same limitations.]

[Trustees with future power of sale.]

Where trustees of a will, having power of sale of settled land, and being also directed to invest personal estate upon land to be brought into settlement, made an investment accordingly, and subsequently sold the original settled land, the purchased lands were held to be "comprised in the settlement and subject to the same limitations" within the meaning of the section, and the trustees were trustees for the purposes of the Settled Land Acts (*b*).

[Appointment by the Court.]

3. Where there are no trustees of the settlement within the statutory definition, or where in any other case it is expedient for the purposes of the Act that new trustees of a settlement should be appointed, the Court may, if it thinks fit, on the application of the tenant for life, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees under the settlement for the purposes of the Act (*c*).

[Survival of powers.]

The persons appointed by the Court, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, are for the purposes of the Act the trustees or trustee of the settlement (*d*).

(*a*) *Re Jackson's Settled Estates*, (1902) 1 Ch. 258; and though the power of sale *might* be exercised so as to create a perpetuity; *Re Davies and Kent's Contract*, (1910) W.N. 61.

(*b*) *Re Moore*, (1906) 1 Ch. 789.

(*c*) 45 & 46 Vict. c. 38, s. 38, sub-s. 1. See *Re Skerritt*, W.N. (1899) p. 240, where an order appointing trustees of the settlement created by a will was held to have the effect of appointing them separate trustees of three several settlements created by the will.

(*d*) S. 38, sub-s. 2.

The exercise of this power is in the discretion of the Court (*a*), and it has been laid down in a case in Ireland, that, upon an application under this section to appoint trustees, the Court should not only require to be satisfied of the fitness of the proposed trustees, but also that the purpose for which their appointment is asked is such as to render such appointment safe and beneficial to all parties interested; and where the application was with a view to having a large fund taken out of Court and invested upon mortgage of lands in Ireland, it was refused (*b*). [Discretion of Court.]

By the Trustee Act, 1893 (*c*), sect. 47 (*d*), the powers and provisions contained in that Act, with reference to the appointment of new trustees, and the discharge and retirement of trustees (*e*), are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement, and the enactment applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of the Act, and is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of the Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881. [Application to trustees under Settled Land Acts of provisions of Trustee Act, 1893, as to appointment of trustees.]

The application to the Court should be by summons, which should be served on the trustees (if any), and also on the tenant for life, if he is not the applicant, but not on any other person unless the Judge so directs (*f*). [Application to Court by summons.]

As the appointment of trustees under the Settled Land Act, 1882, is required to impose a check upon the extensive powers conferred upon the tenant for life, and sect. 44 contemplates the probability of there being differences between the trustees and the tenant for life, the Court will not appoint any member of [Solicitor of tenant for life not appointed trustee.]

(*a*) See *Williams* v. *Jenkins*, W. N. (1894) p. 176.

(*b*) *Burke* v. *Gore*, 13 L. R. Ir. 367; but the Court, as a general rule and in the absence of special circumstances, will make the appointment without going into any such question. As to the power of the Irish Land Commissioners to appoint trustees for the purposes of the Settled Land Acts in certain cases, see 48 & 49 Vict. c. 73, s. 13. As to the appointment of trustees in Ireland when trustees have already been appointed in England, see *Re Maberly's Settled Estate*, 19 L. R. Ir. 341.

(*c*) 56 & 57 Vict. c. 53; *Re Wilcock*, 34 Ch. D. 508; and see *Re Kane's Trusts*, 21 L. R. Ir. 112.

(*d*) Replacing s. 17 of the Settled Land Act, 1890. As to the difficulty which previously arose, see *Re Wilcock*, 34 Ch. D. 510.

(*e*) As to these provisions see *post*, Chap. XXVI.

(*f*) Rules of the Supreme Court under the Settled Land Act, 1882, RR. 2, 4, and 6.

the firm of solicitors who act for the tenant for life (*a*), and *a fortiori* will not appoint the actual tenant for life, or any person who may become tenant for life (*b*), such as a tenant for life in remainder (*c*), to be a trustee of the settlement.

[Appointment of persons resident out of jurisdiction.]

Under special circumstances, where an infant resident and domiciled in a colony was entitled to a share of real estate, and it was proved that a proposed sale would be beneficial to the infant, the Court appointed as trustees persons who were resident in the colony (*d*).

[Infant's share in unconverted realty.]

The share of an infant under the Statute of Distribution in realty which has been improperly allowed to remain unconverted, is settled land within the meaning of the Act (*e*), so as to enable the Court, under sect. 38, to appoint trustees to exercise the powers of the Act; but the order appointing the trustees will be made without prejudice to any question as to the interests of the infant (*f*).

[Tenant for life a lunatic.]

Where a tenant for life is a lunatic, and his committee applies, under sect. 62 of the Act, for an order enabling him to exercise the powers of the Act, and no trustees are in existence, new trustees must be appointed for the purposes of the Act, and be served with notice of the application (*g*).

[Payment of capital money to trustees.]

4. By sect. 39, sub-sect. 1, capital money arising under the Act is not to be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt of capital trust money of the settlement by one trustee. But subject thereto, by sub-sect. 2, the provisions of the Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Where trustees have an implied power of sale over realty settled by reference to trusts of personal estate, and power is

(*a*) *Re Kemp's Settled Estates*, 24 Ch. D. 485; *Re J. Walker's Trusts*, 48 L. T. N.S. 632; 31 W. R. 716; *Re Earl of Stamford*, (1896) 1 Ch. 288, 299, where Stirling, J., intimated that he should be slow to make such an appointment, though he had done so in one case, viz. *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345; and see *Re Spencer's Settled Estates*, (1903) 1 Ch. 75, where the fact that the solicitor of the tenant for life was already a trustee under the compound settlement, and the alleged convenience of having the same trustees for all the settlements, were not deemed sufficient reasons for departing from the ordinary rule.

(*b*) *Re Harrop's Trusts*, 24 Ch. D. 717.

(*c*) *Re Thompson's Will*, 21 L. R. Ir. 109.

(*d*) *Re Simpson*, (1897) 1 Ch. (C.A.) 256.

(*e*) See sect. 59.

(*f*) *Re Wells*, 48 L. T. N.S. 859; 31 W. R. 764; but see *Re Greenville Estate*, 11 L. R. Ir. 138.

(*g*) *Re Taylor*, 52 L. J. N.S. Ch. 728; 31 W. R. 596; 48 L. T. N.S. 420. It is to be noted that the powers of s. 62 arise only in the case of a lunatic so found by inquisition; see *Re Baggs*, (1894) 2 Ch. 416 n.

given by the settlement to the trustees *or trustee* to act and give receipts for moneys subject to the trusts of the settlement, the case falls within the exception of sect. 39, sub-sect. 1, and a single trustee may receive the purchase-money of the real estate arising from a sale by the tenant for life (*a*).

[Tenant for life.]

5. We will next advert to the position of the tenant for life, and the powers given by the Act to the tenant for life, under which term are included, not only the person or persons beneficially entitled to the possession of the settled land, or the receipt of the income thereof for life (*b*), but also the limited owners who, under sect. 58, have the powers of a tenant for life under the Act.

[Definition of tenant for life.]

It may here be remarked that by sect. 2, sub-sect. 5, the tenant for life is defined to be "the person for the time being under a settlement beneficially entitled to possession (*c*) of settled land for his life" (*d*); and by sub-sect. 6, "if there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act" (*e*); and by sub-sect. 7, a person who is "tenant for life within the foregoing definition is to be deemed such, notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner, or to any extent"; and, by sub-sect. 10, possession includes receipt of income.

The definition has been liberally construed, and it has been held that the right to occupy a mansion house rent free, if such right is exercised, constitutes the occupier a tenant for life within

(*a*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*b*) See sect. 2, sub-sects. 5 and 10 (i).

(*c*) The words "entitled to possession" mean entitled "in possession," as distinguished from entitled "in reversion"; *Re Atkinson*, 30 Ch. D. 605; 31 Ch. D. (C.A.) 577.

(*d*) Where there is a trust for accumulation of rents during the life of the tenant for life, who is also heir-at-law, and as such entitled to the residue of the life estate after the expiration of the period limited by the Accumulations Act, 1800, the heir-at-law is tenant for life under the Settled Land Act; *Re Atherton*, W.N. (1891) p. 85.

(*e*) This must be compared with s. 19, which provides that where the settled land comprises an undivided share, or, under the settlement the settled land has come to be held in undivided shares, the tenant for life may join or concur to any extent necessary or proper for any purpose of the Act, with any person entitled to or having power or right of disposition of or over another undivided share. A tenant for life of an undivided moiety of land can sell the moiety of which he is tenant for life without the concurrence of the owner or owners of the other undivided moiety: *Cooper* v. *Belsey*, (1899) 1 Ch. (C.A.) 639, overruling *Re Collinge's Settled Estates*, 36 Ch. D. 516. A jointress whose jointure is paid has merely a charge and not a concurrent estate or interest with that of the tenant for life; *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345. As to sales by trustees in such a case, see *post*, Chap. XXIV. s. 2. v.

the Act (*a*); and where trustees were directed to enter into possession of an estate, keep up the mansion house and permit the testatrix's daughter to reside therein, and extensive powers of management were given to them, and there were provisions with the object of giving a strictly Protestant and Welsh character to the estate, it was held that there being in fact and in substance a trust that the daughter should have the actual right of residence during her life, she was tenant for life within the Act (*b*).

[Persons having powers of tenant for life.]

6. By sect. 58, sub-sect. 1, the powers of a tenant for life are given to each of the following persons, when his estate or interest is in possession (*c*), namely :—

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown.

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent.

(v.) A tenant for the life of another, not holding merely under a lease at a rent (*d*).

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an

(*a*) *Re Carne's Settled Estates*, (1899) 1 Ch. 324.

(*b*) *Re Baroness Llanover's Will*, (1903) 2 Ch. (C.A.) 16; (1902) 2 Ch. 679.

(*c*) These words refer to possession as contrasted with reversion or remainder, not to personal possession as contrasted with possession by another person; *Re Morgan*, 24 Ch. D. 114, 116; *Re Jones*, 26 Ch. D. (C.A.) 736, 741, 744; *Re Woodhouse*, (1898) 1 I. R. 69. An owner in fee simple subject to incumbrances is not within the section; *Re Bective Estate*, 27 L. R. Ir. 364.

(*d*) See *Vine* v. *Raleigh*, (1896) 1 Ch. 37, where the executors of a deceased next of kin and the surviving next of kin, who were entitled for the life of another to receive income directed to be accumulated contrary to the Accumulations Act, 1800 (39 & 40 Geo. 3. c. 98), s. 1, were held to have jointly the powers of a tenant for life. But the section only applies to beneficial owners, and therefore trustees with an estate *pur autre vie* cannot exercise the powers: *Re Jemmett and Guest's Contract*, (1907) 1 Ch. 629.

executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose.

(vii.) A tenant in tail after possibility of issue extinct.

(viii.) A tenant by the curtesy (*a*).

(ix.) A person entitled (*b*) to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not (*c*), or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

By sub-sect. 2, "in every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised." This sub-section has been held to operate as an extension of the definition of settlement contained in sect. 2 to instruments not in terms included therein, so that where land was held upon trust for a married woman for life, without power of anticipation, with remainder to such uses as she should appoint, and in default of appointment, to the use of herself in fee, although the land did not stand for the time being limited to or in trust for persons by way of succession within sect. 2, nevertheless, under sect. 58, the instrument was a settlement, and the married woman had the powers of a tenant for life, under sub-sect. 1, clause (ix.) (*d*).

[Tenant in fee with executory gift over.]

7. Under sub-sect. 1 of sect. 58 it has been held that, where estates were devised to the use of trustees upon trust to pay the net income to the testator's wife, for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without liability to account to the trustees or to the son for the same, and upon the son attaining twenty-one, then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon other trusts, the infant son had the powers of a tenant for life, as being within the meaning of clause (ii.) tenant in fee simple, with an executory limitation over in the event of his death under twenty-one without issue (*e*).

(*a*) By s. 8 of the Settled Land Act, 1884, the estate of a tenant by the curtesy is, for the purposes of the Act of 1882, to be deemed an estate arising under a settlement made by his wife. See observations of Stirling, J., in *Re Pocock and Prankerd*, (1896) 1 Ch. 302.

(*b*) As to the meaning of the word "entitled," see *Re Horne's Settled Estates*, 39 Ch. D. (C.A.) 84, 89.

(*c*) These words ought to receive a liberal construction; *Clarke* v. *Thornton*, 35 Ch. D. 307, at pp. 311, 312.

(*d*) *Re Pocock and Prankerd*, (1896) 1 Ch. 302.

(*e*) *Re Morgan*, 24 Ch. D. 114, and so where the executory limitation over

[Lease for years given to one for life.]

A gift of an estate, comprised in a lease for years, to a person during the remainder of the term, if he shall so long live, is not within either clause (iv.) or clause (vi.) of the sub-section, and the devisee cannot exercise the powers of a tenant for life under the Act (*a*).

[Tenant for life or for years determinable on life.]

Under clause (vi.) it has been held that a person to whom an estate is devised "so long as he shall reside in my present dwelling-house or upon some part of my B. estate for not less than three months in each year after he shall become entitled to the actual possession thereof," is within the clause (*b*); and where the devise was in trust for the testator's widow during her widowhood for the benefit and maintenance of herself and their children, the widow had the powers of a tenant for life under the clause notwithstanding that her estate was incumbered or charged with the liability to provide maintenance for such of her children as should require it (*c*). But the clause does not include the case where the property is vested in trustees upon trust during the life of A., to apply the income for the benefit of A. and of his wife and children, or for the benefit of any one or more of them, with a direction that, in case A. should assign his interest, or do any act whereby he would, if absolutely entitled, be deprived of the enjoyment thereof, the trust in his favour should absolutely cease, and the income should thenceforth during his life be applied by the trustees either for the benefit of A. or for such other purposes and in such manner as the trustees should in their absolute discretion think fit (*d*). An heiress at law, who is only entitled to surplus rents until the birth of a daughter, is not within the clause, which, it would seem, does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing (*e*).

[Trust for accumulation of income.]

The expression "trust for accumulation of income" in clause (vi.) ought not to be narrowly construed, and where in a specified event, which happened, the interest of the tenant for life was suspended during the continuance of a trust for payment of the testator's debts, the clause was held to be applicable (*f*); and so where, during a term antecedent to the life estate, the whole of

was in default of compliance with a condition as to residence in the mansion house, and maintenance of a home there for the sister of the testatrix: *Re Richardson*, (1904) 2 Ch. 777.

(*a*) *Re Hazle's Settled Estates*, 26 Ch. D. 428; 29 Ch. D. (C.A.) 78.

(*b*) *Re Paget's Settled Estates*, 30 Ch. D. 191.

(*c*) *Re Pollock*, (1906) 1 Ch. 146.

(*d*) *Re Atkinson*, 30 Ch. D. 605; 31 Ch. D. (C.A.) 577.

(*e*) *Re Baroness Llanover*, (1907) 1 Ch. 629.

(*f*) *Williams* v. *Jenkins*, (1893) 1 Ch. 700; and see *Re Woodhouse*, (1898) 1 I. R. 69.

the rents were to be accumulated and, subject to payment of annuities, to be treated as capital moneys (*a*).

[Persons entitled to income of land.]

Where, subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A. with remainders over, and the trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay an annuity, and then pay the ultimate residue of the rents and profits to A., and the income was insufficient after payment of the outgoings and interest to pay the annuity, it was held that A. came within clause (ix.), and had the powers of a tenant for life (*b*). So where estates were limited to trustees for a term of 1300 years, and subject thereto to A. for life, with remainders over in strict settlement, and the trusts of the term were to raise portions, to pay annuities, including an annuity to A., and to apply the residue as a sinking fund to pay off mortgage debts and other charges, and the trustees were, "during the continuance of the trust," to enter into and hold possession of the rents and profits of the estate, and "not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned, and full powers of management were given to the trustees, and they were also given such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882, it was held that A. was a tenant for life, or a person having the powers of a tenant for life, within the meaning of the Act, and that the trustees could not sell or enfranchise without his consent, as required by sect. 56 of the Act (*c*). It seems that the clause does not apply to a terminable life interest, or to any interest taken under an intestacy, though comprised in the "subject of the settlement" under sect. 2, sub-s. 2 (*d*).

[Annuitants.]

Where annuitants were for the time being entitled to the entire rents and profits of the residuary real estate, they were held to be persons having together the powers of a tenant for life under clause (ix.) (*e*).

(*a*) *Re Martyn*, 67 L. J. Ch. 733, distinguishing *Re Strangways*, 34 Ch. D. (C.A.) 423, on the ground that there the life estate was only to be created under an executory trust at the end of the term, whereas here the tenant for life took subject to the term.

(*b*) *Re Jones*, 24 Ch. D. 583; 26 Ch. D. (C.A.) 736; and see *Re Baroness Llanover's Will*, (1903) 2 Ch. (C.A.) 16, 21, *ante*, p. 658.

(*c*) *Re Clitheroe Estate*, 28 Ch. D. 378; 31 Ch. D. (C.A.) 135; and see *Re De Hoghton*, (1896) 1 Ch. (C.A.) 855, 861, 865, 869.

(*d*) *Re Baroness Llanover*, (1907) 1 Ch. 629.

(*e*) *Re Bennet*, (1903) 2 Ch. 136.

[Tenant for life whose interest is only to arise *in futuro*.]

But the case is different where by the settlement there is a period of time fixed during which the person claiming to be tenant for life in possession, or to exercise the powers of a tenant for life in possession, can have no right to put himself in possession of the estate, or to claim any part of the rents and profits of the estate, however large they may be. Where, therefore, residuary real estate was devised to trustees upon trust during twenty years to manage and improve the estate, and to accumulate or invest unapplied rents, and after the determination of the term to convey to uses under which the testator's son would become tenant for life, it was held that the son during the term could not exercise the powers of a tenant for life (*a*); and where by a settlement a term of ninety-nine years was limited to trustees upon trust to permit premises to be personally occupied by one for life, so long as she continued a widow and was desirous of personally occupying, and she never occupied, or desired to do so, but concurred in granting a lease of the premises for five years, it was held that, during the term, she was not tenant for life in possession for the purposes of the Act, though she might have the powers of a tenant for life in the event of her exercising her right of personal occupation upon the determination of the lease (*b*).

[Trust for sale of life estate.]

Where the limitation was during the life of A. upon trust to sell the life estate and pay the proceeds after certain deductions to A. and B. as tenants in common, it was held that A. and B. could together exercise the powers of the Act (*c*).

[Infant absolutely entitled to be deemed tenant for life.]

It may here be observed that by sect. 59 of the Settled Land Act, 1882, "where a person who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof."

[Dealings between tenant for life and the estate.]

8. By the Settled Land Act, 1890 (*d*), it is provided that where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement

(*a*) *Re Strangways*, 34 Ch. D. (C.A.) 423; and see *Williams* v. *Jenkins*, (1893) 1 Ch. 700, 705; *Re De Hoghton*, (1896) 1 Ch. (C.A.) 855, 866, 869.

(*b*) *Re Edward's Settlement*, (1897) 2 Ch. 412.

(*c*) *Re Hale and Clarke*, 55 L. J. N.S. Ch. 550; 55 L. T. N.S. 151, *nom. Re Hale and Smyth*.

(*d*) 53 & 54 Vict. c. 69, s. 12.

shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

[Powers of tenant for life.]

9. The Settled Land Act, 1882, has not only given to the tenant for life all the powers of disposition of the settled land which were previously given in well-drawn settlements to the tenant for life, or to the trustees with his consent, but has also conferred on him larger and more extended powers, and has effected a complete revolution in the manner of dealing with settled estates, and in the mutual relations of the tenant for life and trustees. Thus the Act has given to the tenant for life an absolute power at his own discretion to sell, enfranchise, and exchange the settled land, to grant building, mining, and other leases thereof, to concur in a partition, to accept surrenders of leases, to dedicate parts of the settled land for streets and open spaces, and other similar purposes, and various other powers, the details of which, and of the conditions and restrictions upon and subject to which they are exercisable, do not fall within the purview of the present work.

[Conveyance by tenant for life.]

As regards the power of the tenant for life to convey, it is provided by sect. 20 that on a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge. Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under the Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges, subsisting or to arise thereunder, but subject to and with the exception of—(i.) All estates, interests, and charges having priority to the settlement; and (ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed (*a*); and (iii.) All leases and

(*a*) As to the meaning of this expression, see *Conolly* v. *Keating*, (1903) 1 I. R. 353.

grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money, or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

Under these provisions it is competent for the tenant for life to over-ride by his conveyance all charges arising under the settlement, such as jointures or charges for portions not actually raised, but portions actually raised by mortgage of the estate will fall within the second exception (*a*).

[Powers of tenant for life cannot be assigned or released.]

10. These powers of the tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life, but remain exercisable by the tenant for life after and notwithstanding any assignment of his estate or interest; and a contract by the tenant for life not to exercise any of the powers is void (*b*). But the exercise of the powers will be without prejudice to the rights of the assignee for value of the tenant for life's estate or interest; and the assignee's rights are not to be affected without his consent, except that unless the assignee is in actual possession of the settled land or part thereof, his consent is not to be requisite for the making of leases by the tenant for life at the best rent, without fine, and in other respects in conformity with the Act (*c*). Where the tenant for life sells with the consent of the mortgagee of the life estate, the estate of the mortgagee passes

(*a*) See *Re Keck and Hart's Contract*, (1898) 1 Ch. 617. As to the binding effect on all parties interested, of a contract for sale by the tenant for life at a price to be fixed by arbitration, and conditional on the sanction of Parliament, afterwards obtained by a private Act, see *Re Earl of Wilton's Estates*, (1907) 1 Ch. 50. It was held by Joyce, J., that it was not within the powers of a tenant for life to effect an exchange of easements, but the C.A. (without expressing any opinion upon the point so decided) held that the transaction in question might be carried out by means of cross sales: *Re Brotherton's Estate*, (1908) W. N. (C.A.) 56.

(*b*) Thus the statutory power of sale given to the tenant for life will continue in him after a disentailing assurance and resettlement: *Re Mundy and Roper*, (1899) 1 Ch. (C.A.) 275, 296; and although he has assigned a share of his life estate to a remainderman so as to effect a merger: *Re Barlow's Contract*, (1903) 1 Ch. 382; and see *Re Marshall's Settlement*, (1905) 2 Ch. 325, *ante*, p. 648.

(*c*) S. 50. In this section "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a corresponding meaning. But an assignment by the tenant for life in consideration of marriage, or by way of any family arrangement, is not to be deemed an instrument vesting in any person any right as assignee for value within s. 50; see s. 4 of the Act of 1890, and *ante*, p. 651. The Court has no jurisdiction on a vendor and purchaser summons, on a sale by the tenant for

by the exercise of the statutory power, and his concurrence in the conveyance is not necessary (*a*).

By sect. 51, any provision in a settlement tending or intended to prohibit or prevent the tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under the Act, is to be deemed to be void. A clause which defeats the estate of a tenant for life in case he fails to comply with a condition as to residence on the settled property is within this section (*b*); and so also a proviso for reduction of an annuity on failure to comply with a condition as to residence (*c*), or a clause depriving the tenant for life, in the event of alienation by him, of the income of a fund provided for keeping up a wall on the settled property (*d*); but not so a provision for the expenditure of money for improvements, and repayment thereof by the tenant for life by instalments, as such a provision, being less favourable to him than the provisions of the Act, would rather tend to induce him to avail himself of the Act (*e*). In order to bring a case within the section there must be in the settlement "a limitation which, but for the attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act" (*f*). The effect of the section is that "from the time at which a sale or disposition takes place the attempted fetter on the power of the tenant for life is removed" (*g*); but the prohibition is void only so far as it tends to prevent the exercise of the powers of the tenant for life and no further (*h*);

[Provisions prohibiting exercise of powers are void.]

life, to compel an alleged assignee for value to submit his rights to the determination of the Court; see *Re Ailesbury Settled Estates*, 62 L. J. Ch. 1012; W. N. (1893) p. 140, where the summons was dismissed on the ground that, without the consent of the assignee, the title was too doubtful to be forced on a purchaser.

(*a*) *Re Dickin and Kelsall's Contract*, (1908) 1 Ch. 213.

(*b*) *Re Paget's Settled Estates*, 30 Ch. D. 161; *Re Thompson*, 21 L. R. Ir. 109; and see *Re Richardson*, (1904) 2 Ch. 777, where the condition was for residence during the life of the testatrix's sister (who was of unsound mind) and to provide a home for the latter, if required.

(*c*) *Re Eastman's Settled Estate*, W. N. (1898) p. 170; and see *Re Fitzgerald*, (1902) 1 I. R. 162.

(*d*) *Re Ames*, (1893) 2 Ch. 479.

(*e*) *Re Sudbury Estates*, (1893) 3 Ch. 74.

(*f*) *Per* Cotton, L.J., *Re Atkinson*, 31 Ch. D. (C.A.) 577, 581, in which case there was a discretionary trust to apply rents during the life of A. for him and others, and it was held that A. never became tenant for life within the Act.

(*g*) *Per* North, J., *Re Haynes*, 37 Ch. D. 306; see observations on this case, Wolstenholme, 8th ed. p. 383.

(*h*) *Re Trenchard*, (1902) 1 Ch. 378, so that a tenant for life, *durante viduitate*, on whom a condition as to residence is imposed by the will, is not entitled to hold discharged from the provision as to residence, but if she sells and therefore ceases to reside, she will be entitled, as against the income of the proceeds of sale, to the same benefits as if she had not sold; and see *Re Fitzgerald*, (1902) 1 I. R. 162.

and until sale or disposition the condition may be good, and the breach of it cause a forfeiture (*a*); and there is nothing in the section to prevent the limited owner from releasing his rights in consideration of an annual payment, or otherwise upon terms beneficial to the estate (*b*). The section extends to a case where the proviso tending to induce a tenant for life to abstain from exercising his powers under the Act is contained in a separate instrument made by a person other than the settlor of the land (*c*). By sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture.

[Provision against forfeiture.]

[Powers of the Act cumulative.]

11. By sect. 56, the powers conferred by the Act are not to affect prejudicially any powers subsisting under the settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees, and the powers given by the Act are cumulative, by which is understood that the powers of the settlement and those under the Act are co-existent, and that it is optional with the tenant for life to exercise the powers conferred by the Act, or, his consent to the exercise by the trustees of their powers being rendered necessary by sub-sect. 2, to allow the powers under the settlement to be exercised (*d*).

[Powers of tenant for life absolute.]

12. The Act gives to the tenant for life, in his uncontrolled discretion, large and absolute powers of dealing with and disposing of the settled land, without requiring him to procure the consent of any person interested in remainder, or making him responsible to any one for the exercise of his discretion; subject only to this,

[But in exercising them he is in the position of a trustee.]

that by sect. 53 the tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed in the position, and to have the duties and liabilities of a *trustee* for those parties (*e*); and that under sect. 44, the trustees, if any difference arises between them and the tenant for life, may obtain the directions of the Court.

In one of the first cases decided under the Act, Pearson, J., when adverting to the absolute power conferred upon the tenant for life of deciding whether or not a sale should take place, said, "there is nothing in the Act to enable the Court to restrain

(*a*) *Re Haynes*, 37 Ch. D. 306.
(*b*) *Re Trenchard*, (1902) 1 Ch. 378.
(*c*) *Re Smith*, (1899) 1 Ch. 331.
(*d*) As to the effect of the restrictions in sub-s. 2 on the powers of trustees, see Chap. XXIV. s. 2, v.; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Barrs-Haden's Settled Estates*, W. N. 1883, p. 188.
(*e*) *Hatten* v. *Russell*, 38 Ch. D. 334, 342.

the tenant for life from selling, whether he desires to sell because he is in debt and wishes to increase his income, or whether, without being in debt, he thinks he can increase his income, or whether he desires to sell from mere unwillingness to take the trouble involved in the management of landed property; or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power, either in the Court or in trustees, to interfere with his power of sale" (*a*). But in the same case the same learned Judge, when referring to the mode in which the sale was to be conducted, said that "a tenant for life, in selling under the Act, must sell as fairly as a trustee must sell for the tenant for life, and for those in remainder"; and in another case (*b*), the late Lord Justice Kay, then Kay, J., said: "I think the meaning of this 53rd section is that, for the security of the remaindermen, as between the tenant for life and them, he, in the exercise of this power, shall be treated as a trustee, and shall have all the liabilities of a trustee exercising a like power," and his lordship intimated that if a purchaser knew the tenant for life was exercising the power improperly, and that what he was doing would amount to a breach of trust, the purchaser had a right to refuse to complete. And it has been said by Stirling, J., that it is the duty of the tenant for life, in exercising the discretion which is vested in him under the Act as to the application of capital money, to consider whether he is unduly prejudicing any of the parties by the proposed exercise of that discretion; but where it is a matter of doubt, in the absence of any reason for supposing that the discretion is unfairly exercised, then that discretion ought to prevail (*c*). It has been further observed that the regard which is to be had to the interests of the parties entitled under the settlement is not confined to pecuniary interests, but may extend to sentimental considerations (*d*), and in a recent case on

(*a*) *Wheelwright* v. *Walker*, (No. 1) 23 Ch. D. 752; and see *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Thomas* v. *Williams*, 24 Ch. D. 558.

(*b*) *Hatten* v. *Russell*, 38 Ch. D. 334, 345. In *Mogridge* v. *Clapp*, (1892) 3 Ch. (C.A.) 382, 400, the same learned Judge observed that it was the duty of the tenant for life "to do everything regularly, and in strict compliance with the Act; and omitting to do so would be on his part a breach of trust"; and see *Chandler* v. *Bradley*, (1897) 1 Ch. 315.

(*c*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84, 95; and see *Re Earl of Radnor's Will*, 45 Ch. D. (C.A.) 402, 418, 419.

(*d*) *Sutherland* v. *Sutherland*, (1893) 3 Ch. 169, 189; *Re Marquis of Ailesbury's Settled Estates*, (1892) 1 Ch. (C.A.) 506, 536, 541; *S. C.* H. L.

the subject, in which the Court has been said to have gone the furthest in controlling the discretion of the tenant for life (*a*), it was said that, assuming that a tenant for life was acting *bonâ fide*, and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee might fail to see that he was acting unjustly towards those whose interests he was bound to protect, and if he were so acting, and the Court could see it, although he could not, it was the duty of the Court to interfere (*b*). In reference to the investment of capital moneys under the Act, the tenant for life is in the same position as an ordinary trustee with a discretionary power of investment; and the Court will restrain him from directing an investment which is not suitable for trust funds, though within the words of the power given by the Act, under the same circumstances under which it would so restrain an ordinary trustee: and where it is within the knowledge of trustees that property upon which the tenant for life has directed them to invest, and which is within the words of the power given by the Act, is an undesirable investment, they are justified in bringing the matter before the Court by summons under the Act (*c*).

[Undesirable investment by tenant for life.]

The general conclusion seems to be that the effect of the Act is to make the tenant for life, in relation to the exercise of the powers of the Act, a trustee for all parties interested, and therefore subject to the same rules as any other trustee, and liable to the interference of the Court if the exercise of his discretion is affected by improper motives (*d*).

(1892) A. C. 356, *sub nom. Bruce* v. *Marquis of Ailesbury; Re Hope*, (1899) 2 Ch. (C.A.) 679, *post*, p. 690.

(*a*) Per Stirling, J., in *Re Richardson*, (1900) 2 Ch. 778.

(*b*) *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. (C.A.) 531. So where a widow and tenant for life was proposing to grant a lease of the settled estate to her intended second husband, the granting of such lease was restrained, as not being a *bonâ fide* exercise of the powers of a tenant for life: *Middlemas* v. *Stevens*, (1901) 1 Ch. 574; but a lease by a tenant for life under the Settled Land Acts to his wife is good, if it is so in other respects; *Gilbey* v. *Rush*, (1906) 1 Ch. 11, in which case it was intimated that "good faith" in sect. 54 of the Settled Land Act, 1882, means nothing more than that the provisions of the Act must be complied with. Where the estate was subject to mortgages bearing interest at 4 per cent., and the purchase-money could not be properly invested so as to yield more than 3 per cent., the tenant for life was held to be justified in selling, and paying off the mortgages out of the purchase-money, instead of keeping the mortgages on foot for the benefit of the remainderman. The Court relied on the fact that the settlement contained a power of sale under which the trustees could have done what the tenant for life was proposing to do, but intimated that even in the absence of such a power the conclusion might have been the same: *Re Richardson*, (1900) 2 Ch. 778.

(*c*) *Re Hunt's Settled Estates*, (1906) 2 Ch. (C.A.) 11.

(*d*) *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127; 32 Ch. D. (C.A.) 1. As to the control of the Court

Where the remainderman offered to purchase the estate for 7500*l.*, and undertook at the bar not to withdraw his offer, an injunction was granted by Kay, J., to restrain the tenant for life from selling for less than 7500*l.*, and from entering into any contract (otherwise than by public auction) for sale of the estate, or any part thereof, without first communicating the offer to the remainderman, and giving him two clear days to make an advance on the price offered (*a*).

On the other hand, it has been said that the section is rather to be read as imposing the responsibilities of a trustee on the tenant for life than as conferring on him the rights of a trustee (*b*), and he is not necessarily entitled to costs on the footing of his being a trustee (*c*).

[Effect of judgment in action to execute trusts.]

The fact that a judgment has been given in a pending action for the execution of the trusts of a will or settlement of realty will not prevent a tenant for life thereunder from exercising the powers of the Act, without procuring the consent of the Court. To require such consent would be to impose a fetter on the free alienation by the tenant for life inconsistent with the spirit and terms of the Act (*d*).

[Notice to trustees.]

13. By sect. 45, sub-sect. 1, the tenant for life, when intending to make a sale, exchange, partition, lease (*e*), mortgage, or charge, is to give notice of his intention to each of the trustees of the settlement, and also to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by registered letter, posted not less than one month before the making by the tenant

over the exercise of powers, see *post*, Chap. XXIV. s. 2, iv.; and see *Re Mansel's Settled Estates*, W. N. 1884, p. 209; *Re Sebright's Settled Estates*, 33 Ch. D. 429. Although the tenant for life is in the position of a trustee under s. 53, yet a lunatic tenant for life is not a trustee within s. 128 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), so as to enable the Court in lunacy to exercise the statutory powers under s. 62 of the Settled Land Act, 1882; *Re Baggs*, (1894) 2 Ch. 416n; but a power of appointment among children, given to a tenant for life under an ordinary marriage settlement, rests on a different footing, as it is a power vested in the lunatic "in the character of trustee" within sect. 128; *Re A.*, (1904) 2 Ch. (C.A.) 328.

(*a*) *Wheelwright* v. *Walker*, (No. 2) 48 L. T. N.S. 867; 31 W. R. 912.

(*b*) *Re Llewellin*, 37 Ch. D. 317, 325, *per* Stirling, J.; and see *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252, 266, *per* Lopes, L.J.; *Chandler* v. *Bradley*, (1897) 1 Ch. 315.

(*c*) *Sebright* v. *Thornton*, W. N. (1885) p. 176, where only one set of costs was allowed to the tenant for life and his mortgagees.

(*d*) *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531.

(*e*) Except a lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, which lease may now, under s. 7 of the Act of 1890, be made by a tenant for life without any notice being given, and notwithstanding that there are no trustees for the purposes of the Settled Land Acts.

for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same; and by sub-sect. 2, at the date of notice given, the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. Under this section it was held that a general notice of intention to sell or lease all or any part of the settled estate at any time or times, as opportunity should occur, was insufficient (*a*); but by sect. 5 of the Settled Land Act, 1884 (*b*), it is now provided, by sub-sect. 1, that the notice required by sect. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf; but by sub-sect. 2, the tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected or in progress, or immediately intended; and the section applies, by sub-sect. 4, to a notice given before, as well as to a notice given after, the passing of the Act of 1884; provided, by sub-sect. 5, that no objection to such notice was taken before the passing of the Act.

[General notice sufficient.]

It is to be observed that the Act of 1884 does not extend to the case of notice of intention to make a mortgage or charge; and such a notice, to be valid, must specify the particular mortgage or charge contemplated at the time when the notice is given (*c*).

[Except as to a mortgage or charge.]

The committee of a lunatic tenant for life cannot give a legal notice under the Act, unless he has previously obtained the sanction of the Court in Lunacy thereto (*d*).

[Committee of lunatic.]

The giving of the notice, unless waived, is a condition precedent to the exercise of the powers (*e*). But under the Act of 1884 any trustee, by writing under his hand, may waive notice, either in any particular case, or generally, and may accept less than one month's notice (*f*). And it is conceived that the waiver of notice, or acceptance of shorter notice, if signed by all the trustees, will extend as well to the notice to be given to the trustees' solicitor under the Act of 1882, as to the notice to be given to the trustees themselves.

[Waiver of notice.]

14. Where trustees are appointed by a settlement with such powers as to make them, under sect. 2 of the Act of 1882,

[Where notice to sole trustee sufficient.]

(*a*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*b*) 47 & 48 Vict. c. 18.

(*c*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*d*) *Re Ray's Settled Estates*, 25 Ch. D. 464; and see the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120; *Re Salt*, (1896) 1 Ch. (C.A.) 117.

(*e*) *Per* Chitty, J., *Re Countess of Dudley's Contract*, 35 Ch. D. 338, at p. 341.

(*f*) 47 & 48 Vict. c. 18, s. 5 (3).

trustees of the settlement for the purposes of the Act, and the powers are made by the settlement exercisable by the trustees or *trustee* for the time being, it will be sufficient to give notice, under sect. 45, to a sole surviving or continuing trustee: and the number of trustees need not, for the purposes of the notice, be completed (*a*).

[Purchaser need not inquire as to notice.]

15. By sect. 45, sub-sect. 3, a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any notice required by that section (*b*). As, however, under the Act of 1882, at least a month's notice to the trustees was imperative, it was necessary for any person dealing with the tenant for life to see that there had been, for at least that period before any dealing took place, proper trustees to whom notice could have been given (*c*); but a notice to the trustees of an intention to sell, given less than a month before the contract but more than a month before the day fixed for completion, was held to be a sufficient compliance with the Act (*d*). Now, under the Act of 1884 (*e*), it will be sufficient if the trustees, by writing under their hands, either waive notice altogether or accept a shorter notice, and it has been held that the non-existence of trustees for the purposes of the Act is not a defect in title, but rather a defect of conveyance (*f*), and that it is therefore sufficient for the protection of a purchaser if, by the time he comes to complete, there are trustees in existence, and the required notice has been given.

And so, notwithstanding that there are no trustees for the purposes of the Act in existence, a lessee who, acting in good faith, takes a lease from the tenant for life, acquires a good title, and a contract by him for sale of his lease to a purchaser may be specifically enforced; though the tenant for life, who omitted to obtain the appointment of trustees, might not have been entitled to specific performance as against an unwilling lessee, and might perhaps have been liable to be restrained, at the instance

(*a*) *Re Garnett Orme and Hargreave's Contract*, 25 Ch. D. 595.

(*b*) And by section 54, on a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act. As to the effect of this section, see *Hurrell* v. *Littlejohn*, (1904) 1 Ch. 689.

(*c*) *Re Bentley*, 54 L. J. N.S. Ch. 782.

(*d*) *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616.

(*e*) 47 & 48 Vict. c. 18, s. 5.

(*f*) *Hatten* v. *Russell*, 38 Ch. D. 334; *Mogridge* v. *Clapp*, (1892) 3 Ch. (C.A.) 382.

of a remainderman, from granting a lease until he had obtained such appointment (*a*). But where a tenant for life accepted a sum of money from the lessee as a bribe to induce him to grant the lease, and not by way of fine, the lease was held to be void as against the remaindermen (*b*).

[Notice by registered letter.]

If a shorter notice is accepted, it may still be sent by registered letter, as provided by the Act of 1882.

It is conceived that it is not essential to the validity of the notice that it should be sent by a registered letter, but that that is only a convenient mode authorised by the Act of serving the notice.

[Duties of trustees on receipt of notice.]

16. We come now to consider what are the duties of trustees of the settlement under the Act after they have received a notice of an intended dealing by the tenant for life, and it is somewhat remarkable that, having regard to the importance attached by the Act to the service on the trustees of notice of any intended dealing by the tenant for life with the settled land, the Act should be silent as to what the trustees on their part ought to do in the interest of the remainderman when they receive a notice. No doubt if it comes to their knowledge that the tenant for life is contemplating or attempting to commit a fraud—as, for instance, by selling or leasing the property at a gross undervalue under some secret arrangement by which he is to derive a personal benefit, or mortgaging the estate in order to free himself from a personal liability, it would be their duty to come to the Court and ask for an injunction to restrain the sale or lease (*c*). Or if they disapproved of the sale, and considered it improvident, it might be their duty to apply to the Court for directions under sect. 44 (*d*). But if the dealing is not on the face of it fraudulent or improper, there is no obligation on the trustees to inquire into or take any steps in the matter; and in any case they are, by sect. 42, expressly protected from any liability for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing as they might make, bring, take, or do.

[Where consent of trustees necessary to exercise of powers.]

17. There are, however, some powers which the tenant for life can only put in force either with the consent of the trustees or

(*a*) *Mogridge* v. *Clapp*, (1892) 3 Ch. (C.A.) 382, and see *Chandler* v. *Bradley*, (1897) 1 Ch. 315.

(*b*) *Chandler* v. *Bradley* (1897) 1 Ch. 315.

(*c*) *Wheelwright* v. *Walker*, (No. 1) 23 Ch. D. 752, 762; *Re Monson's Settled Estates*, (1898) 1 Ch. 427, 432; and see *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. (C.A.) 531.

(*d*) *Hatten* v. *Russell*, 38 Ch. D. 334, 344; *Re Hunt's Settled Estates*, (1905) 2 Ch. 418, *ante*, p. 668.

under an order of the Court, and as to these the trustees, before giving their consent, must exercise their discretion on behalf of all persons interested. Thus, under sect. 10 of the Settled Land Act, 1890 (repealing, but re-enacting, with variations, sect. 15 of the Act of 1882), the principal mansion-house (if any) (*a*) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, cannot be sold, exchanged, or leased by the tenant for life without such consent or order (*b*). The Court, in exercising the discretion committed to it by this section, is "bound to take into consideration not only the relative interests of the parties, but the interests of the estate itself, including in that expression the well-being of the persons from whose industrial occupation its rents and profits are derived" (*c*). [Sale of mansion-house.]

(*a*) Where there are two or more mansion-houses, the question which is the principal mansion-house is a question of fact, and (*semble*) there may be two principal mansion-houses on one estate; *Gilbey* v. *Rush*, (1906) 1 Ch. 11. And where there were two separate landed properties, each with a principal mansion-house, comprised in one settlement, and in process of time the character of one of the properties, which was in a residential neighbourhood, had altered, and the mansion-house had been let on lease for the purposes of a school, and pleasure-grounds laid out under a building scheme, it was held that the house had ceased to be the principal mansion-house for any settled land, and was no longer subject to the statutory restrictions: *Re Wythe's Settled Estates*, (1908) 1 Ch. 593.

(*b*) The section further provides that where a house is usually occupied as a farmhouse, or where the site of any house, and the pleasure grounds and park and lands (if any) usually occupied therewith, do not altogether exceed 25 acres in extent, the house is not to be deemed a principal mansion-house within the meaning of the section. The Court will sanction a sale, even though the testator has expressly directed that the mansion-house is to be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms shall at all times be kept in the mansion-house, if a proper case for sale is made out, but the sale will not be sanctioned without proper directions being given for the disposal of the heirlooms. They may, however, be sold under s. 37 of the Act of 1882, if the tenant for life so desires and the Court approves: *Re Brown's Will*, 27 Ch. D. 179. But where the tenant for life has mortgaged his life interest to its full value, the Court will not, unless the mortgagees consent, sanction a projected sale without full information as to the circumstances and advisability of the proposed sale: *Re Sebright's Settled Estates*, 33 Ch. D. (C.A.) 429. And the leaning of the Court against a sale is as strong as, or stronger than, in the analogous case of heirlooms: *Re Marquis of Ailesbury's Settled Estates*, W. N. 1891, p. 167. Trustees appointed under s. 60, during the minority of a tenant for life would, it seems, have an unrestricted power to sell the mansion-house: *Re Countess of Dudley*, 35 Ch. D. 338, at p. 343, *per* Chitty, J. In the construction of the expression "pleasure ground and purchased lands (if any) usually occupied therewith," the words "usually occupied therewith" are to be referred to "lands (if any)," and not to the previous words; *Pease* v. *Courtney*, (1904) 2 Ch. 503. The word "park" is used in a popular and not in a technical sense; *S. C.* A lease by a tenant for life, affecting to bind succeeding tenants for life to work an engine to supply water to the lessees, is *ultra vires*; *S. C.*

(*c*) *Bruce* v. *Marquis of Ailesbury*, (1892) A. C. 356, 364, *per* Lord Watson. "In the Settled Land Act the paramount object of the Legislature was the well-being of settled land," *S. C.*, *per* Lord Macnaghten, at p. 365.

The section applies to the lease of an easement over the mansion-house, park, and grounds (*a*).

[Timber.] Again, under sect. 35 of the Act of 1882, a tenant for life impeachable for waste in respect of timber, can, on obtaining such consent or order as above mentioned, cut and sell timber ripe and fit for cutting.

[Improvements.] So again, sect. 25 enumerates the various improvements authorised by the Act (*b*); but by sect. 26, sub-sect. 1, where the tenant

(*a*) *Sutherland* v. *Sutherland*, (1893) 3 Ch. 169.

(*b*) These improvements are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:

(1) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses.

(2) Irrigation, warping.

(3) Drains, pipes, and machinery for supply and distribution of sewage as manure.

(4) Embanking or weiring from a river or lake, or from the sea, or a tidal water.

(5) Groynes, sea walls, defences against water.

(6) Inclosing, straightening of fences, re-division of fields. (Rebuilding garden walls and making new walls, so as to inclose more garden ground for a mansion-house, was held within the term "inclosing": *Re Earl of Dunraven's Settled Estates*, (1907) 2 Ch. 417.)

(7) Reclamation, dry warping.

(8) Farm roads, private roads, roads or streets in villages or towns.

(9) Clearing, trenching, planting.

(10) Cottages for labourers, farm-servants and artisans, employed on the settled land or not, (and any buildings available for the working classes, the building of which, in the opinion of the Court, is not injurious to the estate; see the Housing of Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 11; and that this enactment applies only to the erection of new dwellings, see *Re Calverley's Settled Estates*, (1904) 1 Ch. 150).

(11) Farmhouses, offices, and outbuildings, and other buildings for farm purposes. (See *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252; *Re Houghton Estate*, 30 Ch. D. 102; *Re Earl of Lisburne's Settled Estates*, W. N. (1901) 91.)

(12) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise. (The concluding words would not extend to the erection of an engine-house for the electric lighting of the mansion-house: *Re Lord Leconfield's Settled Estates*, (1907) 2 Ch. 340.)

(13) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption. (As to the installation of a new water supply to a mansion-house being within the sub-section, see *Re Earl of Dunraven's Settled Estates*, (1907) 2 Ch. 417.)

(14) Tramways, railways, canals, docks.

(15) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(16) Markets and market-places.

(17) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment,

for life is desirous that capital money arising under the Act, shall be applied in or towards payment for an improvement authorised

of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land.

(18) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid.

(19) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines.

(20) Reconstruction, enlargement, or improvement of any of those works.

This sub-section is not confined to works already constructed under the powers of the Act, but extends to any of the works previously mentioned in the section: *Re Earl of Dunraven's Settled Estates*, (1907) 2 Ch. 417; and it includes additional works for the purpose of the permanent working of mines; *e.g.* machinery required to guard against influx of water into a coal mine from the probable working of adjoining mines; *Re Mundy's Settled Estates*, (1891) 1 Ch. (C.A.) 399. Re-roofing may, according to circumstances, come under the head of repairs or permanent improvements; *Re Newton's Settled Estates*, W. N. 1890, p. 24, where Cotton, L.J., dissented from the opinion expressed by Kay, J., that s. 9 of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), was more extensive than s. 25 of the Settled Land Act, 1882. Expenditure of capital money for the mere purpose of beautifying an unsightly mansion-house is not justified under the Act; see *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252, where the building of a private chapel, of new stables in lieu of old ones which were efficient though unsightly, and of a house for the estate agent, were held not to be improvements which could be paid for out of capital money. As to the jurisdiction of the Court to sanction the outlay of capital moneys on improvements of real estate in Scotland, settled by an English settlement; see *Re Gurney's Marriage Settlement*, (1907) 2 Ch. 496.

The Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, provides that improvements authorised by the Act of 1882 shall include (1) bridges; (2) making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let; (3) erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof; (4) the rebuilding of the principal mansion-house on the settled land: provided that the sum to be applied under this sub-section shall not exceed one half of the annual rental of the settled land. Under this section it has been held that the "additions or alterations" must be made with a present intention to let the buildings, and not merely with the object of making them fit for letting: *Re De Teissier*, (1893) 1 Ch. 153; *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252; and the word "additions" means structural additions, and will not include an electric lighting installation for the improvement of the mansion-house; nor is (semble) an engine-house for electric lighting apparatus erected some little distance from the mansion-house an "addition" or "alteration" within the sub-s.: *Re Blagrave's Settled Estates*, (1903) 1 Ch. (C.A.) 560, approving *Re Clarke's Settlement*, (1902) 2 Ch. 327, and *Re Gaskell's Settled Estates*, (1894) 1 Ch. 485; nor the erection of a new building in place of an old building; *Re Leveson-Gower's Settled Estate*, (1905) 2 Ch. 95. The words include such things as a new roof and improved entrance (but not heating apparatus): *Re Gaskell's Settled Estates*, (1894) 1 Ch. 485; a new system of drains: *Standing* v. *Gray*, (1903) 1 I.R. 49; new drainage for leasehold houses, notwithstanding a direction in the will that pending a sale the rents are to be first applied in paying "all incidental expenses and outgoings": *Re Thomas*, (1900) 1 Ch. 319; substitution of a block floor over concrete for ordinary floor boards resting on joists in order to keep dry

by the Act (*a*), he may submit for approval to the trustees of the settlement, or to the Court as the case may require, a scheme for the execution of the improvement showing the proposed expenditure thereon; and by sub-sect. 2, where the capital money to be expended is in the hands of trustees (*b*), then, after a scheme

rot out of the basement of a large house let in separate offices: *Stanford* v. *Roberts*, (1901) 1 Ch. 440; and works which the tenant for life has promised to execute for a yearly tenant, and the non-execution of which will cause the tenant to leave, are "necessary or proper to enable" the property "to be let": *Re Calverley's Settled Estates*, (1904) 1 Ch. 150, 154; so also structural alterations to a public-house, including the rearrangement of the bar, required by a licensing authority on granting a renewal of the licence: *Re Gurney's Marriage Settlement*, (1907) 2 Ch. 496. By "rebuilding" is meant not merely structural alterations and repairs, however extensive, *Re De Teissier*, (1893) 1 Ch. 153, but a substantial rebuilding; *Re Walker's Settled Estates*, (1894) 1 Ch. 189; *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252; *Re Legh's Settled Estates*, (1902) 2 Ch. 274, (where the Court allowed the expense of rebuilding portions of the mansion-house in order to save the whole from destruction by dry rot); and the clause was held not to authorise the rebuilding of a laundry 250 yards away from the mansion-house; *Re Earl of Dunraven's Settled Estates*, (1907) 2 Ch. 417. In calculating the "annual rental," income derived from capital money invested is to be included; *Re De Teissier*, (*ubi sup.*); and the rent of any farm usually let, but temporarily unlet; *Re Walker's Settled Estates*, (1894) 1 Ch. 189; and, it would seem, the annual rental of all the land comprised in the settlement, and not merely of the estate upon which the improvement is made; *Re Gerard's Settled Estates*, (*ubi sup.*); but not any allowance for the rental of the mansion-house or any farm occupied therewith; *S.C.*

By the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, sub-s. 1 (*b*), the improvements on which capital money may be expended, enumerated in s. 25 of the Settled Land Act, 1882, in addition to cottages for labourers, farm servants, and artisans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which, in the opinion of the Court, is not injurious to the estate. This last proviso applies only where new buildings are to be erected: *Re Calverley's Settled Estates*, (1904) 1 Ch. 150. Dwellings of a kind suitable for the working classes, but occupied at the time by persons who are not members of those classes, are not "available for the working classes" within the meaning of the enactment; *S.C.* The enactment is, by virtue of s. 18 of the Settled Land Act, 1890, to have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: but only as to buildings of a rateable value not exceeding one hundred pounds per annum.

(*a*) *Re Knatchbull's Settled Estate*, 27 Ch. D. 349; affirmed 29 Ch. D. 588.

(*b*) As to the meaning of these words, see *Re Millard's Settled Estates*, (1893) 3 Ch. (C.A.) 116, where the Court declined to make a prospective order. Trustees under the Settled Land Acts may approve of a scheme for the improvement of settled land, although they have not at the time capital moneys in their hands; and if the tenant for life provides the moneys for carrying out the improvements, the trustees, on subsequently receiving capital money, may recoup him what he has actually spent, subject to the proper certificate or order of the Court being obtained: *Re Duke of Norfolk's Estates*, (1900) 1 Ch. 461; but if no capital money becomes available, there is no power under the Acts to charge the inheritance with the cost of executing the improvements; *Standing* v. *Gray*, (1903) 1 I. R. 49. Where the Court is not asked to approve the scheme in any way, but only to decide whether certain proposed works are improvements under the Act, the existence of capital money is im-

is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(A). A certificate, formerly of the land commissioners, and now of the Board of Agriculture (*a*), certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is to be conclusive in favour of the trustees, as an authority and discharge for any payment made by them in pursuance thereof; or on

(B). A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Board, or by the Court, which certificate shall be conclusive as aforesaid; or on

(C). An order of the Court, directing or authorising the trustees to so apply a specified portion of the capital money.

[Scheme.] It was essential that the scheme for the proposed work should be submitted by the tenant for life to the trustees before the works were commenced; and if the tenant for life, before submitting the scheme, executed the works at his own expense, the Court could not authorise repayment out of capital money (*b*). But where a scheme had been approved by the trustees without any express limitation as to the amount of the expenditure, any extra expenditure, over and above the estimated cost, which was incidental to and necessary for the execution of the scheme might be paid out of capital money in the hands of the trustees (*c*).

Now, by the Settled Land Act, 1890 (*d*), sect. 15, it is enacted that the Court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval as required by the Act of 1882, to trustees of the settlement or to the Court. The words "payment for any improvement" will not include past payments of instalments of rent-charges to secure moneys borrowed for improvements (*e*). The Court has jurisdiction under the

material; *Re Calverley's Settled Estates*, (1904) 1 Ch. 150. The preparation and approval of a scheme during the minority of the tenant for life rests with the trustees: *Re Greys Court Estate*, W.N. (1901) 60.

(*a*) See Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (*b*).

(*b*) *Re Hotchkin's Settled Estates*, 35 Ch. D. 41; and see *Re Dalison's Settled Estates*, (1892) 3 Ch. 522.

(*c*) *Re Bulwer Lytton's Will*, 38 Ch. D. (C.A.) 20; *Re Earl of Egmont's Settled Estates*, (1908) W.N. 176.

(*d*) 53 & 54 Vict. c. 69.

(*e*) *Re Dalison's Settled Estates*, *ubi sup.* It has been held that the section is applicable to every case in which

section to allow the application of capital money in reimbursing to the tenant for life money which he has actually paid for improvements executed; but in view of the difficulty of ascertaining, after the work has been done, how far the cost ought to be defrayed out of capital, this jurisdiction will be exercised with great care, and expenditure will not be allowed in respect of drainage and sanitary arrangements of the mansion-house, or other matters incidental to the ordinary occupation of the property (*a*).

Where the tenant for life had expended money on improvements both before and after the Act of 1882, the Court allowed the application of capital money in defraying the expenditure made subsequently to the Act of 1882, but, without deciding whether the provisions of the section would extend to the previous expenditure, declined to allow the payment of it, on the ground that it had been deliberately incurred as a payment out of income (*b*); and it has been held that in the exercise of its discretion the Court ought not to make a prospective order as to the application of capital moneys not yet in hand (*c*).

The effect of the Act of 1882 is to give to the tenant for life, with a view to the improvement of the land, a power to require the capital money to be laid out under a proper scheme for such improvement; and that, notwithstanding that there is a trust under which the trustees could apply income for such purpose, the power of the tenant for life being by sect. 56, sub-sect. 2, made paramount over that of the trustees (*d*); but it is otherwise if there is a paramount trust requiring trustees to provide for improvements out of the income of the settled property in the first instance (*e*).

[Duty of trustees.]

Where a scheme has been submitted under sect. 26, the duty of the trustees is simply to see (1) that the proposed improvement is authorised by the Act; (2) that the scheme is a proper one for carrying it out; and (3) that the tenant for life is acting *bonâ fide* and on skilled advice. They are not concerned with the general policy pursued, nor with the amount already spent on improvements (*f*).

a scheme has not been submitted, even where it was not competent to the tenant for life to submit a scheme: *Re Wormald's Settled Estates*, (1908) W.N. 214.

(*a*) *Re Tucker's Settled Estates*, (1895) 2 Ch. (C.A.) 468.

(*b*) *Re Ormrod's Settled Estates*, (1892) 2 Ch. 318.

(*c*) *Re Marquis of Bristol's Settled Estates*, (1893) 3 Ch. 161; and see *Re Millard's Settled Estates*, (1893) 3 Ch. (C.A.) 116, referred to *post*, p. 680.

(*d*) *Clarke v. Thornton*, 35 Ch. D. 307; and see *Re Lord Stamford's Estate*, 43 Ch. D. 84, 96; *Re Gee*, 64 L. J. Ch. 606; W. N. 1895, p. 90.

(*e*) *Re Partington*, (1902) 1 Ch. 711.

(*f*) *Re Earl of Egmont's Settled Estates*, (1906) 2 Ch. 151.

Where no scheme has been submitted under sect. 26 the power of the Court can only be exercised under sect. 15 of the Act of 1890, and under that section there is a discretion, which the Court will not exercise in favour of the tenant for life where the will contains an express provision for improvements out of income (*a*). [Discretion of Court.]

The power of the Court when an application is made to it under sect. 26 is not merely ministerial, and it must be satisfied by evidence that the proposed expenditure is proper in the interest of all parties (*b*).

18. It may here be observed that under the term "capital money arising under the Act," are comprised—(1) Money received upon any sale or enfranchisement (*c*), or for equality of exchange or partition; (2) Fines received on the grant of leases under any power conferred by the Act of 1882 (*d*); (3) The proportion of rent under mining leases to be set aside under sect. 11 of the Act of 1882; (4) Money raised on mortgage of the settled land, under sect. 18 of the Act; (5) Three-fourths of the net proceeds of the sale of timber cut under the powers of sect. 35, where the tenant for life is impeachable for waste in respect of timber; (6) Money arising from the sale of heirlooms under sect. 37 of the Act; (7) Money received under an option to purchase contained in a building lease or agreement for a building lease under the Settled Land Act, 1889 (*e*); and (8) Money which, under sect. 11 of the Settled Land Act, 1890 (*f*), the tenant for life is empowered to raise on mortgage of the settled land for the purpose of discharging an incumbrance on such land or any part thereof. [Capital money under the Act.]

By sect. 32, where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of the Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in Court, [Money arising from other sources.]

(*a*) *Re Partington*, (1902) 1 Ch. 711.

(*b*) *Re Keck's Settlement*, (1904) 2 Ch. 22; 73 L.J. Ch. 262, where it was intimated that any contract by a tenant for life under sect. 31 (1) (v.), relating to an improvement, is made at his risk if an order of Court has to be obtained.

(*c*) The term "enfranchisement" includes the conversion of leasehold land into freehold by the purchase of the reversion: *Re Bruce*, (1905) 2 Ch. 372.

(*d*) The Settled Land Act, 1882, omitted to provide that these fines should be capital money under the Act, but the omission has been supplied by the Settled Land Act, 1884, s. 4; and see *Chandler* v. *Bradley*, (1897) 1 Ch. 315, and *ante*, p. 672.

(*e*) 52 & 53 Vict. c. 36.

(*f*) 53 & 54 Vict. c. 69; see *post*, p. 684.

that money may be invested or applied as capital money arising under the Settled Land Act. And by sect. 33, where, under a settlement (*a*), money is in the hands of trustees (*b*), and is liable to be laid out in the purchase of land (*c*) to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option of the tenant for life (*d*), invest or apply the same as capital money arising under the Act.

[Application of capital money.]

19. By sect. 21, capital money arising under the Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, is when received (*e*) to be invested or applied in one or more of the following modes:—

(1) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (*f*) authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares,

(*a*) For the definition of "settlement," see *ante*, p. 646.

(*b*) It has been held in Ireland that this section does not apply to money in Court in an administration action, which has arisen from personal estate given to trustees upon trust to convert, and to invest the proceeds in the purchase of lands to be settled; *Burke* v. *Gore*, 13 L. R. Ir. 367; but it applies where, under a will devising land to the uses of a settlement, the executors are directed to lay out money bequeathed by the will in the purchase of land to be limited to the same uses; *Re Mundy's Settled Estates*, (1891) 1 Ch. (C.A.) 399, and see *ante*, p. 360; and to money raised, under a special power in a settlement (which authorises investment in the purchase of land), as a sinking fund to defray expense of improvement; *Re Sudbury Estates*, (1893) 3 Ch. 74.

(*c*) Money held upon trust for investment in the purchase of a particular piece of land is included in this expression; *Re Hill*, (1896) 1 Ch. 962; as also is personal property held by trustees with power to invest in land; *Re Soltau's Trusts*, (1898) 2 Ch. 629; and see *Re Thomas*, (1900) 1 Ch. 319.

(*d*) Who is not subject to the control of the trustees in his selection of investments; *Re Lord Coleridge's Settlement*, (1895) 2 Ch. 704; and see *Re Gee*, 64 L. J. Ch. 606; W. N. 1895, p. 90; and *post*, p. 687. Although there was no tenant for life capable of exercising the option, the Court directed money arising from sale of land under the Settled Estates Act, 1877, to be applied as capital money pursuant to the section; *Re Tesseyman's Settled Estate*, W. N. (1897) 168.

(*e*) The words of the Act being "when received," the Court cannot authorise the application of capital moneys before they are received, in paying for contemplated improvements; *Re Millard's Settled Estates*, (1893) 3 Ch. (C.A.) 116; and see *Re Marquis of Bristol's Settled Estates*, (1893) 3 Ch. 161; *Round* v. *Turner*, W. N. 1889, p. 38; 60 L. T. N.S. 379.

(*f*) As to investments authorised by law, see *ante*, Chap. XIV. s. 4.

with power to vary the investment into or for any other such securities.

(2) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown-rent, chief-rent, or quit-rent, charged on or payable out of the settled land (*a*).

(3) In payment for any improvement authorised by the Act (*b*).

(4) In payment for equality of exchange or partition of settled land.

(5) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land.

(6) In purchase of the reversion of freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life.

(7) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land (*c*).

(8) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or

(*a*) Where two estates are included in the same devise, and together constitute "the settled estate," capital money is rightly applied in redeeming an incumbrance on one of them, although in the result (*e.g.* by reason of contingent remainders failing as to one estate) the two estates devolve differently: *Re Freme*, (1894) 1 Ch. 1. Expenses incurred by a local authority in works in a new street on settled land, charged under statutory powers on the land and made payable, together with interest thereon, by instalments, constitute an incumbrance affecting settled land within the subsection, and the tenant for life is entitled to repayment out of capital moneys, of such portion of past instalments paid by him as represent capital; *Re Legh's Settled Estates*, (1902) 2 Ch. 274. And see *Re Lord Stafford's Settlement and Will*, (1904) 2 Ch. 72, where the words "settled land" were held to mean the land (settled by deed), by reference to the limitations of which heirlooms were settled by a will.

(*b*) For the authorised improvements, see *ante*, p. 674, note (*b*).

(*c*) In interpreting this sub-section, the Court will not adopt the latitude of construction which, under such cases as *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364, has been applied to s. 69 of the Lands Clauses Act, 1845. The Settled Land Acts are to be treated as a code dealing exhaustively with the subject matter to which they relate; *Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252; *Re Legh's Settled Estates*, (1902) 2 Ch. 274. The sub-section does not authorise investment in the purchase of an equity of redemption: *Re Earl Radnor's Settled Estates*, W. N. (1898) 174.

privilege convenient to be held with the settled land for mining or other purposes.

(9) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*a*).

(10) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of the Act (*b*).

(11) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

[Settled Land Act, 1890.]

To these by the Act of 1890 is added the following mode :—

(12) In payment (if the Court thinks fit) to the trustees of the settlement for the purposes of the Settled Land Acts (*c*).

[Improvements under Agricultural Holdings Act.]

Under the Agricultural Holdings (England) Act, 1883 (*d*), capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under the Act of 1883 in the execution of any improvement mentioned in the first or second parts of the schedule thereto (*e*), as for an improvement authorised by the Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under the Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorised by the Settled Land Act to be discharged out of such capital money.

[Discharge of incumbrances.]

20. With reference to the discharge of incumbrances, it has been held that the words "incumbrances affecting the inheritance of the settled land" in sub-sect. 2 of sect. 21,

(*a*) As to the effect of this enactment in enabling the Court to direct payment out of Court under the Lands Clauses Act, 1845, of purchase-moneys of settled lands to trustees, see *Re Smith*, 40 Ch. D. (C.A.) 386, and *ante*, p. 529. A tenant for life, who has power to cut and sell the timber and apply the proceeds to his own use, is not absolutely entitled to the proceeds, if he sells the timber as standing timber along with the estate; *Re Llewellin*, 37 Ch. D. 317; and trustees appointed under s. 38 are not persons absolutely entitled; *Cookes* v. *Cookes*, 34 Ch. D. 498.

(*b*) Commission charged by an estate agent for procuring a lease of settled land for a tenant for life, is within this clause; *Re Maryon Wilson's Settled Estates*, (1901) 1 Ch. 934; but agents' commission for obtaining a tenant for a short occupation lease granted by the tenant for life, is a charge payable out of income: *Re Leveson-Gower's Settled Estate*, (1905) 2 Ch. 95.

(*c*) 53 & 54 Vict. c. 69, s. 14. An application under the section by the Settled Land Act trustees for payment out of Court to them, under sect. 21 (ix.) and sect. 33 of the Act of 1882, may be made by petition: *Re Torry Hill Estate*, (1909) 1 Ch. 468.

(*d*) 46 & 47 Vict. c. 61, s. 29.

(*e*) The first part of the schedule relates to improvements to which the landlord's consent is required, and comprises:

(1) Erection or enlargement of buildings.

(2) Formation of silos.

(As to the Court authorising the formation of silos, see *Re Broadwater Estate*, 33 W. R. 738; 54 L. J. N.S. Ch. 1104.)

must be taken in their ordinary sense as referring to mortgages, charges for portions, and the like (*a*), and not as meaning incumbrances such as charges for land drainage and improvements created under the Land Improvement Act, 1864, and other similar Acts, which, although in one sense affecting the inheritance, are in numerous cases charges rather affecting the tenant for life than the remainderman (*b*); and therefore where, before the passing of the Settled Land Act, 1882, charges of this nature had been created, the tenant for life was not entitled to have them discharged out of capital. [Land Improvement charges.]

Now by the Settled Land Acts Amendment Act, 1887 (*c*), sect. 1, "where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882." Under this enactment "capital money" may be applied in redeeming a terminable rent-charge by paying not only the unpaid balance of principal, but also a proper sum by way of bonus as compensation for loss of interest consequent on the redemption (*d*); but not in repayment [Settled Land Acts Amendment Act, 1887.]

(3) Laying down of permanent pasture.
(4) Making and planting of osier beds.
(5) Making of water meadows or works of irrigation.
(6) Making of gardens.
(7) Making or improving of roads or bridges.
(8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9) Making of fences.
(10) Planting of hops.
(11) Planting of orchards or fruit bushes.
(12) Reclaiming of waste land.
(13) Warping of land.
(14) Embankment and sluices against floods.

The second part of the schedule relates to drainage, an improvement in respect of which notice to the landlord is required.

(*a*) *E.g.* a debt secured by a mortgage of a long term of years; *Re Frewen*, 38 Ch. D. 383; arrears of jointure secured by a term of years: *Re Duke of Manchester's Settlement*, (1909) W. N. 212; or an annuity charged upon tithes; *Re Esdaile*, W. N. 1886, p. 47; 54 L. T. N.S. 637.

(*b*) *Re Knatchbull's Settled Estates*, 27 Ch. D. 369, *per* Pearson, J.; affirmed 29 Ch. D. 588; and see *Re Duke of Leinster's Estate*, 23 L. R. Ir. 152, 161; *Re Howard's Settled Estates*, (1892) 2 Ch. 233; *Re Dalison's Settled Estates*, (1892) 3 Ch. 522.

(*c*) 50 & 51 Vict. c. 30.

(*d*) *Re Lord Egmont's Settled Estates*, 45 Ch. D. (C.A.) 395; disapproving *Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123.

of a sum paid by the tenant for life, in order to obtain a reduction of interest, to the holders of the rent-charge as an inducement to them to transfer it (*a*). In the exercise of its discretion, the Court declined to allow capital money to be applied in redeeming terminable charges on glebe land of a benefice, to the detriment of the owners of the advowson (*b*). The section is not retrospective, so as to allow the recoupment to the tenant for life of instalments paid by him before the time when he has called upon the trustees to pay them (*c*), nor does the provision of sect. 15 of the Act of 1890 (*d*) enable this to be done (*e*); and the section is not applicable to a sum paid to redeem future annual instalments of tithe rent-charge payable by virtue of an order under the Irish Church Act Amendment Act, 1872, sect. 7 (*f*).

[Incumbrances affecting part only.]

It is not necessary that the incumbrance should affect the whole of the settled estates; it is sufficient if it affect any land the subject of the settlement (*g*), and where a part only of settled land is subject to a charge, capital money arising from that part can be applied for the improvement of the other part (*h*).

[Settled Land Act, 1890.]

By the Settled Land Act, 1890 (*i*), sect. 11, "where money is required (*j*) for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly. Incumbrance in this section does not include any annual sum payable only during life or lives, or during a term of years absolute or determinable" (*k*).

(*a*) *Re Verney's Settled Estates*, (1898) 1 Ch. 508.

(*b*) *Ex parte Vicar of Castle Bytham*, (1895) 1 Ch. 348.

(*c*) *Re Howard's Settled Estates*, (1892) 2 Ch. 233; *Re Marquis of Bristol's Settled Estates*, (1893) 3 Ch. 161.

(*d*) See *ante*, p. 677.

(*e*) *Re Dalison's Settled Estates*, (1892) 3 Ch. 522; *Re Marquis of Bristol's Settled Estates*, *ubi sup.*

(*f*) 35 & 36 Vict. c. 13; *Re Duke of Leinster's Estate*, 23 L. R. Ir. 152, 161.

(*g*) *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *In re Navan and Kingscourt Railway Co.*, 21 L. R. Ir. 369.

(*h*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

(*i*) 53 & 54 Vict. c. 69.

(*j*) The word "required" is not confined to cases where a mortgagee has given notice to call in his money, but is to be read as meaning "where money is reasonably required having regard to the circumstances of the settled land". *Re Clifford*, (1902) 1 Ch. 87.

(*k*) As to difficulties which may arise in the application of this section to the case of a compound settlement, where one portion of the settled pro-

Under this section, it is competent for a tenant for life to mortgage the whole of a settled estate in order to pay off incumbrances affecting part only, but this power ought not to be exercised in a way which will operate unjustly towards those whose interests the tenant for life is bound under sect. 53 (*a*) to protect; and where the effect of a proposed mortgage would have been unduly to postpone the charge of annuitants on the land, the Court, although the tenant for life was acting *bonâ fide*, interfered by granting an injunction to prevent him from mortgaging otherwise than subject to the rights of the annuitants (*b*). Where the tenant for life is required to pay the cost of paving and other works under sect. 150 of the Public Health Act, 1875, and does so in order to keep the charge under sect. 257 of that Act alive for his benefit, he is entitled to raise the money necessary for discharging the incumbrance and the cost by mortgage of the settled land (*c*).

[Costs allowed to tenant for life.]

The word "incidental" in clause (10) of sect. 21 of the principal Act has received a liberal construction (*d*), and it has been held that a tenant for life was entitled to his extra costs of successfully defending an action brought to restrain him from exercising his powers (*e*), and the costs as between solicitor and client of the solicitor and surveyor of the tenant for life in preparing and carrying out schemes of improvement have been allowed (*f*); and where a tenant for life, acting honestly and with due diligence in the exercise of his powers, attempted to sell, but the sale was unsuccessful, his costs and expenses properly incurred were allowed, and the Court, under sects. 46, sub-sect. 6, 47, and 55, sub-sect. 3, ordered that they should be paid out of the property subject to the settlement, and raised by a charge on the settled land (*g*). But the costs of obtaining the consent and concurrence of the mortgagees of the life estate, though "incidental" within the meaning of the clause, ought not as a general rule to be paid out of capital money (*h*).

[Abortive sale.]

[Concurrence of mortgagees.]

[Commission on sale.]

Where settled property had been put up for sale by auction by the tenant for life under the Act, but withdrawn for want of a sufficient offer, and was afterwards sold by private contract on

perty is brought into settlement subject to an existing incumbrance, see *Re Monson's Settled Estates*, (1898) 1 Ch. 427, 432.

(*a*) See *ante*, p. 666.

(*b*) *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. (C.A.) 531.

(*c*) *Re Smith's Settled Estates*, (1901) 1 Ch. 689.

(*d*) *Re Llewellin*, 37 Ch. D. 317; *Cardigan* v. *Curzon-Howe*, 41 Ch. D. (C.A.) 375.

(*e*) *Re Llewellin*, 37 Ch. D. 317.

(*f*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

(*g*) *Re Smith's Settled Estates*, (1891) 3 Ch. 65.

(*h*) *Cardigan* v. *Curzon-Howe*, 41 Ch. D. (C.A.) 375.

the same day, it was held that the trustees were at liberty to pay out of the purchase-moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance according to the scale of charges contained in Schedule 1, Part I., to the general order under the Solicitors Remuneration Act, 1881 (*a*); and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees, and a proper sum to the auctioneer for his charges (*b*).

Where several persons together constitute a tenant for life within the Act of 1882, there is no rule which obliges them to employ the same solicitor, and where four persons out of twenty-five in such a case employed separate solicitors to peruse conveyances on a sale under the Act, they were held to be entitled to their costs (*c*).

[Investment, etc., of capital money.]

21. By sect. 22, sub-sect. 1, capital money arising under the Act is to be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and is to be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

Sub-sect. 2. The investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof, according to the direction of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of the trust money of the settlement; and any investment is to be in the names or under the control of the trustees.

Sub-sect. 3. The investment or other application under the direction of the Court is to be made on the application of the tenant for life, or of the trustees.

Sub-sect. 4. Any investment or other application is not during the life of the tenant for life to be altered without his consent.

[Devolution.]

Sub-sect. 5. Capital money arising under the Act, and the securities arising from the investment thereof, are for all purposes of disposition, transmission, and devolution, to be considered as land, and to be held and go "to the same persons successively, in the same manner, and for and on the same estates, interests,

(*a*) 44 & 45 Vict. c. 44.
(*b*) *Re Beck*, 24 Ch. D. 608.
(*c*) *Smith* v. *Lancaster*, (1894) 3 Ch. (C.A.) 439.

and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement" (*a*).

Sub-sect. 6. The income of the securities is to be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement. [Application of income.]

Sub-sect. 7. The securities may be converted into money, which is to be capital money arising under the Act.

It will be observed that the tenant for life may *direct* in what manner, consistently with the Act, the capital money is to be invested or applied; and so long as he exercises his power of direction in good faith, he cannot be controlled by the trustees or the Court (*b*), otherwise than upon an application under section 26 (*c*). But the trustees are not bound to invest capital moneys on a particular mortgage on the direction of the tenant for life, unless they are satisfied that the direction has been given upon a proper investigation as to title, a proper report as to the value of the proposed security, and proper advice as to the form of the mortgage; but upon being so satisfied they are bound to make the investment (*d*). If not so satisfied they may, as we have seen (*e*), be justified in bringing the matter before the Court (*f*). The duty of the trustees, therefore, in carrying out the direction of the tenant for life is to a great extent ministerial, and except as above indicated, or where their consent or approval is expressly required, as for an outlay on improvements, the exercise of discretion by them is not involved. But, nevertheless, in order that the tenant for life may exercise his *option* of directing the payment of purchase-money into Court, it is necessary that there should be trustees for the purposes of the Act in existence (*g*), and without the concurrence of the trustees there can be no valid discharge to a purchaser (*h*). [Direction of tenant for life.]

(*a*) The object of this sub-section is to indicate the nature of the money while it remains in the hands of the trustees uninvested; *Re Freme*, (1894) 1 Ch. 1, 9, *per* Smith, L.J., and see *Re Duke of Marlborough*, (1897) 1 Ch. 712, 718. In *Beddington* v. *Baumann*, (1903) A. C. (H.L.) 13, affirming *S. C.* (*nom. Re Moses*), 1902 1 Ch. (C.A.) 100, where a testator having exercised a special power of appointment by his will, afterwards granted leases under the Settled Land Acts in consideration of fines and premiums, it was held that this enactment, jointly with s. 4 of the Settled Land Act, 1884, had not the effect of making the fines and premiums pass to the appointees.

(*b*) *Re Lord Coleridge's Settlement*, (1895) 2 Ch. 704. But the trustees may select their own broker, as well as solicitor: *Re Duke of Cleveland's Settled Estates*, (1902) 2 Ch. 350.

(*c*) See *Re Keck's Settlement*, 73 L. J. Ch. 262, *ante*, p. 679.

(*d*) *Re Hotham*, (1902) 2 Ch. (C.A.) 575.

(*e*) *Ante*, p. 668.

(*f*) *Re Hunt's Settled Estates*, (1906) 2 Ch. (C.A.) 11.

(*g*) *Hatten* v. *Russell*, 38 Ch. D. 334, 345; and see *Re Fisher and Grazebrooke's Contract*, (1898) 2 Ch. 660.

(*h*) *Re Norton and Las Casas' Contract*, (1909) 2 Ch. 59.

The option is exercised by the tenant for life consenting to the payment of the purchase-money into Court, in consequence of the purchaser refusing to complete unless this is done; and money having thus come into Court, it was held that it must remain in Court, and be invested and applied under the direction of the Court pursuant to sub-sect. 3 (*a*); but now by the Settled Land Act, 1890 (*b*), sect. 14, all or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid to the trustees of the settlement for the purposes of the Settled Land Acts.

[Settled Land Act, 1890.]

[Purchase-money of land sold under Lands Clauses Act.]

22. Independently of this enactment, where settled real estate had been sold under the Lands Clauses Consolidation Acts, and the purchase-money paid into Court, the Court would, in the exercise of its discretion, appoint trustees of the settlement for the purposes of the Settled Land Act, and order the fund in Court to be paid out to them to be held upon the trusts of the settlement (*c*).

[Purchases confined to England.]

23. By sect. 23, capital money arising under the Act from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorises the same.

[Form of conveyance.]

24. By sect. 24, land acquired by purchase, or in exchange, or on partition, is to be made subject to the settlement, as follows: Freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions subsisting with respect to the settled land, or as near thereto as circumstances permit (*d*), but not so as to increase or multiply charges or powers of charging. Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement on trusts, and subject to powers and provisions corresponding with the uses, trusts, powers, and provisions of the freehold land, but so that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under twenty-one. Where there is a charge which does not affect the whole of the settled land, the land acquired by purchase, or in exchange, or on partition is not to be subject thereto, unless

(*a*) *Cookes* v. *Cookes*, 34 Ch. D. 498.

(*b*) 53 & 54 Vict. c. 69.

(*c*) *Re Harrop's Trusts*, 24 Ch. D. 717; *Re Wright's Trusts*, 24 Ch. D. 662; *Re Duke of Rutland's Settlement*, 31 W. R. 947; W. N. 1883, p. 140; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576; *Re Smith*, 40 Ch. D. (C.A.) 386; *Re Belfast Improvement Acts*, (1898) 1 I. R. 1.

(*d*) As to the meaning of these words, see *Re Duke of Marlborough*, (1897) 1 Ch. 712, 717.

acquired by purchase with money arising from sale, or by exchange or partition, of land which was subject to the charge (*a*). This provision is not confined to charges which take priority over the settlement, but extends to charges created by the settlement itself (*b*); and the expression "the whole of the settled land" is to be read as including heirlooms comprised in the settlement, so that charges affecting the rest of the settled property, but not affecting the heirlooms, will not attach to land purchased with the proceeds of sale of the heirlooms (*c*).

[Application of money arising from limited interests.]

25. By sect. 34, where capital money arising under the Act is purchase-money paid in respect of a lease for years, or life, or for years determinable on life, or in respect of any other estate or interest in land less than a fee simple, or in respect of a reversion, the trustees of the settlement or the Court, as the case may be, may require the same to be laid out, invested, accumulated, and paid in such manner as in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom, as they might lawfully have had from the lease, estate, interest, or reversion, in respect whereof the money was paid, or as near thereto as may be.

Under this section it will be the duty of the trustee to take care upon a sale by the tenant for life of a leasehold interest, or a reversion, that the proceeds of the sale are so dealt with as not to affect the relative interests of the tenant for life and remainderman (*d*). This section corresponds with the 74th section of the Lands Clauses Consolidation Act, 1845, and its construction will be regulated by the decisions under that Act (*e*). Thus, if the property is subject to a lease at a rent less than the income produced by the investment of the purchase-money, the tenant for life will be entitled, during the remainder of the term for which the property was let, to a sum equal only to the rent, and the residue of the income should be accumulated at compound interest until the end of the term, after which the tenant for life will be entitled to the whole of the income, including the income of the accumulation (*f*).

So, on the other hand, if the property sold was a lease for a short term, the tenant for life is entitled to receive an annuity

(*a*) Sect. 24, sub-s. 5.

(*b*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84, 94.

(*c*) *Re Duke of Marlborough*, (1897) 1 Ch. 712.

(*d*) See *Re Griffith's Will*, 49 L. T. N.S. 161; and see *Re Broadwood's Settlement*, (1908) 1 Ch. 115, *ante*, p. 342.

(*e*) *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

(*f*) *Re Wootton's Estate*, 1 L. R. Eq. 589; *Re Mette's Estate*, 7 L. R. Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

of such an amount as will exhaust the proceeds of sale in the number of years which the lease had to run (*a*).

[Heirlooms.] 26. By sect. 37, sub-sect. 1, where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born, or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them; and by sub-sect. 2, the money arising by the sale is to be capital money arising under the Act, and to be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by the Act directed with respect to other capital money arising under the Act, or may be invested in the purchase of other chattels of the same or any other nature, which are to be settled and held on the same trusts, and to devolve in the same manner as the chattels sold (*b*); but by sub-sect. 3, no sale or purchase of chattels under this section is to be made without an order of the Court. In giving its sanction to any proposed sale the Court must be satisfied that, under the circumstances of the case, such sale is reasonable and proper, having regard to the interests of all persons entitled, the interests of persons more remotely entitled being of less weight than those of persons nearer in succession; but the leaning of the Court is against a sale (*c*); and the fact that the tenant for life has got himself into difficulties by his extravagance will have no weight with the Court in favour of a sale (*d*). Where the application is for leave to sell a unique and historical heirloom, such as a famous jewel, the Court will have special regard to the intention of the settlor and the wishes of the remaindermen (*e*). And by force of sect. 53, the tenant for life is in the position of a trustee with a discretionary power of sale, and must have a like regard to the interests of other persons entitled as well as to his own (*f*). Where circumstances rendered it expedient, the Court sanctioned the removal of some of the heirlooms to another family mansion, and the sale of the rest (*g*). The Court has no jurisdiction to

[Sanction of Court to sale.]

(*a*) *Askew* v. *Woodhead*, 14 Ch. D. (C.A.) 27; and see *Re Lingard*, (1908) W. N. 107.

(*b*) In *Re Waldegrave*, 81 L. T. N.S. 632, under special circumstances, an order was made that the proceeds of sale of heirlooms should be applied for reparation of heirlooms remaining unsold.

(*c*) *Re Earl of Radnor's Will*, 45 Ch. D. (C.A.) 402, 419, 424; and see *Re Beaumont's Settled Estates*, 58 L. T. N.S. 916; *Re Marquis of Ailesbury's Settled Estates*, W. N. 1891, p. 167; *Re Hope*, (1899) 2 Ch. (C.A.) 679.

(*d*) *Re Hope*, (1899) 2 Ch. (C.A.) 679.

(*e*) *Re Hope*, *sup.*

(*f*) *Re Earl of Radnor's Will*, 45 Ch. D. (C.A.) 402, 418.

(*g*) *Browne* v. *Collins*, W. N. 1890, p. 78; 62 L. T. N.S. 566.

sanction a sale of heirlooms *ex post facto*, but where an advantageous sale had been effected, the Court protected the trustees by directing them to take no steps for the recovery of the heirlooms sold (*a*).

[Title of honour.]

A dignity or title of honour which descends to the heirs general or heirs of the body, is within the definition of land, and heirlooms settled so as to devolve with the dignity or title may be sold under this section (*b*).

[Whether proceeds of heirlooms devolve as personalty.]

Reference has already been made to the sections regulating the application or disposition of capital money arising under the Act (*c*), and it is to be observed that under sect. 22, sub-sect. 5, capital money is "for all purposes of disposition, transmission, and devolution, to be considered as *land*," and is to be "held for and go to the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the *land* wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement" (*d*). The effect of this sub-section in relation to money arising from heirlooms has been discussed in *Re Duke of Marlborough's Settlement* (*e*), in which different views were expressed by the judges; but the balance of opinion seems to be in favour of the view that the devolution of the proceeds of the sale of chattels and of any interim investments thereof follows the devolution which originally belonged to the chattels. The tenant for life may, however, apply the moneys arising under sect. 37 for any of the purposes authorised by sect. 21, notwithstanding that the effect of such application may be to alter the devolution, as, for instance, in paying off incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot so as to preserve existing

(*a*) *Re Ames*, (1893) 2 Ch. 479.

(*b*) *Re Sir J. Rivett Carnac's Will*, 30 Ch. D. 136; *Re Earl of Aylesford's Settled Estate*, 32 Ch. D. 162.

(*c*) See *ante*, p. 679.

(*d*) See *ante*, p. 686. It has been doubted whether this sub-section has any application to money arising from the sale of personal chattels; and there seems no sound reason for making the money arising from the chattels devolve as land, while if it is reinvested in other chattels they are to devolve as personalty. The latter part of the sub-section points to money arising from *land* as being the subject matter to which it relates, and it would be construing the sub-section in direct opposition to the spirit in which it is framed, to hold that, although its apparent object was to leave the estates and interests of the persons beneficially interested in land unaffected by the sale, yet when applied, by reference, to money arising from personal chattels, it is to have the effect of altering the nature of the estates, and in most cases, of changing an absolute estate in remainder into a mere tenancy in tail. To effectuate such a change the language of the Act should be clear and unambiguous, and it is conceived that the language of sub-sect. 5 does not meet that test, and that the devolution of the moneys arising from personal chattels will remain unaffected by the sale.

(*e*) 30 Ch. D. 127; 32 Ch. D, (C.A.) 1,

rights; and so long as the moneys are applied for such authorised purposes, the tenant for life cannot be prevented from directing any such application, on the ground of his being a trustee of the power under sect. 53, although the effect of the application may be to alter the course of devolution (*a*).

[Receipts.] 27. By sect. 40, the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him is made a good discharge, and, in the case of a mortgagee or other person advancing money, exonerates him from being concerned to see that the money advanced is wanted for any purpose of the Act, or that no more than is wanted is raised. It would seem that this power extends to trustees appointed by the Court under sect. 38 (*b*).

In construing sect. 40, sect. 39 must be borne in mind, which expressly prohibits the payment of capital money to fewer than two persons as trustees of a settlement, unless the settlement otherwise provides; and, taking the two sections together, it seems to follow that, in the absence of any special direction in the settlement, a sole personal representative of the last surviving or continuing trustee cannot give a good discharge for capital money under the Act.

[Indemnity and reimbursement.] 28. Sects. 41 and 43 supply the usual indemnity and reimbursement clauses for the trustees of the settlement.

[Protection of trustees.] 29. By sect. 42, the trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under the Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as

(*a*) *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127; 32 Ch. D. (C.A.) 1; and see *Re Duke of Marlborough*, (1897) 1 Ch. 712, *ante*, p. 689; and see *Re Lord Stafford's Settlement*, (1904) 2 Ch. 72.

(*b*) See *Cookes* v. *Cookes*, 34 Ch. D. 498.

giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Under this section the trustees are under no liability if they stand by and take no active part while the tenant for life is exercising his powers, but it is apprehended that the protection given by this section to the trustees only holds good so long as they have not actual notice that the tenant for life is acting fraudulently or improperly. At any rate, trustees who, with the knowledge that the tenant for life is committing a fraud upon his powers, take no active steps for the protection of the remaindermen, relying on this section, would be acting most imprudently, and would have little reason to complain if they were made personally liable for any loss arising from their negligence.

[Trustees must see that conveyance is in the proper form.]

It will be observed that trustees, in order to have the benefit of this section where land is brought into the settlement upon a purchase, exchange, partition, or lease, must see that the conveyance purports to convey the land in the proper mode, but they are not bound to do more than take care that the deed, on the face of it, is properly drawn, and is duly executed by the conveying parties, and that the person to whom the purchase-money is paid by the direction of the tenant for life properly joins in the conveyance.

[Differences between tenant for life and trustees.]

30. By sect. 44, if at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of the Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit. It would be right for the trustees to avail themselves of this section if a sale were proceeding which they disapproved of as being improvident (*a*).

31. By sect. 55, the powers conferred by the Act are exercisable from time to time, and in exercising the powers the tenant for life and trustees may respectively execute, make, and do, all necessary and proper deeds, instruments, and things.

[Additional powers.]

32. By sect. 57, sub-sect. 1, nothing in the Act is to preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those

(*a*) *Hatten* v. *Russell*, 38 Ch. D. 334, 344; *Re Hunt's Settled Estates*, (1906) 2 Ch. (C.A.) 11, *ante*, p. 668.

conferred by the Act; but by sub-sect. 2, any such additional or larger powers are to operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences as if they were conferred by the Act, unless a contrary intention is expressed in the settlement.

[Infant entitled absolutely or for life.]

33. By sect. 59, where a person who is in his own right seised of or entitled in possession to land is an infant, then for the purposes of the Act the land is settled land, and the infant is to be deemed tenant for life thereof; and by sect. 60, where a tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life, the powers under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. And persons appointed by the Court under this section can make a good title without the necessity of appointing under sect. 38 trustees of the settlement for the purposes of the Act (*a*). But in such a case, the order ought to contain a direction that the purchase-money be paid into Court (*b*). Under these sections the Court in Ireland refused, where an infant was entitled to an undivided share of land, to appoint one of his co-owners to exercise on his behalf the powers of the Act, but required the appointment of an independent person (*c*). The Court in directing the mode of sale under this section, can order it to be made out of Court (*d*).

[Tenant for life a married woman.]

34. By sect. 61, sub-sect. 1, the foregoing provisions of the Act do not apply in the case of a married woman; but by sub-sect. 2, a married woman entitled for her separate use, or entitled under any statute for her separate property, or as a *feme sole*, is, without her husband, to have the powers of the Act; and by sub-sect. 3, where she is entitled otherwise than as aforesaid, she and her husband together are to have the powers. By sub-sect. 4, the provisions of the Act referring to a tenant for life extend to a married woman entitled to property as her separate estate, or as a *feme sole*, and this appears to bring the case of an infant married woman so entitled within sect. 60,

(*a*) *Re Countess of Dudley's Contract*, 35 Ch. D. 338.
(*b*) *S. C.*
(*c*) *Re Greenville Estate*, 11 L. R. Ir. 138; and see *Re MClintock*, 27 L. R. Ir. 463.
(*d*) *Re Price*, 27 Ch. D. 552.

so that her powers can during infancy be exercised by the trustees of the settlement.

[Settlement containing a trust or direction for sale.]

35. Where the settlement contains a trust or direction for the sale of the property, the rights and powers of the trustees and tenant for life stand upon a different footing, and are governed by the independent enactment contained in the 63rd section (*a*). The construction of this section is somewhat obscure, and the extent to which the powers of trustees were affected by it was a question of grave difficulty; but by the Settled Land Act, 1884 (*b*), the powers given by the 63rd section of the Act of 1882 to tenants for life or other persons having limited interests are not to be exercised without the leave of the Court, which leave is to be given by order naming the persons to exercise the powers, and until such an order is made and registered as a *lis pendens*, it seems clear that the trustees may execute all trusts and powers reposed in them by the settlement as if the Settled Land Acts had not been passed, while after an order has been made and registered, and so long as it remains in force, the powers of the trustees are suspended, so far as relates to any purpose for which leave is given by the order to exercise a power conferred by the Act of 1882. Under these circumstances no conflict can now arise, under sect. 63, between the trustees and the tenant for life as to the exercise of their powers, and it seems unnecessary to consider what is the proper construction of the section in this respect.

The submission by the tenant for life of a scheme for improvements, pursuant to sect. 15 of the Act of 1890 (*c*), being merely a preliminary to the giving of directions as to the application of capital moneys, is not an exercise of his "powers" under sect. 7 of the Act of 1884, requiring the leave of the Court (*d*).

[Trustees of such settlement.]

36. Where the powers of the Act are exercisable, and any necessity arises for trustees of the settlement for the purposes of the Act, they are by sect. 63, which follows with the necessary variation the definition contained in sect. 2 (*e*), defined to be

(*a*) As to this section and the extent to which the powers given by the settlement to trustees are affected by it and the Settled Land Act, 1884, see Chap. XXIV. s. 2, v. A settlement of property purely personal containing a power to trustees to invest in the purchase of lands, which power was exercised, was held to be within the section, so that the tenant for life was entitled to be recouped for expenditure on improvements upon purchased land: *Re Child's Settlement*, (1907) 2 Ch. 348.

(*b*) 47 & 48 Vict. c. 18, s. 7. For cases in which the leave was granted, see *post*, Chap. XXIV. s. 2, ad fin.

(*c*) *Ante*, p. 677.

(*d*) *Re Wormald's Settled Estates*, (1908) W. N. 214.

(*e*) *Ante*, p. 652.

the persons, if any, who are, for the time being, under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of the Act.

[Application of Act to such settlement.]

37. By sub-sect. 2 of sect. 63, the provisions of the Act referring to a tenant for life, and to a settlement, and to settled land, are to extend to cases under that section with certain exceptions, of which the following are the material ones for the present purpose:—

(A) Capital money is not to be applied in the purchase of land unless such application is expressly authorised by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorised by the Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(B) Capital money and the securities in which the same is invested shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests and trusts, as the same would have gone, and been held, if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(C) Land of whatever tenure acquired under the Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

[Universities and College Estates Act, 1898.]

38. It may here be mentioned that by the Universities and College Estates Act, 1898 (*a*), certain of the powers conferred on a tenant for life under the Settled Land Acts, 1882 to 1890, are, subject to certain modifications, made exercisable by universities and colleges. The powers of sale, enfranchisement, exchange, and partition, and the power of granting building leases with option of purchase are, however, not to be exercised without the consent of the Board of Agriculture, and capital money payable in such cases is to be paid to the Board of Agriculture (*b*).]

(*a*) 61 & 62 Vict. c. 55.

(*b*) The Act applies only to the universities and colleges to which the Universities and College Estates Acts, 1850 to 1880, apply (sec. 7).

CHAPTER XXIII

OF JUDICIAL TRUSTEES AND THE PUBLIC TRUSTEE

[Judicial Trustees Act, 1896.]

[By the Judicial Trustees Act, 1896 (*a*), which came into operation on the first of May, 1897 (*b*), an entirely new class of trustees (*c*) was called into existence, by the name of "Judicial Trustees." These trustees, as their name indicates, are appointed by, and act under the control of, the Court, and their special functions are regulated by the Act and the rules which have been made thereunder (*d*).

1. Sect 1 of the Act is as follows :—

[Power of Court on application to appoint judicial trustee.]

"(1) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

"(2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

"(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of a person so nominated, an official of the Court may be

(*a*) 59 & 60 Vict. c. 35. The Act does not extend to Scotland or Ireland, nor to any charity, whether subject to or exempted from the Charitable Trusts Acts, 1853 to 1894.

(*b*) Sect. 6, sub-s. 6.

(*c*) Persons discharging similar functions to those of these new judicial trustees, have for more than 150 years been appointed in Scotland, and known as "judicial factors," and the numerous cases decided in that country as to the duties and liabilities of such persons may be of use in reference to the duties and liabilities of judicial trustees in this country. The subject from this point of view is dealt with in the treatise on the Act by Gerald J. Wheeler, Esq.

(*d*) The Judicial Trustee Rules, 1897 (31st August, 1897), printed *in extenso* in Law Reports, Current Index, 1897, pp. lxxiii. to lxxviii., and also in the treatise above mentioned.

appointed (*a*), and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof.

"(4) The Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof (*b*).

"(5) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

"(6) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the Court by the prescribed persons, and, in any case where the Court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner (*c*)."

Under this section the appointment of a judicial trustee is not matter of right, but entirely within the discretion of the Court. As the administration of the property of a deceased person is a "trust," and the "executor" is a "trustee," it is competent to the Court to remove an executor and appoint a judicial trustee in his place. Where a testator had manifested an intention that his widow and sole executrix, who was tenant for life under his will, should have the sole control of his estate, and there was no ground of complaint against her, the Court refused to appoint a judicial trustee at the instance of the reversioner (*d*).

2. Sect. 2 of the Act is as follows:—"The jurisdiction of the Court [Court to exercise jurisdiction.]

(*a*) If, on an application for the appointment of a judicial trustee, the Court is not satisfied of the fitness of the named person, there is jurisdiction to appoint a person suggested by the retiring judicial trustee; and the Court is not bound under this subsection to appoint only an official trustee: *Douglas* v. *Bolam*, (1900) 2 Ch. (C.A.) 749.

(*b*) Rule 12 provides that a judicial trustee may at any time request the Court to give him directions as to the trust or its administration. The request is to be accompanied by a statement of facts, and a fee of 2*s*. 6d. (see schedule); and the Court may require the trustee or any other person to attend at chambers, where that course is necessary or convenient.

(*c*) By Rule 14, the Court is to give directions as to the date to which the accounts are to be made up in each year, and the time within which they are to be delivered for audit. The audit is to be by the officer of the Court, but in cases of difficulty reference may be made to a professional accountant.

(*d*) *Re Ratcliff*, (1898) 2 Ch. 352.

under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a palatine court, and (subject to the prescribed definition of the jurisdiction) by any county court judge to whom such jurisdiction may be assigned under this Act."

[Section 3.] 3. Sect. 3 of the Act, which has reference to the general jurisdiction of the Court in cases of breach of trust, will be dealt with in its appropriate place in this work (*a*).

[Rules.] 4. By sect. 4 it is provided that rules may be made for carrying the Act into effect.

[Persons to be appointed judicial trustees.] 5. As regards the persons to be appointed to the office of judicial trustee, it is provided by the rules that the Court shall not be precluded by any existing practice as to the appointment of trustees from appointing any person to be a judicial trustee by reason of that person being a beneficiary, or relation, or husband or wife of a beneficiary, or a solicitor to the trust or to the trustee of any beneficiary, or a married woman, or standing in any special position with regard to the trust, and that a person may be appointed to be a judicial trustee of a trust although he is already a trustee of the trust (*b*).

[Executors and administrators.] Any person who is an executor or administrator may be appointed a judicial trustee for the purpose of the collection and distribution of the estate of a deceased person, in the same manner and subject to the same provisions as a person may be appointed judicial trustee of a trust (*c*).

[Public Trustee Act, 1906.] 6. The Public Trustee Act, 1906 (*d*), which came into operation on January 1st, 1908, is of a wider scope than the Judicial Trustees Act, 1896, and may prove to be of considerable public utility. By this Act (*e*) and the rules made in pursuance of it (*f*), the office of

[Office of public trustee.] the public trustee is established (*g*), and it is enacted that he "shall be a corporation sole under that name, with perpetual succession

(*a*) See *post*, Chap. XXXI. s. 3.

(*b*) Rule 5. The Court is unwilling to appoint a judicial trustee to act jointly with a private and gratuitous trustee; *Re Martin*, W. N. (1900) 129.

(*c*) Rule 25. For further consideration of the subject of judicial trustees see the last edition of this work.

(*d*) 6 Edw. VII. c. 55.

(*e*) Sect. 1.

(*f*) Under sect. 14. The Public Trustee Rules, 1907 (Nov. 29, 1907), are printed *in extenso* in Law Reports, Current Index, 1907, pp. lxxxii. to lxxxvi.

(*g*) See Rule 3. His appointment and status are regulated and defined by sect. 8 of the Act. He is to have a central office in London (Rule 4), and provision is made for the establishment of branch offices (*Ib.*), and the appointment of deputy public trustees at such branch offices (Rule 5). As to the security required from officers, see Rule 6. As to the liability of the Consolidated Fund to make good any personal liability of the trustee, see sect. 7 of the Act.

and an official seal, and may sue and be sued under the above name like any other corporation sole, but any instruments sealed by him shall not, by reason of his using a seal, be rendered liable to a higher stamp duty than if he were an individual" (*a*).

[General powers of public trustee.]

7. Subject to and in accordance with the Act and rules the public trustee may (*b*), if he thinks fit, (a) act in the administration of estates of small value; (b) act as custodian trustee; (c) act as an ordinary trustee; (d) be appointed to be a judicial trustee (*c*); or (e) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870 (*d*). In any of these capacities he may act either alone or jointly with any person or body of persons, and have the same powers, duties, and rights as a private trustee acting in the same capacity (*e*). He may decline, either absolutely or except on prescribed conditions, to accept any trust, but he is not to decline to accept any trust on the ground only of the small value of the trust property (*f*).

[Acting as ordinary trustee.]

8. Of the several functions of the public trustee the most important is that of an "ordinary trustee." By sect. 5 of the Act it is enacted that "the public trustee may by that name, or any other sufficient description, be appointed to be trustee of any will or settlement or other instrument creating a trust (*g*), or to perform any trust or duty belonging to a class which he is authorised by the rules made under this Act to accept, and may be so appointed whether the will or settlement or instrument creating the trust or duty was made or came into operation before or after the passing of this Act, and either as an original or as a new trustee, or as an additional trustee, in the same cases, and in the same manner, and by the same persons or Court, as if he were a private trustee, with this addition, that, though the trustees originally appointed were two or more, the public trustee may be appointed sole trustee (*h*). Where the public trustee has been

[Appointment as sole trustee.]

(*a*) Sect. 1, sub-s. 2.
(*b*) Sect. 2, sub-s. 1.
(*c*) See *ante*, p. 698.
(*d*) 33 & 34 Vict. c. 23, s. 28; see *ante*, p. 27.
(*e*) Sect. 2, sub-s. 2.
(*f*) Sect. 2, sub-s. 3.
(*g*) By Rule 7 it is provided that he shall not accept the trusts of any instrument made solely by way of security for money.
(*h*) Sect. 5, sub-s. 1. As to the general practice of the Court in respect to the appointment of a sole trustee, see *post*, Chap. XXVI. sect. 32. Resort to the new enactment may often be found useful, as in *Re Kensit*, W. N. (1908) 235, where, on an application under sect. 25 of the Trustee Act, 1893, the public trustee was appointed in the place of a trustee who was about to go abroad and desired to retire, and whose co-trustee was willing to appoint a new trustee, but declined to appoint the public trustee; and there being no evidence that the continuing trustee's conduct was improper, the usual order was made as to costs.

[Retirement of trustee.] appointed a trustee of any trust, a co-trustee may retire from the trust under and in accordance with sect. 11 of the Trustee Act, 1893 (*a*), notwithstanding that there are not more than two trustees, and without such consents as are required by that section (*b*). The public trustee shall not be so appointed either as a new or additional trustee where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, unless the Court otherwise order" (*c*).

[Notice of appointment.] 9. Notice of any proposed appointment of the public trustee is to be given, where practicable, in the prescribed manner (*d*) to the beneficiaries, or, if infants, to their guardians, and any person to whom notice has been given may, within twenty-one days, apply to the Court for an order prohibiting the making of the appointment; but a failure to give any notice is not to invalidate the appointment (*e*).

[Appointment by testator.] A testator may appoint the public trustee to be trustee or custodian trustee under any testamentary instrument without previously applying to him for his consent to act as such (*f*), but no such appointment by a testator or any other person is to

[Consent to act.] have effect unless the consent of the public trustee to act is obtained (*g*).

The application to the public trustee to act may be made by a trustee or beneficiary under a testamentary instrument, by any person beneficially interested under an intestacy, or by any person having power under the Act to make the appointment (*h*).

[Power as to granting probate.] 10. Under sect. 6 of the Act (*i*) as supplemented by the rules (*j*), the public trustee is authorised to accept by that name probates of wills or letters of administration, and "the Court having jurisdiction to grant probate of a will or letters of administration may grant such probate or letters to the public trustee by that name, and for that purpose the Court shall consider the public trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the public trustee shall not be required for the grant of letters of administration to any other person, and

(*a*) See *post*, Chap. XXVI. s. 12.
(*b*) Sect. 5, sub-s. 2. This appears to be a useful provision.
(*c*) Sect. 5, sub-s. 3.
(*d*) That is, by notice addressed to the person at his last known place of abode or place of business, and served by post; see Rule 40 (2, 3).
(*e*) Sect. 5, sub-s. 4.
(*f*) Rule 9 (1).
(*g*) Rule 9 (2); it is further provided that in the case of an appointment by a testator, the public trustee, after the fact of the appointment has come to his knowledge, may act as if formal application had been received by him.
(*h*) Rule 10 (1).
(*i*) Sect. 6, sub-s. 1.
(*j*) Rule 7 (1a).

that, as between the public trustee and the widower, widow or next-of-kin of the deceased, the widower, widow or next-of-kin shall be preferred, unless for good cause shown to the contrary. Any executor who has obtained probate, or any administrator who has obtained letters of administration, and notwithstanding he has acted in the administration of the deceased's estate, may, with the sanction of the Court, and after such notice to the persons beneficially interested as the Court may direct, transfer such estate to the public trustee for administration either solely, or jointly with the continuing executors or administrator, if any. And the order of the Court sanctioning such transfer shall, subject to the provisions of this Act, give to the public trustee all the powers of such executor and administrator, and such executor and administrator shall not be in any way liable in respect of any act or default in reference to such estate subsequent to the date of such order, other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible" (*a*).

[Retirement of executor or administrator, and substitution of public trustee.]

The public trustee is prohibited from accepting "any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules" made under the Act, "nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent" (*b*).

[Management of business.]

11. By sect. 3 of the Act, "any person who in the opinion of the public trustee would be entitled to apply to the Court for an order for the administration by the Court of an estate, the gross capital value whereof is proved to the satisfaction of the public trustee to be less than 1000*l*., may apply to the public trustee to administer the estate; and, where any such application is made, and it appears to the public trustee that the persons beneficially entitled are persons of small means, the public trustee shall administer the estate, unless he sees good reason for refusing to do so (*c*). On the public trustee undertaking, by declaration in writing signed and sealed by him, to administer the estate, the trust property other than stock shall, by virtue of this Act, vest in him, and the right to transfer

[Administration of small estates.]

[Vesting in public trustee.]

(*a*) Sect. 6, sub-s. 2. This is an important provision.

(*b*) Sect. 6, sub-s. 4. By Rule 8 (2) the public trustee is empowered to accept as ordinary trustee under exceptional circumstances a trust which involves the management or carrying on of any business, but upon the conditions that, except with the consent of the Treasury, he shall only carry on the same (a) for a short time not exceeding eighteen months; and (b) with a view to sale, disposition or winding up; and (c) if satisfied that the same can be carried on without risk of loss.

(*c*) Sect. 3, sub-s. 1.

or call for the transfer of any stock forming part of the estate shall also vest in him, in like manner as if vesting orders had been made for the purpose by the High Court under the Trustee Act, 1893, and that Act shall apply accordingly." As from such vesting any trustee entitled under the trust to administer the estate is to be discharged from all liability attaching to the administration, except in respect of past acts. The public trustee, however, is not to transfer stock without the leave of the Court; and as to copyhold land he is to have the like powers as if he had been appointed by the Court under sect. 33 of the Trustee Act, 1893, to convey (*a*), and sect. 34 of that Act is to apply accordingly (*b*).

[Powers and resort to the Court.]

The general powers of the public trustee in these administrations are regulated by the Act and rules (*c*), and there are provisions enabling him, without judicial proceedings, to take the opinion of the High Court upon any question arising in the administration (*d*).

[Transfer by Court of administration proceedings to public trustee.]

12. By sect. 3, sub-s. 5, "where proceedings have been instituted in any Court for the administration of an estate, and by reason of the small value of the estate it appears to the Court that the estate can be more economically administered by the public trustee than by the Court, or that for any other reason it is expedient that the estate should be administered by the public trustee instead of the Court, the Court may order that the estate shall be administered by the public trustee, and thereupon (subject to any directions by the Court) this section shall apply as if the administration of the estate had been undertaken by the public trustee in pursuance of this section" (*e*).

[Custodian trustee.]

13. The public trustee may, if he consents to act, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust by (1) order of the Court made on the application of any person on

[Appointment.]

whose application the Court may order the appointment of a new trustee; or (2) by the testator, settlor, or other creator of any trust; or (3) by the person having the power to appoint new trustees (*f*). The trust property is to be transferred to the

(*a*) See *post*, Chap. XXVI., sects. 33, 34.

(*b*) Sect. 3, sub-s. 2.

(*c*) Sect. 3, sub-ss. 3, 4, and RR. 14-17.

(*d*) Rule 17. The duty of advising upon such questions has been assigned by the Lord Chancellor to Mr Justice Joyce.

(*e*) This clause appears to be wider in its terms than sect. 3, sub-s. 1. It does not, for instance, contain any requirement as to the beneficiaries being persons of "small means."

(*f*) Sect. 4, sub-s. 1.

custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1893 (*a*). The management is to remain vested in the other or managing trustees (*b*), but the custodian trustee is to have the custody of the securities and documents of title (*c*). The custodian trustee is to concur where necessary in the acts of the managing trustees, but not where the matter is a breach of trust or involves a personal liability; and unless he concurs he is not to be liable for any act or default of the managing trustees (*d*). All payments are to be made to or by the custodian trustee, but he may allow dividends or income to be paid to the managing trustees (*e*). The power of appointing new trustees continues with the managing trustees, but the custodian trustee has the same power as they have of applying to the Court for the appointment of a new trustee (*f*). It is further provided that "in determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee" (*g*). The custodian trustee is protected in reference to evidence of title and acting on legal advice (*h*), and provision is made for terminating the custodian trusteeship (*i*). [Powers and duties.]

By sect. 4, sub-s. 3, the provisions of the section are to apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under the Act (*j*) to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee. [Corporate bodies as custodian trustees.]

14. Provisions as to investigation and audit of trust accounts are contained in sect. 13 of the Act. The principal one is as follows (*k*):— [Audit of trust accounts.]

"Subject to rules under this Act (*l*), and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner (*m*) by any trustee or beneficiary, be investigated

(*a*) Sect. 4, sub-s. 2, Clause (*a*). As to vesting orders see *post*, Chap. XXVI., ss. 13 *et seq.*
(*b*) Clause (*b*).
(*c*) Clause (*c*).
(*d*) Clause (*d*).
(*e*) Clause (*e*).
(*f*) Clause (*f*).
(*g*) Clause (*g*).
(*h*) Clause (*h*).
(*i*) Clause (*i*).
(*j*) See Rule 36, which (by sub.-r. 1) provides that the bodies corporate entitled to act as custodian trustees are to be any such incorporated banking or insurance or guarantee or trust company or friendly society, and any such body corporate established for charitable or philanthropic purposes as may be approved by the public trustee and the Treasury.
(*k*) Sub-s. 1.
(*l*) See RR. 37 to 39.
(*m*) See RR. 38, 40.

and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees or, in default of agreement (*a*), by the public trustee or some person appointed by him: Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit."

The statute provides for access by the auditor to books and accounts, and the forwarding by him of copies of the accounts and of his certificate, showing the sufficiency or deficiencies of the accounts, and that he has had the securities produced to him (*b*); for inspection by beneficiaries (*c*); for removal and replacement of the auditor (*d*); for remuneration and expenses (*e*); and for application to the Court by the auditor in case of obstruction (*f*).

It is further provided that "subject to rules of Court (*g*), applications under or for the purposes of this section to the High Court shall be made to a judge of the Chancery Division in Chambers" (*h*); and penalties by way of fine or imprisonment are imposed on any person who "in any statement of accounts, report, or certificate required for the purposes of this section, wilfully makes a statement false in any material particular" (*i*).

[Appeal to the Court.]

15. By sect. 10, "(1) a person aggrieved by any act or omission or decision of the public trustee in relation to any trust may apply to the Court (*j*), and the Court may make such order in the matter as the Court thinks just. (2) Subject to rules of Court, an application under this section to the High Court shall be made to a judge of the Chancery Division of the High Court in chambers" (*k*).

[Reward.]

16. Except as provided by the Act neither the public trustee nor any of his officers may act for reward (*l*). The public trustee may, subject to the rules, employ for the purposes of the

[Employment of agents by trustee.]

(*a*) By Rule 38, if within three months from the date of the notice, no solicitor or public accountant shall have been appointed by the applicant and the trustees to conduct the investigation and audit, there is to be deemed to be a "default of agreement," within the section, and the applicant may apply to the public trustee accordingly.

(*b*) Sect. 13, sub-s. 2.

(*c*) Sect. 13, sub-s. 3.

(*d*) Sect. 13, sub-s. 4.

(*e*) Sect. 13, sub-s. 5.

(*f*) Sect. 13, sub-s. 6.

(*g*) By Rule 37, any application under sub-s. 1 is to be to the public trustee.

(*h*) Sect. 13, sub-s. 7.

(*i*) Sect. 13, sub-s. 8.

(*j*) By sect. 15 the expression "Court" means the High Court and, as respects trusts within its jurisdiction, the County Court.

(*k*) As to the procedure provided for in reference to small estates, see *ante*, p. 703. The application of the Act to palatine courts is provided for by sect. 12.

(*l*) Sect. 11, sub-s. 1.

trust such solicitors, bankers, accountants and brokers, or other persons as he may consider necessary. In determining the persons to be employed he is to have regard to the interests of the trust, but subject to this is to take into consideration the wishes of the creator of the trust, the other trustees, and the beneficiaries as in the Act mentioned (*a*). On behalf of the public trustee, such person as may be prescribed may take any oath, make any declaration, verify any account, give personal attendance at any court or place, and do any act or thing whatsoever which the public trustee is required or authorised to take, make, verify, give, or do; but subject to a proviso protective of the rights of barristers and duly certificated solicitors (*b*). [Representation in proceedings.]

Where any bond or security would be required from a private person upon the grant to him of administration, or upon his appointment to act in any capacity, the public trustee, if administration is granted to him, or if he is appointed to act in such capacity, is not to be required to give such bond or security, but is to be subject to the same liabilities and duties as if he had given such bond or security (*c*). [Bond or security not required from trustee.]

It is provided that the entry of the public trustee by that name in the books of a company shall not constitute notice of a trust, and a company is not to be entitled to object to enter the name of the public trustee on its books by reason only that the public trustee is a corporation, and, in dealings with property, the fact that the person or one of the persons dealt with is the public trustee, is not of itself to constitute notice of a trust (*d*). [Entry of trustee's name in books of company.]

17. In reference to administration generally the rules provide for the following matters:—That a principal register as indicated of all trusts in which the public trustee is acting is to be kept at the central office in London (*e*); that the trustee may invest in any investment authorised by the trust instrument or by law, but not so as to expose himself to liability (*f*); that the trust securities and documents are to be kept at the bank to the trust or some other safe place allowed by the Treasury (*g*); that a separate account, as indicated, is to be kept for every trust or estate (*h*); that the accounts of the trustee are to be audited (*i*); [General provision as to administration.] [Register.] [Investment.] [Custody of documents.] [Accounts.]

(*a*) Sect. 11, sub-s. 2. Rule 18 provides that, subject to the Act, Rules, and terms of the particular trust, the public trustee may take and use professional advice and assistance in regard to legal and other matters, and may act on credible information (though less than legal evidence) as to matters of fact.

(*b*) Sect. 11, sub-s. 3.

(*c*) Sect. 11, sub-s. 4.

(*d*) Sect. 11, sub-s. 5.

(*e*) Rule 19. (*f*) Rule 20.

(*g*) Rule 21. (*h*) Rule 22.

(*i*) Rule 23.

[Payment into bank.] [Assurances.] [Payments to parties.] [Evidence.] [Information.] [Secrecy.] that "all payments of money to or from the capital of the trust property shall be made through the bank to the trust or estate" (*a*); that all transfers and assurances by the public trustee shall be under his hand and official seal, or under the hand and seal of an authorised officer (*b*); as to the mode of payment of sums payable out of income or capital (*c*); as to mode of payment of income to persons entitled (*d*); enabling the public trustee in a proper case to pay income to his co-trustee on his undertaking to apply it (*e*); and to make advances for administration purposes out of monies found by the Treasury (*f*); to require evidence as to persons entitled (*g*); and in cases where any such person cannot be found, or it is not known whether he is living or dead, to apply to the Court for directions, and retain any sum payable until order made (*h*). There is a provision requiring the public trustee to give to persons interested due inspection of accounts and documents, and information as to the trust property, and subject as aforesaid, he is to observe "strict secrecy in respect of every trust or estate in course of administration by him" (*i*).

[Deputies and officers.] 18. Power to appoint deputies is conferred in wide terms on the public trustee (*j*), and any officer authorised by him in writing may take any oath, make any declaration, verify any account, and give personal attendance at any court or place (*k*).

[Fees.] 19. The fees to be charged by the public trustee are regulated by sect. 9, and the Public Trustee (Fees) Order, 1907 (*l*), and Public Trustee (Fees) Order, 1909 (*m*). It is provided by the Act that the incidence of the fees and expenses under the section as between capital and income shall be determined by the public trustee (*n*).

[Exception of religious or charitable trusts.] 20. Lastly, it is to be observed that the public trustee is not to accept any trust exclusively for religious or charitable purposes, and nothing in the Act contained, or in the rules to be made under the powers in the Act contained, is to abridge or affect the powers or duties of the official trustee of charity lands or official trustees of charitable funds (*o*).]

(*a*) Rule 24. (*b*) Rule 25.
(*c*) Rule 26. (*d*) Rule 27.
(*e*) Rule 28. (*f*) Rule 29.
(*g*) Rule 30. (*h*) Rule 31.
(*i*) Rule 32.
(*j*) Rule 33. By Rule 34 no deputy, and no firm or member of a firm of solicitors of which such deputy is a member shall, except with the consent in writing of the public trustee, and subject to such conditions as he may impose, act as solicitor or solicitors to a trust or estate which is in course of administration by such deputy.
(*k*) Rule 35.
(*l*) Current Index, 1907, p. lxxxvi. (Dec. 21).
(*m*) Current Index, 1909, p. clxi. (Mar. 1).
(*n*) Sect. 9, sub-s. 5.
(*o*) Sect. 2, sub-s. 5.

CHAPTER XXIV

THE POWERS OF TRUSTEES

THE powers of trustees are either *General* or *Special;* the former, such as by construction of law are incident to the office of trustee *virtute officii;* the latter, such as are conferred *vi terminorum, i.e.* by the settlor himself by an express proviso in the instrument creating the trust.

SECTION 1

OF THE GENERAL POWERS OF TRUSTEES

Powers of trustees at law distinguished from their powers in equity.

1. In a Court of *Law,* the trustee, as the absolute proprietor, may of course exercise all such powers as the legal ownership confers; but in *equity* the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate without rendering himself responsible in the *forum* of a Court of Equity.

General rule as to powers of trustees in simple trusts.

2. With respect to the *simple* trust, as the trustee is a mere passive depositary, he can in equity neither take any part of the profits, nor exercise any dominion or control over the *corpus,* except at the instance of the *cestui que trust.*

In special trusts.

3. In the *special* trust, the authority of the trustee is, as a *general* rule, equally limited, except so far as the execution of the trust itself may invest him with a proprietary power, and the duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand or to the left.

Exceptions.

4. But, *under particular circumstances,* the trustee is held capable of exercising the discretionary powers of the *bonâ fide* proprietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate action, while the sanction of the parties who are

beneficially interested could not be procured without great inconvenience (as where the *cestuis que trust* are a numerous class), or perhaps could not be obtained at all (as where the *cestuis que trust* are under disability, or not yet in existence). It is, therefore, evidently in furtherance of the *cestuis que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power (*a*). But a trustee for adults should not take any proceeding without consulting his *cestuis que trust;* and if he do, and the proceeding is disavowed by them, he may have to pay the costs (*b*).

Notice of trustee's intention to *cestui que trust.*

5. Where the trust is not definite and precise, and it is doubtful what ought to be done under the trust, it is said that the trustee may *give notice to the cestui que trust of his intention* to do a particular act, and that unless the *cestui que trust* interferes to stop it, the Court might well hold the trustee not to be liable for doing the act (*c*).

Validity of an act without suit.

6. It is a rule of equity, that what is compellable by suit, or would have been ordered by the Court, is equally valid if done by the trustee *without suit, i.e.* without the sanction of the Court (*d*). The difficulty with which the trustee has to struggle is the danger of assuming that the Court, on application to it, would view the matter in the same light in which he regards it himself (*e*).

Matter of form may be dispensed with.

7. Trustees, to avoid circuity, may dispense with *forms,* the observance of which would only lead to expense. If, for instance, the transfer of a sum of stock be secured to trustees of a settlement, and they have power by the settlement to sell out the fund and invest on mortgage, they need not insist on a transfer of the stock *in specie* for the purpose of immediately selling out and investing the proceeds on mortgage, but if they have the mortgage ready may take the value of the stock and hand it over to

(*a*) See *Angell* v. *Dawson*, 3 Y. & C. 317; *Darke* v. *Williamson*, 25 Beav. 622; *Harrison* v. *Randall*, 9 Hare, 407; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827; *Ward* v. *Ward*, 2 H. L. Cas. 784.

(*b*) *Bradby* v. *Whitchurch*, W. N. 1868, p. 81.

(*c*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74, *per* L. J. Turner.

(*d*) *Lee* v. *Brown*, 4 Ves. 369, *per Cur.; Earl of Bath* v. *Bradford*, 2 Ves. 590, *per* Lord Hardwicke; *Cook* v. *Parsons*, Pr. Ch. 185, *per Cur.; Inwood* v. *Twyne*, 2 Eden, 153, per Lord Northington; *Hutcheson* v. *Hammond*, 3 B. C. C. 145, *per* Buller, J.; *Terry* v. *Terry*, Gilb. 11, *per* Lord Cowper; *Shaw* v. *Borrer*, 1 Keen, 576, *per* Lord Langdale; *Seagram* v. *Knight*, 2 L. R. Ch. App. 630; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 42, *per Cur.;* [*Brown* v. *Smith*, 10 Ch. D. (C.A.) 377]. The same rule holds also at law, see Co. Lit. 171, a.

(*e*) See *Forshaw* v. *Higginson*, 3 Jur. N.S. 476.

the mortgagor (*a*). So trustees, having a power to lay out a certain sum in the purchase of an annuity for A. B., may pay the sum to A. B. direct, without going through the form of purchasing the annuity (*b*).

Repairs.

8. Where the legal estate is vested in trustees in trust for one person *for life*, with remainders over to others, it is clearly settled that the trustee cannot (where there is no special clause of management) interfere with the possession of an equitable tenant for life who neglects to repair (*c*). [But it is the duty of trustees, for the purpose of properly performing their trust, to see that the trust property does not fall into decay from want of repair, and if the occasion for repairs arises they should apply to the Court to direct the proper repairs and the mode in which the expenses of such repairs are to be borne (*d*).]

Legal rights.

9. In other respects the rights in equity must, it is conceived, be governed by those at law. Thus a legal tenant for life may cut timber for the purpose of repairs (*e*), though he may not cut timber to sell it and apply the produce (*f*), or to repay himself the outlay in repairs (*g*); and similarly, the trustee may, it is conceived, as against the remainderman, cut timber for necessary repairs, if the tenant for life will consent to an application of income towards repairs in making use of the timber. The repairs by a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance (*h*). Nor [before the Settled Land Act, 1882,] would the Court at his instance direct *lasting improvements* to be made (*i*); and though

Equitable rights.

Repairs and improvements.

(*a*) See *Pell* v. *De Winton*, 2 De G. & J. 20; *George* v. *George*, 35 Beav. 382.

(*b*) *Messeena* v. *Carr*, 9 L. R. Eq. 260; [*Stokes* v. *Cheek*, 28 Beav. 620; *Re Mabbett*, (1891) 1 Ch. 707, 712; *Re Ross*, (1900) 1 Ch. 162; *Re Robbins*, (1906) 2 Ch. 648; *Re Brunning*, (1909) 1 Ch. 276].

(*c*) *Powys* v. *Blagrave*, Kay, 495; 4 De G. M. & G. 458, and cases there cited by Lord Cranworth; *Harnett* v. *Maitland*, 16 M. & W. 257; [*Re Cartwright*, 41 Ch. D. 532, and cases there cited; *Re Freman*, (1898) 1 Ch. 28, 32;] and see *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; [*Brereton* v. *Day*, (1895) 1 I. R. 519].

[(*d*) *Re Hotchkys*, 32 Ch. D. (C.A.) 408; *Re M'Clure's Trusts*, (1906) W. N. 200 (where the amount of repairs was directed to be raised by mortgage).]

(*e*) Co. Lit. 54 *b*. [And see the Settled Land Act, 1882, s. 29.]

(*f*) Co. Lit. 53 *b*. [But see now the Settled Land Act, 1882, s. 35, *post*, p. 715.]

(*g*) *Gower* v. *Eyre*, G. Coop. 156; and see *Duke of Marlborough* v. *St John*, 5 De G. & Sm. 181.

(*h*) *Hibbert* v. *Cooke*, 1 S. & S. 552; *Caldecott* v. *Brown*, 2 Hare, 144; and see *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Hamer* v. *Tilsley*, Johns. 486; *Dent* v. *Dent*, 30 Beav. 363; *Floyer* v. *Bankes*, 8 L. R. Eq. 115; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 35; *Re Leigh's Estate*, 6 L. R. Ch. App. 887; [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503].

(*i*) *Nairn* v. *Majoribanks*, 3 Russ. 582.

it was said by the Court in one case that the rule might not be absolutely without exception, as if there were a settled estate, and a fund directed to be laid out in the purchase to the same uses, it might be more beneficial to the remainderman that part of the trust fund should be applied to prevent buildings on the settled estates from going to destruction, than that the whole should be laid out in the purchase of other lands (*a*), yet an extraordinary case was requisite to create such exception (*b*). [But where trustees having moneys in their hands directed to be invested in lands to be strictly settled, entered into an agreement for purchase of an estate, and the farm buildings, and cottages on the property were out of repair, the Court sanctioned the application of 1000*l.* out of the moneys in their hands in repairing, improving and rebuilding the farm buildings and cottages (*c*); and money paid into Court under the Lands Clauses Act has been applied in defraying expenditure necessarily incurred for the preservation of the trust estate (*d*).

[Under Settled Land Act.]

10. Now by the Settled Land Act, 1882, sect. 26, the tenant for life may, with the approval of the trustees of the settlement, or the approval of the Court as the case may require, according as the money to be expended is in the hands of the trustees or in Court, expend any capital money arising under the Act in any of the improvements specified in sect. 25 of the Act (*e*).

And as, under sect. 59, an infant entitled in possession to land is for the purposes of the Act to be deemed tenant for life thereof, and by sect. 60, the powers of an infant tenant for life may be exercised on his behalf by the trustees of the settlement, or if there are none, by the nominees of the Court, all proper improvements may be effected under the Act, notwithstanding the infancy of the beneficial owner.

[Drainage or sanitary works.]

11. The expenses of drainage or sanitary works, executed under the powers of statutes relating to Public Health, and payable by the trustees as "owners" under the statutes, are in general a charge

(*a*) *Caldecott* v. *Brown*, 2 Hare, 145, *per* Sir J. Wigram; and see *Re Barrington's Estates*, 1 J. & H. 142; [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552].

(*b*) *Dunne* v. *Dunne*, 3 Sm. & G. 22; *Dent* v. *Dent*, 30 Beav. 363. [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552, where a tenant for life was allowed expenditure necessarily incurred by him in order to prevent previous expenditure by the settlor from being totally lost; and see *ante*, p. 591.]

[(*c*) *Lord Cowley* v. *Wellesley*, 46 L. J. N.S. Ch. 869; and see *ante*, p. 591.]

[(*d*) *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Aldred's Estate*, 21 Ch. D. 228.]

[(*e*) As to payment out of capital money for improvements under the Agricultural Holdings (England) Act, 1883, see s. 29 of that Act, and *ante*, p. 682.]

on the *corpus*, which may be provided for out of capital money (*a*).

12. Independently of the powers of the Settled Land Act] a trustee holding an estate for the benefit of a person absolutely entitled, but incapable from infancy or otherwise to give directions, may make necessary *repairs*, but he must not go beyond the necessity of the case, as by *ornamental improvements*, or the expense will not be allowed (*b*). The trustees of a will were to permit the testator's son to have "the use and enjoyment" of a house, and were "empowered" during the son's "occupation" to make "repairs," and Lord Romilly, M.R., held that the trustees were to keep the house in a *habitable* state, but not to make *ornamental* repairs (*c*). Where a mansion-house was dilapidated at the date of the testator's will, and he empowered his trustees "to keep all the buildings in good *repair*, and to make such improvements by draining, walling, *building*, liming, or manuring, as they should think proper," the trustees had no power to *rebuild* the mansion-house (*d*). But under a power to "improve the estate by erecting farm-houses and out-buildings, or by draining and planting," it was held that the trustees could erect agricultural cottages (*e*). And where the trustees of a term of 1000 years were specially authorised to keep the premises in good repair and "*generally to superintend the management*" of the estate, the Court held that the latter words conferred a general power without limit, that is, according to the discretion of the trustees, and allowed the sums expended by them in erecting and repairing farm-houses and buildings, in draining, fencing, sinking wells, putting up pumps, constructing a bridge, and forming, repairing, and altering roads (*f*). If trustees, without any special power to authorise it, lay out money in improving the estate (as in building a villa upon ground intended to be

a Generally.

[(*a*) *Re Barney*, (1894) 3 Ch. 562; *Re Lever*, (1897) 1 Ch. 32; and see *Re Legh's Settled Estates*, (1902) 2 Ch. 274; and see *Re Farnham's Trusts*, (1904) 2 Ch. (C.A.) 561, where an inquiry was directed to ascertain what part of the works was in the nature of permanent improvements, and for that part at all events assignees of the life interest, who had caused the works to be executed, were held to be entitled to a charge in subrogation to the trustee; and see *Re Pizzi*, (1907) 1 Ch. 607, (where the works were under the Private Street Works Act, 1892).]

(*b*) *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; and see *Attorney-General* v. *Geary*, 3 Mer. 513; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 35; [*Re Gerard's Settled Estates*, (1893) 3 Ch. (C.A.) 252, *ante*, p. 675, note].

(*c*) *Maclaren* v. *Stainton*, M.R., March 14, 1866, MS.; [and see *Re Colyer*, 55 L.T. N.S. 344; 50 L. J. Ch. 79].

(*d*) *Bleazard* v. *Whalley*, 2 Eq. Rep. 1093; see *ante*, p. 632.

(*e*) *Lord Rivers* v. *Fox*, 2 Eq. Rep. 776.

(*f*) *Bowes* v. *Earl of Strathmore*, 8 Jur. 92.

building ground, and which object they are advised will be promoted by the erection of the villa), they cannot justify the expenditure, but on the other hand, the *cestuis que trust* cannot take the benefit and repudiate the whole outlay, but the trustees will be liable only for the loss to the estate (*a*). [And where the mansion-house had been burnt down and the trustee applied a large sum, in addition to the insurance moneys, in restoring the mansion-house, the Court was of opinion that it had no jurisdiction to order a sale or mortgage of the settled estates to raise the amount of the outlay, or to authorise the expenditure, for the restoration, of moneys which were subject to a trust for reinvestment in land; but it appearing that the estate had been benefited to the full amount of certain funds in Court, which had arisen from the sale of part of the settled estates, Kay, J., sanctioned the application of those funds towards recouping the trustee, on the ground that the trustee having *bonâ fide* expended money for building on the estate, under a reasonable expectation that the Court would sanction the expenditure, and having improved the estate to the full amount of the funds in Court, might be recouped the amount so expended (*b*).] If the trust be to make repairs out of the *rents*, and the trustees borrow money to make the repairs, and then repay themselves out of the rents, they will not be allowed the interest on the money borrowed, for the trust was to apply the rents after they had accrued (*c*).

[Allowances to tenant for life.]

[13. Where trustees of a term are authorised to make improvements on the trust property, and to raise the sums required by mortgaging the hereditaments comprised in the term, or out of the rents, issues, and profits, and subject to the term the property is strictly settled, the tenant for life is entitled to have the amount of income applied by the trustees in *permanent* improvements raised out of the *corpus* of the estates (*d*).

[Personal estate advanced for benefit of real estate.]

Where there was no power to manage or cultivate the real estate, and a farm was in hand, and no tenant could be found, the Court, on evidence that the outlay would be to the advantage of infant remaindermen, allowed 1000*l*., part of the personalty which was held on the same trusts as the realty, to be advanced to the tenant for life, who was one of the trustees, on his bond,

(*a*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 309; affirmed 7 L. R. H. L. 318.

[(*b*) *Jesse* v. *Lloyd*, 48 L. T. N.S. 656.]

(*c*) *Fazakerley* v. *Culshaw*, 19 W. R. 793; 24 L. T. N.S. 773.

[(*d*) *Re Marquess of Bute*, 27 Ch. D. 196.]

he undertaking to expend it in stocking, taking, and cultivating the farm to the satisfaction of his co-trustee (*a*).]

Land Improvement Act.

14. By the Improvement of Land Act, 1864 (*b*), trustees in the *actual possession or receipt of the rents or profits* of land are enabled, by the 24th section, to apply for and make, in conformity with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, reclamation of land, erection of farm buildings, planting, &c.

Cutting timber.

15. Where an estate was devised to A. and his heirs upon trust to settle on B. for life, subject to impeachment of waste, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail, and before any settlement was executed the trustee, with the concurrence of B. and C., cut down timber which showed symptoms of decay, Sir L. Shadwell said "he considered the timber to have been cut by the authority of the trustee, who had a superintending control over the estate; that it was not a wrongful act; and that the effect of it must be the same as if it had been done with the sanction of the Court" (*c*). And in a later case (*d*), the Court seemed to think that a tenant for life, impeachable for waste, would not be chargeable with interest during his own life as to such timber felled by him as the Court would have ordered to be cut, but that the *onus* would be on the tenant for life to make out that such was the case.

[Settled Land Act.]

[16. Now by the Settled Land Act, 1882, sect. 35, a tenant for life impeachable for waste may, on obtaining the consent of the trustees of the settlement or an order of the Court, cut and sell timber ripe and fit for cutting; but three fourth parts of the net

[(*a*) *Re Household*, 27 Ch. D. 553; and see *Conway* v. *Fenton*, 40 Ch. D. 512, 517, where the Court sanctioned expenditure in repairing buildings; and see *ante*, p. 592.]

(*b*) 27 & 28 Vict. c. 114. Extended by the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), to building and improvement of mansions; [and by 40 & 41 Vict. c. 31, to the construction and erection of reservoirs and other works of a permanent character for the supply of water; and by the Settled Land Act, 1882, s. 30, to all improvements authorised by that Act, see s. 25, *ante*, p. 674. In *Re Dunn's Settled Estate*, W. N. 1877, p. 39, it was held that the sum to be charged under 33 & 34 Vict. c. 56, was not confined to two year's rental of the particular estate on which the mansion was to be built, but extended to two year's rental of all the estates comprised in the settlement. Kay, J., considered that s. 9 of the Act of 1864 was in some respects more extensive than s. 25 of the Act of 1882, but this view was dissented from by Cotton, L.J., see *Re Newton*, W. N., 1890, p. 24. As to the power of a tenant for life, with the consent of the owner of a rent-charge created under the Act of 1864, and without the intervention of the Board of Agriculture, to exonerate a part of the land, and charge the entire rent-charge on the remainder, see *Re Earl of Strafford and Maples*, (1896) 1 Ch. (C.A.) 235].

(*c*) *Waldo* v. *Waldo*, 7 Sim. 261; and see *Gent* v. *Harrison*, Johns. 517; *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656.

(*d*) *Bagot* v. *Bagot*, 32 Beav. 509; 2 New Rep. 297.

proceeds of the sale are to be set aside as capital money arising under the Act (*a*).

[Management of land and receipt and application of income during minority.]

17. In the case of instruments coming into operation after the 31st December, 1881, under which an infant, not being a married woman, is beneficially entitled to the possession or receipt of the rents and profits of land or hereditaments corporeal or incorporeal, large powers of management during the minority of the infant have, unless a contrary intention is expressed in the instrument, been provided by the Conveyancing and Law of Property Act, 1881. Sect. 42 of that Act enacts that:—

(1) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land (*b*) or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply (*c*).

(2) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course of sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for

[(*a*) If the timber is sold by the tenant for life along with the land the proceeds must be treated as capital money; *Re Llewellin*, 37 Ch. D. 317.]

[(*b*) Trustees appointed for the purposes of the Settled Land Acts, and empowered by s. 60 of the Act of 1882 to exercise the powers of an infant tenant for life during his minority, are not thereby constituted "trustees with power of sale of the settled land" within the above enactment, so as to be entitled to possession of the infant's land as against his testamentary guardian: *Re Helyar*, (1902) 1 Ch. 391.]

[(*c*) The enactment applies to the case of an infant taking by descent: *Re Cowley*, (1901) 1 Ch. 38; *Re Glover*, (1899) 1 I. R. 337; *Re Bradshaw*, (1904) 1 I. R. 19.]

waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same (*a*).

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes. [Maintenance of infant.]

(5) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely): [Accumulations of income.]

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the

[(*a*) By the Settled Land Act, 1882, the powers of cutting timber conferred on a tenant for life by that Act, may be exercised on behalf of an infant tenant for life or absolute owner, by the trustees of the settlement, or if there are none, by such person and in such manner as the Court, on the application of a testamentary guardian or other next friend of the infant, orders; see ss. 59, 60.]

accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.]

Trustees authorised to oppose a bill in Parliament prejudicial to *cestuis que trust.*

18. Conservators of public works and similar *quasi trustees* are authorised to apply the funds under their control in *opposing* a bill in Parliament, the effect of which, if passed, would be injurious to the interests confided to them. "Every trustee," said Lord Cottenham, "is entitled to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect, but probable" (*a*).

Applications to Parliament.

19. On the other hand, *quasi* trustees, such as those before referred to, are not entitled to apply the funds of an existing undertaking in or towards the expense of obtaining *other or larger* Parliamentary powers (*b*).

[Settled Land Act.]

[By the Settled Land Act, 1882, it is provided that the Court may approve of any petition to Parliament, parliamentary opposition, or other proceeding to be taken for protection of settled lands, and may direct that any costs, charges, or expenses incurred in relation thereto be paid out of property subject to the settlement (*c*). Costs of proceedings in the House of Lords whereby a claim to a peerage was established, and which resulted in the recovery of estates settled on corresponding limitations, were allowed under the section (*d*).

(*a*) *Bright* v. *North*, 2 Ph. 220; *Reg.* v. *Norfolk Commissioners of Sewers*, 15 Q. B. 549; *Attorney-General* v. *Andrews*, 2 Mac. & G. 225; *Attorney-General* v. *Eastlake*, 11 Hare, 205; [*Attorney-General* v. *Mayor of Brecon*, 10 Ch. D. 204; *Reg.* v. *White*, 14 Q. B. D. 358, reversing *S. C.* 11 Q. B. D. 309; and see *Leith Council* v. *Leith Harbour and Docks Commissioners*, (1899) A.C. (H.L.) 508].

(*b*) *Attorney-General* v. *Andrews*, 2 Mac. & G. 225; *Vance* v. *East Lancashire Railway Company*, 3 K. & J. 50; *Attorney-General* v. *Guardians of the Poor of Southampton*, 17 Sim. 6; *Attorney-General* v. *Corporation of Norwich*, 16 Sim. 225; *Stevens* v. *South Devon Railway Company*, 13 Beav. 48; [*Buckham* v. *Trustees of Whitehaven*, 55 L. T. N.S. 694].

[(*c*) 45 & 46 Vict. c. 38, s. 36; and see to the like effect the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 17.]

[(*d*) *Re Earl of Aylesford*, 32 Ch. D. 162. As to allowance of such costs independently of statute, see *post*, Chap. XXV. s. 2.]

As to Insurance.

20. The duty of a trustee in reference to insuring the property was until recently not very clearly defined; it was conceived that] under special circumstances, and in due course of management, he would be justified in *insuring* (*a*); but that where there was a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent. [But now by the Trustee Act, 1893 (*b*), sect. 18, it is enacted that "a trustee may insure against loss or damage by fire any building or other insurable property (*c*) to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income"; but the section does not apply to the case of a trustee who is bound forthwith to convey absolutely to any beneficiary (*d*).]

By mortgagee.

If an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income (*e*). A *mortgagee* is not regarded as a *trustee*; and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances. It is the same as if a lessor or lessee insured, in which case the other would have no claim to the benefit of the policy (*f*).

Breaking up testator's establishment.

21. An *executor* is allowed a reasonable time for breaking up the testator's establishment, and a period of two months in one case was considered not to be excessive (*g*). Executors, as a general rule, do not pay legacies until the expiration of one year from the testator's death; but this is a rule of convenience,

(*a*) *Ex parte Andrews*, 2 Rose, 412; and see *Fry* v. *Fry*, 27 Beav. 146.

[(*b*) 56 & 57 Vict. c. 53, reproducing s. 7 of the Trustee Act, 1888.]

[(*c*) This expression includes heirlooms, see *Re Earl of Egmont's Trusts*, (1908) 1 Ch. 821, *ante*, p. 330.]

[(*d*) Where trustees insured a mansion-house, and settled chattels and furniture by two separate policies, the infant tenant for life was entitled to the whole of the policy moneys payable in respect of the chattels; but the remaindermen were entitled to have the policy moneys recovered on the house policy applied in rebuilding; *Re Quicke's Trusts*, (1908) 1 Ch. 887.]

(*e*) *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19.

(*f*) *Dobson* v. *Land*, 8 Hare, 216; and see *Ex parte Andrews*, 2 Rose, 410; *Phillips* v. *Eastwood*, Ll. & G. *t.* Sugden, 289. [But see Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 11; since repealed and its place supplied by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19, sub-s. 1 (ii.), conferring a power to insure where the mortgage is by a deed not expressing a contrary intention.]

(*g*) *Field* v. *Peckett* (No. 3), 29 Beav. 576.

and, therefore, if the assets be clearly sufficient for payment of debts and legacies, there is nothing to prevent the executors from discharging the legacies before the expiration of the year (*a*).

[Carrying on trade of testator.]

[22. As it is the duty of executors to realise their testator's estate to the best advantage, they may carry on his business for such reasonable time as is necessary to enable them to sell it as a going concern (*b*), and if they do so, may be entitled even as against the testator's creditors to an indemnity out of the estate in respect of liabilities properly incurred (*c*); and, as regards beneficiaries under the will, a power in the executors to carry on the business for a reasonable time may be implied from a general power to postpone the sale and conversion of the estate, although the business is not specially referred to (*d*). But, except for such purpose of realisation, executors are not justified in continuing to carry on the testator's business unless there is a distinct and positive direction and authority given by the will to that effect (*e*), nor can the Court, where infants are interested, authorise an administrator to carry on the trade of the intestate (*f*).

[Power to postpone sale.]

Where a will contained an express reference to the testator's business, and a general power to the trustees and executors to postpone sale and conversion "for such period as to them should seem expedient," it was held that there was an implied power to carry on the business until sale, and that the trustees were justified in having carried it on for twenty-two years (*g*); but where there was a special direction for sale of the business with all convenient speed, and a general power to postpone sale for so long as the trustees should think fit, it was held that the trustees would not be justified in carrying on the business indefinitely, but, under the circumstances, the Court authorised the continuance of it for two years from the testator's death (*h*).

[Indemnity of executors where business properly carried on.]

Where the testator's business has been properly carried on

(*a*) *Angerstein* v. *Martin*, 1 T. & R. 241, *per* Lord Eldon; *Pearson* v. *Pearson*, 1 Sch. & Lef. 12, *per* Lord Redesdale; and see *Garthshore* v. *Chalie*, 10 Ves. 13.

[(*b*) *Collinson* v. *Lister*, 20 Beav. 356, 365, 366, *per* Romilly, M.R.; *Garrett* v. *Noble*, 6 Sim. 504; *Dowse* v. *Gorton*, (1891) A. C. 190. As to the carrying on of a business under the Public Trustee Act, 1906, see *ante* Chap. XXIII. p. 703.]

[(*c*) *Dowse* v. *Gorton*, (1891) A.C. 190, 199, *per* Lord Herschell.]

[(*d*) *Re Chancellor*, 26 Ch. D. (C.A.) 42.]

[(*e*) *Kirkman* v. *Booth*, 11 Beav. 273; *Collinson* v. *Lister*, 20 Beav. 356; and see *Re Sykes*, (1909) 2 Ch. (C.A.) 241, observing upon *Smith* v. *Langford*, 2 Beav. 362.]

[(*f*) *Laud* v. *Laud*, 43 L. J. Ch. 311.]

[(*g*) *Re Crowther*, (1895) 2 Ch. 56.]

[(*h*) *Re Smith*, (1896) 1 Ch. 171.]

in accordance with the provisions of the will and with the assent of the creditors, and in their interest as well as in that of the beneficiaries, the executors will be entitled, in priority to creditors, to indemnity out of the general estate, and not merely out of that portion of the assets which has come into existence since the testator's death (*a*); and this principle is applicable where, in the absence of an express power in the will, the business is carried on under the direction of the Court in an administration action (*b*).

[Execution against trust chattels.]

As a Court of Equity will never take trust property out of the hands of the trustee without seeing that his costs and expenses are reimbursed to him, the trustee carrying on his testator's business is entitled to a *primâ facie lien* on goods forming part of the assets of the business, and this *lien* will pass on his bankruptcy to his trustee in bankruptcy, and, in the absence of evidence as to the state of account between the bankrupt and the trust estate, will prevail as against an execution creditor suing in respect of a personal debt of the bankrupt (*c*).

[Special direction in will.]

In a case in Ireland (*d*), it was held that a general bequest in the will of a trader to trustees upon trust to permit his wife to carry on his business, so long as she should remain a widow, empowered the trustees to allow her to use the property employed by the testator himself in the trade, and that the assets, to the extent of such property, were liable to pay for goods supplied to the testator's widow for the trade carried on by her; and where a will contained a direction that the testator's business was to be carried on for a specified time, without any actual disposition of his property beyond a direction for the payment by the executors of certain legacies, the executors were held to be entitled, so long as the business was carried on for the purposes of the will, to the free use and occupation of the business premises and the fixed plant and machinery without paying any rent for the same (*e*). Where a testator gave all his real and personal estate to trustees upon trust for sale and conversion, and

[(*a*) *Dowse* v. *Gorton*, (1891) A. C. 190, varying the decision of the Court of Appeal, 40 Ch. D. 536; *Hodges* v. *Hodges*, (1899) 1 I. R. 480; and as to the priority of this right of indemnity over the plaintiff legatee's costs of action, and the right of the trade creditors by subrogation, see *Moore* v. *McGlyn*, (1904) 1 I. R. 334.]

[(*b*) *Re Brooke*, (1894) 2 Ch. 600; but not where there is an administration decree only, and no direction authorising the carrying on of the business: *M'Aloon* v. *M'Aloon*, (1900) 1 I. R. 367.]

[(*c*) *Jennings* v. *Mather*, (1902) 1 K. B. (C.A.) 1.]

[(*d*) *Gallagher* v. *Ferris*, 7 L. R. Ir. 489; and see *Re Johnson*, 15 Ch. D. 548; *Strickland* v. *Symons*, 26 Ch. D. (C.A.) 245; *Boylan* v. *Fay*, 8 L. R. Ir. 374.]

[(*e*) *Re Cameron*, 26 Ch. D. (C.A.) 19.]

empowered them to carry on his business and employ therein all the capital invested therein at his death, and to increase or abridge the business and his capital therein, an equitable mortgage by the trustees of the testator's real estate to raise moneys which were applied for the purposes of the business, was held to be within their powers (*a*).]

Appropriation of legacy.

23. An executor may *appropriate* a legacy without the necessity of a suit, where the appropriation is such as the Court itself would have directed (*b*); [and an administrator may appropriate part of the estate to his own share as one of the next of kin (*c*). By the Land Transfer Act, 1897 (*d*), personal representatives are empowered to appropriate any part of the residuary estate, which under that Act includes land, in or towards satisfaction of any legacy.

[Contingent legacy without interest.]

Where a legacy is given upon a contingency, but without interest in the meantime, so that it cannot be inferred that the testator intended that a fund should be set apart and invested to answer the legacy, it is not competent for the executor or trustee to appropriate an investment to the legacy, so as to throw upon the legatee any loss by depreciation in value previously to the happening of the contingency (*e*).

[Trust legacy.]

Where a legacy is to be held by the executors upon trust, and the will is silent as to the mode of investment, the powers of the Trustee Act, 1893 (*f*), will be applicable, so that an investment in the securities authorised by the Act will be a proper mode of appropriation (*g*). Where several legacies are given, the executors may be justified in setting aside one entire amount without dividing it into portions, but the proper course, as a general rule, is to invest each particular sum in separate

[(*a*) *Re Dimmock*, 52 L. T. N.S. 494.]

(*b*) *Hutcheson* v. *Hammond*, 3 B. C. C. 128, see 145, 148; and see *Cooper* v. *Douglas*, 2 B. C. C. 231; Roper on Legacies, 4th ed. 931; [*Re Lepine*, (1892) 1 Ch. 210].

[(*c*) *Barclay* v. *Owen*, 60 L. T. N.S. 220; as to appropriation of shares of residue, see *post*, p. 740; and as to an executor converting himself into a trustee, *ante*, p. 228.]

[(*d*) 60 & 61 Vict. c. 65, s. 4, sub-s. 1.]

[(*e*) *Re Hall*, (1903) 2 Ch. (C.A.) 226, *q.v.* per Romer, L.J., at p. 233, as to the course to be adopted in such a case in order that the administration of the estate may be proceeded with.]

[(*f*) 56 & 57 Vict. c. 53; see *ante*, p. 362.]

[(*g*) It may be observed that it must not be assumed that a general power of investment contained in the will is applicable to the investment of the particular fund, although it may occur, as in *Fraser* v. *Murdoch*, 6 App. Cas. 855, that such general power is wide enough to cover all the purposes of the will requiring investment. The question must necessarily turn upon the construction of the will. Where there is a general investment clause containing prohibitory words, the safe course is for the trustees to keep within the terms of that clause, as well as within the statutory power. See *ante*, p. 367.]

investments, and such investments should not be varied without reasonable cause (*a*). As the question whether an appropriation has been made is necessarily one of fact, and may be one of difficulty, it is obviously desirable that evidence of the appropriation should be preserved, and that distinct notice of it should be given to all the beneficiaries who are *sui juris*. The wishes and opinions of the tenants for life may properly be taken into consideration, so long as no undue favour is shown to them at the expense of the remaindermen (*b*).

[Effect of appropriation.]

Where an appropriation has been validly made it will be binding on the beneficiaries, who will alike share in any increment in value, and bear any loss arising from depreciation, of the investments of the severed fund (*c*), and thereafter there can be no community of loss or gain between appropriated legacies *inter se* as to either income or capital (*d*); nor can the trustees claim any right of indemnity for subsequent loss as against the general trust estate (*e*). But an appropriation by means of an investment on an unauthorised security, as, for instance, on an equitable mortgage effected by the executors, when the will authorised investments on legal mortgages only, cannot stand (*f*).

[Bequest of unascertained sum.]

Where the testator, instead of bequeathing a particular sum, directs the executors to set apart a sufficient sum on specified securities to answer a particular purpose, there can be no fund to which the powers of the Trustee Act, 1893, are applicable, until the directions of the will have been observed. Thus, where a testator empowered the trustees of his will to set apart and invest on any of the investments thereby authorised, such a sum as would be sufficient at the time of investment to satisfy an annuity, it was held that the trustees would not be justified in making an investment for that purpose in India 3½ per cent. stock, which was not one of the investments authorised by the will (*g*).]

[*Ex. gr.*, to provide an annuity.]

[(*a*) *Re Walker*, 59 L. J. Ch. 386.]

[(*b*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, 864, 878.]

[(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, 865, 878, citing Roper on Legacies, 4th ed. p. 942; *Re Waters*, W. N. 1889, p. 39, where Kay, J., referring to the authorities last cited, said that it was clear that where a deferred legacy was *bonâ fide* set apart by an executor, the legatees must take it "for better or worse," and his lordship added (though the words do not appear in the report), "If the security improves in value, so much the better; if it deteriorates the loss must be theirs; but the executors have full power to make the appropriation without coming to the Court for an authority so to do, and when it is done, it is final and conclusive, and binding upon everybody. That is the undoubted law." And see *Re Richardson*, (1896) 1 Ch. 512.]

[(*d*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, at p. 865, *per* Lord Selborne.]

[(*e*) *S. C.*]

[(*f*) *Re Waters*, *ubi sup.*]

[(*g*) *Re Owthwaite*, (1891) 3 Ch. 494. Where an annuity is a charge upon

Maintenance.

24. A trustee may expend sums of money for the *protection and safety*, or *support*, of a *cestui que trust* who is incapable of taking care of himself, but the more prudent course is to apply to the Court (*a*).

Out of interest.

25. If a *legacy* be left to an infant, and the Court, upon application, would, from the inability of the parent to support his child, order *maintenance* out of the *interest*, the trustee, should he make advances for that purpose without suit, would be allowed them in his account (*b*). In the case of *Andrews* v. *Partington* (*c*), Lord Thurlow refused to indemnify the trustee; but the authority of that decision has been repeatedly denied, and may be considered as overruled (*d*). And the maintenance of each year need not be confined to the interest of that year, but the trustee will be allowed in his accounts to set off the gross amount of the maintenance against the gross amount of the interest (*e*).

[Conveyancing Act, 1881.]

[Now by the 43rd sect. of the Conveyancing and Law of Property Act, 1881 (*f*), it is provided as follows:—

(1) "Where any property is held by trustees (*g*) in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property, or any part thereof, whether there is

the whole personal estate of a testator, it seems clear that the executor cannot affect the legatee's right to the entire annuity by any appropriation; Williams on Executors, 9th ed. p. 1259. Where an annuity is payable out of the clear residuary estate of a testator, the Court has jurisdiction, notwithstanding the opposition of the annuitant, to set apart a sufficient sum to answer the annuity, and pay the balance to the residuary legatees; *Harbin* v. *Masterman*, (1896) 1 Ch. (C.A.) 351.]

(*a*) *Duncombe* v. *Nelson*, 9 Beav. 211; and see *Chester* v. *Rolf*, 4 De G. M. & G. 798, and cases there cited; [and Simpson on Infants, 2nd ed. p. 261].

(*b*) *Sisson* v. *Shaw*, 9 Ves. 285; *Prince* v. *Hine*, 26 Beav. 634; [and for a consideration of the rules by which the Court is guided in granting maintenance to infants under its inherent jurisdiction, see Simpson on Infants, 2nd ed. pp. 261, *et seq.*].

(*c*) 3 B. C. C. 60.

(*d*) See *Sisson* v. *Shaw*, 9 Ves. 288; *Maberly* v. *Turton*, 14 Ves. 499; *Lee* v. *Brown*, 4 Ves. 369; *Ex parte Darlington*, 1 B. & B. 241; *Cotham* v. *West*, 1 Beav. 381.

(*e*) *Carmichael* v. *Wilson*, 3 Moll. 79; *Edwards* v. *Grove*, 2 De G. F. & J. 210; [and see *Re Wise*, (1896) 1 Ch. 281].

[(*f*) 44 & 45 Vict. c. 41.]

[(*g*) Where residue is bequeathed to an infant, the executor, when the estate is cleared and the residue ascertained, becomes trustee for the infant within the meaning of the section; *Re Smith*, 42 Ch. D. 302; an administrator *cum testamento annexo* may be a "trustee" within the meaning of this section; *Re Adams*, (1906) W. N. 220.]

any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(2) "The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise (*a*); but so that the trustees may at any time, if they think fit, apply those accumulations or any part thereof, as if the same were income arising in the then current year.

(3) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) "This section applies whether that instrument comes into operation before or after the commencement of this Act." The Act (*b*) repeals the corresponding section of Lord Cranworth's Act (*c*). [Lord Cranworth's Act.]

26. Upon the construction of the enactment of 1881, as of that for which it is substituted, various questions of difficulty have arisen. The consideration which first presents itself is as to the circumstances under which trustees can be said to hold property in trust for an infant in the manner indicated in the section. [Construction of Acts attended with difficulty.]

27. The corresponding section in Lord Cranworth's Act, the wording of which was very similar, was held to be confined to cases of absolute and contingent gifts, and not to apply to the case of a gift absolute in the first instance, but liable to be defeated in the event of the legatee not attaining twenty-one. In such a case the accumulations of income were held to belong to the infant's estate, notwithstanding his death under age (*d*). It may be doubted whether that case was not intended to be covered by the enactment, but it does not fall within the strict letter of it, and it would seem that no distinction can be drawn in this respect between the language of the corresponding sections in Lord Cranworth's Act and the Conveyancing Act of 1881. [Income of gift absolute in form but liable to be defeated.]

[(*a*) As to the meaning of these words see *Re Scott*, referred to *post*, p. 729.]

[(*b*) See s. 71.]

[(*c*) 23 & 24 Vict. c. 145, s. 26.]

[(*d*) *Re Buckley's Trusts*, 22 Ch. D. 583.]

[Income of contingent gift.]

28. Where the infant was entitled contingently on his attaining twenty-one, or on some event before his attaining that age, to a legacy carrying interest in the meantime, the power of maintenance in Lord Cranworth's Act applied (*a*), as does also the power under the Conveyancing Act; but where a further contingency is involved in the gift, as, in addition to attaining twenty-one, the contingency of surviving a particular person, the case does not come within either of the enactments, and neither the trustees nor the Court can apply the income for maintenance, and there is no obligation to accumulate (*b*).

[Contingent legacy not carrying interest.]

29. Another question which arises is, whether, under sect. 43 of the Conveyancing Act, an infant is entitled to maintenance out of the income of property to which he is entitled contingently on his attaining twenty-one, in a case where, independently of the section, he could never have become entitled to such income; as for instance in the case of a pecuniary legacy, given by a person not the parent or *in loco parentis*, to an infant contingently on his attaining twenty-one. By Lord Cranworth's Act, where an infant was contingently entitled to property, the trustees were empowered to apply towards his maintenance and education "the whole or any part of the income to which such infant might be entitled in respect of such property"; and it was held in *Re George* (*c*), that this power did not extend to the case of a contingent pecuniary legacy not carrying interest until the time of payment. In this state of the law, the Conveyancing and Law of Property Act, 1881, was passed, and sect. 43 omitted the words, "to which such infant might be entitled in respect of such property," but notwithstanding the variation in the language of the Act of 1881, it has been held by the Court of Appeal, affirming Kay, J., that the section does not apply to the case of a pecuniary legacy given by a person not a parent or *in loco parentis* to an infant contingently on his attaining twenty-one, followed by a residuary gift. Cotton, L.J., was of opinion that there is in such a case no property held in trust for an infant within the meaning of the section, until the time arrives for severing the legacy from the residue, *i.e.* until the infant attains twenty-one; while Fry, L.J., though expressing his assent to this view, preferred to rest his judgment on the ground

[(*a*) *Re Cotton*, 1 Ch. D. 232.]

[(*b*) *Re Judkin's Trusts*, 25 Ch. D. 743; see *Tuthill* v. *Tuthill*, (1902) 1 I. R. 429, where the Court appointed the trustees to be trustees for the purposes of s. 42 (*v. sup.* p. 716), so as to enable them in their discretion to apply the share of income and accumulations of their infant *cestui que trust* for his benefit.]

[(*c*) 5 Ch. D. (C.A.) 837.]

that the gift of residue which, independently of the section, carries the income accruing during the minority to the residuary legatee, is a sufficient expression of a contrary intention within sub-sect. 3, to take the case out of the Act (*a*).

From this and subsequent decisions, it appears that in considering whether the section is applicable where a legacy is contingent, it is necessary to ascertain in the first instance, upon the construction of the will (*b*), whether the infant, on the happening of the event, will become entitled to the interim income as well as to the capital. If he will not, then the section has no application. If he will, then by what has been described by the late Lord Justice Kay as "very arbitrary legislation" (*c*), income to which the infant may in event never become entitled is made by the section applicable for his maintenance. Upon the question of construction, it appears to be well settled, that where a legacy is given, by one who is not *in loco parentis*, to an infant *simpliciter* on the happening of a contingent event, the interim income accruing before the event happens does not pass (*d*), but that where the donor is *in loco parentis* to the infant, or the subject matter of the gift is residue (*e*), or is severed from the general estate for the benefit of the legatee, the income, on the happening of the event, passes with the capital, and the section is accordingly applicable (*f*). Such a severance is deemed to have taken place wherever a fund is directed to be invested and held by trustees on certain trusts, or is otherwise set apart for the benefit of the infant legatee (*g*), but where trustees were directed to "raise and pay" the legacies at a particular time, and upon the construction of the will it appeared that the direction was given for convenience of administration rather than the benefit of the legatees, it was held that there was no such severance (*h*). Though a legacy to an infant contingently on his attaining twenty-one bears interest from the testator's death, it is none the less contingent, and if the infant dies under twenty-one, the surplus income not applied for his maintenance does not pass to his representatives (*i*).

[Effect of the recent decisions.]

[(*a*) *Re Dickson*, 28 Ch. D. 291, 297; affirmed 29 Ch. D. (C.A.) 331.]

[(*b*) *Re Holford*, (1894) 3 Ch. (C.A.) 30, 49.]

[(*c*) *Re Holford*, (1894) 3 Ch. (C.A.) 30, 52.]

[(*d*) See *Re Clements*, (1894) 1 Ch. 665, 669; *Re Woodin*, (1895) 2 Ch. (C.A.) 309, 316, and cases there referred to.]

[(*e*) *Genery* v. *Fitzgerald*, Jac. 468; *Earl of Bective* v. *Hodgson*, 10 H. L. Cas. 656; 1 H. & M. 376; *Re Holford*, (*ubi sup.*).]

[(*f*) *Re Woodin*, (1895) 2 Ch. (C.A.) 309; *Kidman* v. *Kidman*, 40 L.J. Ch. 358; *Re Medlock*, 55 L. J. Ch. 738; 54 L. T. 828; *Johnson* v. *O'Neil*, 3 L. R. Ir. 476; *Re Clements*, (1894) 1 Ch. 665.]

[(*g*) *Re Woodin*, (1895) 2 Ch. (C.A.) 309, 317.]

[(*h*) *Re Inman*, (1893) 3 Ch. 518.]

[(*i*) *Re Bowlby*, (1904) 2 Ch. (C.A.) 685.]

Where there was a gift of residuary personal estate among a class of persons contingently on their attaining twenty-one, it was held by North, J., on the authority of a decision very briefly reported (*a*), that the whole income belonged exclusively to those members of the class who had attained that age at the time when it accrued, and that therefore there was no scope for the application of the section (*b*), but this decision was questioned (*c*), and has now been overruled by the Court of Appeal, and it has been held that in such a case, the members of the class as they respectively attain twenty-one take the income of their respective shares, and that the income of the shares of those who from time to time are infants is applicable for their maintenance under the section (*d*).

[Where property held for an infant for life.]

30. The section of the Conveyancing Act gives rise to this further question; the power applies to the case of "property held in trust for an infant for life," but the surplus accumulations are to be held "for the benefit of the person who ultimately becomes entitled to the *property* from which the same arise" (*e*). It has been thought to be difficult (*f*), without construing the word "property" in different senses in the same section, to attach any other meaning to these words than that the accumulations are to be added to and go with the corpus of the property, a construction which would have the effect of depriving an infant, who has an absolute life interest, of the income accrued during his minority, and not required for his maintenance.

However, in a case (*g*) where an infant was tenant for life of a share of residue, North, J., relying on the authority of *Re Buckley's Trusts* (*h*), held that on attaining her majority the infant became absolutely entitled to the accumulations of the past income of her share, and observed that he was by no means satisfied that the expression "the property from which the accumulations arise," did not refer to the income from which

[(*a*) *Furneaux* v. *Rucker*, W.N. (1897) 135. In *Re Woodin*, (1895) 2 Ch. (C.A.) 309, 318, Kay, L.J., expressed the hope that this case would not be cited again as an authority for anything.]

[(*b*) *Re Jeffery*, (1891) 1 Ch. 671; *Re Adams*, (1893) 1 Ch. 329.]

[(*c*) *Re Burton*, (1892) 2 Ch. 38.]

[(*d*) *Re Holford*, (1894) 3 Ch. (C.A.) 30; and see *Re Jeffery*, (1895) 2 Ch. 577.]

[(*e*) Similar words occur in Lord Cranworth's Act, and their occurrence formed a ground for the decision in *Re Buckley's Trusts*, 22 Ch. D. 583, where Fry, J., observed that if he were to extend that Act to a defeasible legacy he should deprive a person defeasibly entitled to the principal, of the interest he would otherwise be entitled to.]

[(*f*) The difficulty may have arisen from the language of Lord Cranworth's Act (which did not apply to a life interest), having been copied without the appropriate modification, and see *Re Humphreys*, (1893) 3 Ch. (C.A.) 1, 8.]

[(*g*) *Re Wells*, 43 Ch. D. 281.]

[(*h*) 22 Ch. D. 583.]

the accumulations had arisen, that it was not necessary to say that "property" meant capital exclusively (*a*), and that "the object of the Conveyancing Act was to shorten and simplify conveyances, and it was not intended to alter the devolution of property"; but in a recent case in the Court of Appeal, where there was a similar gift of an immediate vested life interest in a share of residue, the Court, while leaving the point of construction suggested by North, J., open until the necessity for deciding it arose, and acquiescing in the view that the statutory provision was not intended to alter the rights of the infant, preferred to base their decision on the ground that the terms of the gift showed such a contrary intention within sub-sect. 3 of sect. 43 as to preclude any conversion of the income given to the infant into capital (*b*). In the most recent case on the subject it was held that the words of sub-section 2 are to be construed as equivalent to "shall hold those accumulations for the benefit of the person who in the events which happen becomes entitled to the property (namely the income) from the accumulation of which the accumulations arise," and therefore a daughter, whose share is to be retained on trust for her for life, and afterwards for her children, is entitled to the accumulations of income existing when her share becomes vested in her on her attaining twenty-one (*c*); but this decision has been disapproved by the Court of Appeal, and it has been held that these words mean "the property the income arising from which has been accumulated," so that if the contingent legacy is settled, the surplus income and accumulations thereof form an accretion to the original legacy, and the tenant for life, on the happening of the contingency, is entitled only to the interest during his life arising from the aggregate amount (*d*).

[Past maintenance.]

31. The opinion has been expressed that under the recent enactment trustees have a discretionary power to apply past accumulations of income in payment for past maintenance (*e*).

[Contrary intention.]

32. A direction to trustees to accumulate the income of the shares of children who are entitled contingently on their attaining twenty-one, or being daughters on attaining that age or

[(*a*) The suggested construction seems to be not inconsistent with the natural import of the words "property," "income," and "accumulations," and would, if it could be adopted, make the section easy of application, inasmuch as the accumulations would simply follow the destination, whatever it might be, of the unspent income from which they had arisen.]

[(*b*) *Re Humphreys*, (1893) 3 Ch. (C.A.) 1.]

[(*c*) *Re Scott*, (1902) 1 Ch. 918.]

[(*d*) *Re Bowlby*, (1904) 2 Ch. (C.A.) 685.]

[(*e*) *Re Pitt's Settlement*, W. N. 1884, p. 225; but see *S. C.* Ib. p. 242, showing that the question did not in fact arise.]

marrying, and to pay the same to them as and when their presumptive shares become payable, is not the expression of a contrary intention within sub-sect. 3 of sect. 43 (*a*).

[Concurrent powers under the recent Act.]

33. It is to be observed that cases may easily arise in which the trustees would be in a position to exercise either the powers of sect. 42, or those of sect. 43 of the Conveyancing Act, as for instance if under an instrument coming into operation since the 31st December, 1881, real estate were vested in them in trust for an infant for life, and the trustees had a power of sale or of consenting to the exercise of a power of sale.

Having regard to the recent decisions, it is not certain that any case can arise in which the ultimate destination of accumulations of income under the two sections would be different, but sect. 42 contains provisions applicable to the case of a female infant who marries while an infant, which are not to be found in sect. 43. It is conceived that wherever the infant is beneficially entitled to the possession of land, the income of which is received by the trustees, they will be treated as having entered into possession under sect. 42, but that other cases, where the trustees merely receive the income as legal owners, and are not called upon to exercise any of the powers of sect. 42, must be regarded as governed by sect. 43.]

Maintenance out of principal.

34. Where the amount of an infant's legacy is inconsiderable, as 100*l.*, the Court would, in the absence of other means, direct maintenance to the child out of the *principal* itself (*b*); the executor therefore, who, under similar circumstances, but without the authority of the Court, breaks in upon the capital, would not be liable, on the *cestui que trust's* coming of age, to account for the

[(*a*) *Re Thatcher's Trusts*, 26 Ch. D. 426; and see *King Harman* v. *Cayley*, (1899) 1 I. R. 39.]

(*b*) *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Swift*, Ib. 575; *Re Mary England*, Ib. 499; *Harvey* v. *Harvey*, 2 P. W. 21; *Ex parte Hays*, 3 De G. & Sm. 485. [In *Re Howarth*, 8 L. R. Ch. App. 415, the Lords Justices held that the Court had jurisdiction to order maintenance, where there were no other means, out of the *corpus* of an infant's freehold estate; and in *De Witte* v. *Palin*, 14 L. R. Eq. 251, V. C. Malins allowed maintenance to be raised by a charge on reversionary property; but the decision in *Re Howarth* was rested upon the ground that where a judgment can be obtained against an infant for necessaries, the Court can charge his real estate with the amount so recoverable; and in *Re Hamilton*, 31 Ch. D. (C.A.) 291, the Court of Appeal held that there was no jurisdiction to charge maintenance on a reversionary estate tail, inasmuch as such an estate could not be delivered in execution, and the principle of *Re Howarth* did not apply to it; and a similar view was also taken in *Cadman* v. *Cadman*, 33 Ch. D. (C.A.) 397, where it was doubted whether the Court was warranted in making the order which was made in *Re Howarth*; and these cases have recently been followed; *Re Hambrough*, (1909) 2 Ch. 621.]

expenditure (*a*). But where payments of this kind, which were not strictly authorised, were made by executors or trustees, and the propriety of them was questioned in a suit, and there was a deficiency of assets, the costs of suit had priority over the allowances to the executors or trustees (*b*). Where the legacy was not more than 300*l*., Sir W. Grant determined that the trustee had exceeded his duty, and said his *impression* was that the rule had been never to permit trustees of their own authority to break in upon the capital (*c*); but the case of *Barlow* v. *Grant*, which is clearly to the contrary, must have escaped his Honour's recollection (*d*). The *general rule* is, however, not to break into capital for maintenance, and where the legacy is considerable, as 1000*l*., or the like, as the Court itself would most probably not order the application of part of the principal, the trustee would not be safe in exceeding of his own authority the amount of the interest (*e*).

Maintenance where father alive.

35. Where the father of an infant is alive, trustees should, in granting maintenance, bear in mind that the Court never allows a *father* maintenance out of his children's property without a previous inquiry as to his ability to maintain them himself (*f*). The term *ability*, however, is relative to the position of the father and children; and maintenance has been allowed to a father who had 6000*l*. a year (*g*). And an express declaration in the instrument of trust, or a previous contract, as in the case of a marriage settlement to which the father is a party, may confer on the father a right to have maintenance for his children out of the settlement funds (*h*). But the decisions in this respect have gone as far as can be justified upon principle (*i*).

[In exercising their discretion trustees should consider what is most for the benefit of the infant, and they should not be deterred from doing what is for the infant's benefit, because it is also a

(*a*) *Barlow* v. *Grant*, 1 Vern. 255; *Carmichael* v. *Wilson*, 3 Moll. 79; *Bridge* v. *Brown*, 2 Y. & C. C. C. 181, 189.

(*b*) *Robinson* v. *Killey*, 30 Beav. 520.

(*c*) *Walker* v. *Wetherell*, 6 Ves. 473.

(*d*) See also *Prince* v. *Hine*, 26 Beav. 636.

(*e*) *Barlow* v. *Grant*, 1 Vern. 255, *per* Lord Guildford; *Davies* v. *Austen*, 1 Ves. jun. 247; *S. C.* 3 B. C. C. 178; *Beasley* v. *Magrath*, 2 Sch. & Lef. 35.

(*f*) See 23 & 24 Vict. c. 145, s. 26; [since repealed, and its place supplied by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43].

(*g*) *Jervoise* v. *Silk*, 1 G. Coop. 52; *Ex parte Williams*, 2 Coll. 740; *Culbertson* v. *Wood*, 5 I. R. Eq. 23, see 41.

(*h*) *Mundy* v. *Lord Howe*, 4 B. C. C. 223; *Meacher* v. *Young*, 2 M. & K. 490; *Stocken* v. *Stocken*, 4 Sim. 152; 2 M. & K. 489; 4 M. & Cr. 95; *White* v. *Grane*, 18 Beav. 571; *Ransome* v. *Burgess*, 3 L. R. Eq. 773; *Newton* v. *Curzon*, 16 L. T. N.S. 696; [*Malcolmson* v. *Malcolmson*, 17 L. R. Ir. 69].

(*i*) *Thompson* v. *Griffin*, Cr. & Ph. 321, *per* Lord Cottenham; [*Wilson* v. *Turner*, 22 Ch. D. (C.A.) 521;] and see *Re Kerrison's Trusts*, 12 L. R. Eq. 422, the case of a voluntary settlement.

benefit to the father, though on the other hand they must not act with a view to the father's benefit apart from that of the infant (*a*).

Where there was a power of maintenance in the usual form in the discretion of the trustees, and the trustees, without exercising any discretion in the matter, paid the whole income to the father of the infant, it was held that the father's estate must account for the income received by him (*b*).

Where the father had borrowed money to enable him to keep his infant children at school, and was unable to repay the debt, the Court allowed him to be recouped the amount so borrowed as an allowance for past maintenance (*c*).]

After death of father.

36. It was formerly much doubted whether after the death of the father maintenance should be granted to the *mother*, so long as she continued a *widow*, without an inquiry as to her ability (*d*). But it was ruled that *where she had married again* there should be no inquiry as to ability, the second husband being, it was said, under no liability to maintain his wife's children (*e*). It has been since settled that no inquiry as to the mother's ability will be directed even during her widowhood (*f*); and as a widow is undoubtedly liable at law to maintain her children (*g*), the direction of the inquiry cannot be regarded as depending upon the *legal liability*. It would seem to follow that the enactment rendering a husband liable to maintain his wife's children by a former marriage (*h*) ought not to make (and it is believed that it has not in fact made) any alteration in the practice of the Court of granting maintenance where the mother has married again, without any inquiry as to ability.

[Where accumulation directed.]

[37. Where a testator left property to the value of 10,000*l.* a year to be accumulated for twenty-one years, and directed that the accumulations should be laid out in the purchase of lands which, after the expiration of the twenty-one years, were to be held for A. for life, and after his death for his sons in strict settlement, and A.'s income was insufficient to enable him to

[(*a*) *Re Lofthouse*, 29 Ch. D. (C.A.) 921, 932.]

[(*b*) *Wilson* v. *Turner*, 22 Ch. D. (C.A.) 521; and see *Re Byrant*, (1894) 1 Ch. 324.]

[(*c*) *Davey* v. *Ward*, 7 Ch. D. 754.]

(*d*) As to the mother's right to be recouped for past maintenance of a child, see *Re Cottrell's Estate*, 12 L. R. Eq. 566.

(*e*) *Billingsly* v. *Critchet*, 1 B. C. C. 268.

(*f*) *Douglas* v. *Andrews*, 12 Beav. 310; and see the note, p. 311.

(*g*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6; Poor Law Amendment Act, 1834 (4 & 5 W. 4. c. 76), s. 56.

(*h*) 4 & 5 W. 4. c. 76, sect. 57.

bring up and educate his infant sons in a manner suitable to their prospective positions in life, V.C. Malins allowed him 2700*l.* a year out of the income of the property, with liberty to apply for an increased allowance, if necessary, when the children grew older (*a*); and this decision was followed by Pearson, J. (*b*). But in a case in Ireland where the circumstances were similar, the Court refused to follow the decision of V.C. Malins, and held that where there is an imperative trust to accumulate, it is the duty of the Court to carry out the testator's intention, and that the Court has no discretion to allow maintenance out of the income (*c*).

A direction by a testator that a specified yearly sum shall be allowed for the maintenance and education of an infant tenant in tail, and that surplus income shall be accumulated, is not necessarily to be taken as excluding an intention that the estate should be kept up and the infant maintained suitably to his position, and, the estate being considerable, a yearly sum very much larger than the specified sum may be allowed for keeping up the estate and maintenance of the infant (*d*).

[Interests of third parties protected.]

38. Where an accumulation has been directed by a testator, and the Court allows maintenance out of the accumulations, the order should be framed so as to protect the interests of third parties, by directing the interests of the infants in any legacy or share of residue to be held as a security for recouping any diminution in the accumulations (*e*).

Where an infant was entitled, contingently on her attaining twenty-one or marrying, to a large property, the Court sanctioned a scheme for providing for her past and future maintenance, by effecting a policy of assurance payable on her death before either attaining twenty-one or marrying under that age, and mortgaging the policy and charging the infant's contingent interest to secure the necessary advances and compound interest, but it was expressly provided that the interest of any person other than the infant was not to be affected (*f*).]

[(*a*) *Havelock* v. *Havelock*, 17 Ch. D. 807; and see *Bennett* v. *Wyndham*, 23 Beav. 521; and *S. C.* 4 De G. F. & J. 259.]

[(*b*) *Re Collins*, 32 Ch. D. 229.]

[(*c*) *Kemmis* v. *Kemmis*, 13 L. R. Ir. 372; affirmed 15 L. R. Ir. 90; following *Shaw* v. *M'Mahon*, 8 Ir. Eq. R. 584; and see *Re Smeed*, 54 L. T. N.S. 929; *Re Alford*, 32 Ch. D. 383; *King Harman* v. *Cayley*, (1899) 1 I. R. 39.]

[(*d*) *Re Walker*, (1901) 1 Ch. 879.]

[(*e*) *Re Colgan*, 19 Ch. D. 305; see this case, and *Re Arbuckle*, 2 Set. on Dec. 6th ed. 1002, for form of order providing for the recoupment.]

[(*f*) *Re Bruce*, 30 W. R. 922; and see *Re Tanner*, 53 L. J. N.S. Ch. 1108; 51 L. T. N.S. 507, as to adopting a similar course for the security of the other persons interested where an advance is required for an infant whose interest is only contingent.]

Advancement out of capital.

39. A part of the capital may be sunk by a trustee without the direction of the Court for the *advancement* of a child, where the same sums if expended for *maintenance* would not have been allowed (*a*). [But as an "advancement" is merely a payment before the time fixed for the obtaining of an absolute interest by the beneficiary, a power of advancement will not, in the absence of express words, be construed to authorise an advance out of corpus, where by the terms of the instrument the beneficiary can never become entitled to a share of corpus (*b*).]

Advancement when there is a limitation over.

40. A trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the Court itself could not make an order to that effect.

Thus in *Lee* v. *Brown* (*c*), where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under that age the testatrix gave the legacy to his brother and sister equally, Lord Alvanley said: "It certainly was not competent under this

(*a*) *Swinnock* v. *Crisp*, Freem. 78; *Walker* v. *Wetherell*, 6 Ves. 477; and see *Ex parte M'Key*, 1 B. & B. 405. [As to what purposes will fall under the description of advancement, see *Boyd* v. *Boyd*, 4 L. R. Eq. 305; *Roper-Curzon* v. *Roper-Curzon*, 11 L. R. Eq. 452; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Taylor* v. *Taylor*, 20 L. R. Eq. 155; Simpson on Infants, 2nd ed. pp. 190, 191, 324 *et seq.*] In *Taylor* v. *Taylor* an advancement by way of *portion* was said to be something given by a parent to establish his child in life, a provision for him, and not a casual payment; [and this has been followed in *Re Scott*, (1903) 1 Ch. (C.A.) 1, see *ante*, p. 479]. Under portions would be ranked the following, viz. sums advanced on *marriage* (*Lloyd* v. *Cocker*, 27 Beav. 643), on setting up a child in *business* or putting him into a *profession* (*Warr* v. *Warr*, Prec. Ch. 213; *Roper-Curzon* v. *Roper-Curzon*, 11 Eq. 452), [paying an apprenticeship fee to a chartered accountant, *Curtis* v. *Curtis*, (1901) 1 I. R. 374], buying the *goodwill* of a business, and giving *stock-in-trade*, or supplying *further capital* for carrying on the business (*Gilbert* v. *Wetherall*, 2 S. & St. 254; *Taylor* v. *Taylor*, 20 L. R. Eq. 155), or paying the *entrance fee to an Inn of Court* with a view to the Bar (*Boyd* v. *Boyd*, 4 L. R. Eq. 305), or buying a *commission* and providing the *outfit* (*Taylor* v. *Taylor*, *sup.*; *Boyd* v. *Boyd*, *sup.*). So a *large sum* given to a child in *one payment* might be presumed, in the absence of evidence, to be an advancement by way of portion. But the qualities of a portion would not attach to *small sums* paid by a father to a child, whether an infant or adult (*Morris* v. *Burroughs*, 1 Atk. 403; *Pusey* v. *Desbouverie*, 3 P. W. 317, note (*o*); *Re Peacock's Estate*, 14 Eq. 236; *Watson* v. *Watson*, 33 Beav. 574), or to *temporary assistance* in the discharge of his debts, or to payment of his *travelling expenses*, as a passage to India, or to the payment of a *fee to a special pleader* (*Taylor* v. *Taylor*, *sup.*), which would come rather under preliminary education than advancement. [But in the case of *Re Blockley*, 29 Ch. D. 250, Pearson, J., dissented from the view that a sum given by a father to his son to enable him to pay his debts could not be treated as an advancement. And as to advances by way of portion under the Statute of Distributions, see Simpson on Infants, 2nd ed. p. 190.]

[(*b*) *Re Aldridge*, 55 L. T. N.S. 554, 556.]

(*c*) 4 Ves. 362.

trust to the executor, nor could he, *if he had applied*, have obtained permission from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for if it had been such a case that the Court would have authorised the act that was done, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application" (*a*). But where an infant was entitled on a contingency, and at a certain time which had not arrived there was a power of advancement, and the trustee took upon himself the risk as against the person entitled if the contingency did not happen, and applied part of the capital for the advancement of the infant, he was allowed it in his account as between him and the infant, who in the event became entitled (*b*).

Where there are cross limitations amongst the children.

41. And where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry*, a trustee, who had paid a premium on the apprenticeship of a child who died under twenty-one, was allowed it by the Court (*c*). The case turned upon the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal chance of survivorship, the individuals of the class will be ordered maintenance even before their shares in the fund have become actually vested (*d*). This power is exercised by the Court, but cannot be exercised by trustees without the authority of the Court, nor can the Court itself make such an order in a summary way without the institution of a suit (*e*).

[Power of advancement.]

[42. Where there is a power of advancement, the question of the propriety of any particular advance must necessarily depend on the wording of the power, and the extent of the discretion conferred on the trustees. With this discretion, as in the

(*a*) 4 Ves. 369.

(*b*) *Worthington* v. *M'Craer*, 23 Beav. 81; [and for instances in which advances have been allowed in the absence of a power, see Simpson on Infants, 2nd ed. p. 325].

(*c*) *Franklin* v. *Green*, 2 Vern. 137. That the limitation over was for the benefit of the children is not mentioned in the report, but appears from Reg. Lib.

(*d*) See Rop. Leg. Chap. XX. s. 5; *Greenwell* v. *Greenwell*, 5 Ves. 194; *Cavendish* v. *Mercer*, cited Ib.; *Brandon* v. *Aston*, 2 Y. & C. C. C. 30; [Simpson on Infants, pp. 282, 326].

(*e*) *Re Breeds' Will*, 1 Ch. D. 226; [and see *Re Lofthouse*, 29 Ch. D. (C.A.) 921, 929].

analogous case of a power of maintenance (*a*), the Court will not readily interfere (*b*), though where the trustees fail to exercise the power, an inquiry has been directed as to the proper exercise of it (*c*). The trustees in exercising the discretion should, of course, regard the benefit of the *cestui que trust* as the primary consideration (*d*), but where it is clear that the proposed application will be beneficial to him, considerable latitude as to the mode of application may be permissible (*e*).

[Consent of tenant for life.]

Where the power is exercisable with the consent of the tenant for life, and the tenant for life becomes a bankrupt, his power of consenting is not extinguished, but can only be exercised with the consent of his trustee in bankruptcy acting under the directions of the Court of Bankruptcy (*f*).]

General power of advancing tenant for life.

Where trustees had a power to apply a moiety of a trust fund in or towards the preferment or advancement of the tenant for life, or *otherwise for his benefit*, in such a manner as they should in their discretion think fit, it was held that they might apply the moiety in payment of the debts of the tenant for life, the interest of which absorbed nearly the whole of his income, and the principal of which he was unable to pay out of his own resources (*g*). [So a power of applying the capital for the benefit and advancement in the world of the tenant for life, coupled with words showing that the power of advancement was a large one, has been held to justify applications of the trust funds for the benefit of the tenant for life which were not strictly advancements (*h*).

[Implied powers where no estate in land.]

43. Where powers of advancement and maintenance out of income of land were given to trustees, but no estate in the land itself, the Court implied powers of entry and revocation of uses

[(*a*) *French* v. *Davidson*, 3 Mad. 396; *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837-38, 472; *Brophy* v. *Bellamy*, 8 Ch. 798; *Re Bryant*, (1894) 1 Ch. 324; and other cases cited in s. 2 of this chapter.]

[(*b*) *Edgeworth* v. *Edgeworth*, Beatt. 328; *Re Brittlebank*, 30 W. R. 99.]

[(*c*) *Lewis* v. *Lewis*, 1 Cox, 162; *Robinson* v. *Cleator*, 15 Ves. 526; *Kilvington* v. *Gray*, 10 Sim. 293; and see *Re Sanderson*, 3 K. & J. 497.]

[(*d*) *Simpson* v. *Brown*, 13 W. R. 312; 11 L. T. N.S. 593.]

[(*e*) Thus in the case of a married daughter, an advance for setting up her husband in business has been allowed, *Phillips* v. *Phillips*, Kay, 40; *Re Kershaw*, 6 Eq. 322; but not for payment of the husband's debts, *Talbot* v. *Marshfield*, 3 Ch. 622; and see *Molyneux* v. *Fletcher*, 67 L. J. Q. B. 392 (where the husband was indebted to the trustee who was pressing for payment); and for other instances, see Simpson on Infants, 2nd ed. p. 327, and as to the mode in which applications to the Court for maintenance and advancement are to be made, Ib. p. 330.]

[(*f*) *Re Cooper*, 27 Ch. D. 565.]

(*g*) *Lowther* v. *Bentinck*, 19 L. R. Eq. 166; and see *Re Breeds' Will*, 1 Ch. D. 226; [*Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Re Price*, 34 Ch. D. (C.A.) 603, at p. 605].

[(*h*) *Re Brittlebank*, 30 W. R. 99.]

sufficient to enable them to execute the powers of advancement and maintenance (*a*).]

Debts barred by the Statute of Limitations.

44. An executor has never been held responsible for paying a debt due and owing from the testator's estate, the remedy for which has been barred by the Statute of Limitations; and upon the same principle he may retain his own debt though barred (*b*). But an executor is not at liberty to pay such a debt after a decree for the administration of the testator's estate, for from that time any other creditor, or even a legatee, specific, pecuniary, or residuary, may plead the statute in taking the accounts (*c*), except to the debt of a plaintiff in a creditor's suit, to which debt the defendant, the executor, did not plead the statute by his statement of defence, and on the basis of which the decree has been made (*d*). [Nor may an executor pay such a debt after a claim by the creditor in an administration action has been dismissed on the ground that the debt is barred by statute (*e*).] If after a decree neither the executor nor the parties beneficially interested before the Court plead the statute, the *Court* will not set up the statute on behalf of absent parties, but if the *executor* omits to plead the statute, it is at his own risk (*f*).

[Retainer of such debt not assisted by Court.]

[The Court will not assist a legal personal representative to retain a statute-barred debt, and where, by reason of the length of time which had elapsed before representation was taken out, an inquiry was directed in the presence of the representative as to the person entitled to a fund belonging to the deceased (*g*), the Court declined to pay the fund to the representative in order to enable him to exercise his right of retainer (*h*).

[Principle not to be extended.]

And as the principle of these cases, being an exception to the general rule that it is the duty of an executor to protect

[(*a*) *Dean* v. *Dean*, (1891) 3 Ch. 150.]

(*b*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166; *Hunter* v. *Baxter*, 3 Giff. 214; *Dring* v. *Greetham*, 1 Eq. Rep. 442; *Louis* v. *Rumney*, 4 L. R. Eq. 451; [*Midgley* v. *Midgley*, (1893) 3 Ch. 282; *Trevor* v. *Hutchins*, (1896) 1 Ch. (C.A.) 844].

(*c*) See *Fuller* v. *Redman*, 26 Beav. 614; *Shewan* v. *Vanderhorst*, 1 R. & M. 347; 2 R. & M. 75; *Dring* v. *Greetham*, 1 Eq. Rep. 442; [*Re Wenham*, (1892) 3 Ch. 59].

(*d*) *Adams* v. *Waller*, 35 L. J. N.S. Ch. 727; 14 W. R. 789; 14 L. T. N.S. 727; *Fuller* v. *Redman*, (No. 2), 26 Beav. 614; *Briggs* v. *Wilson*, 5 De G. M. & G. 12; *S. C.* 2 Eq. Rep. 153; *Ex parte Dewdney*, 15 Ves. 496. [In *Re Lacey*, (1907) 1 Ch. 330, persons in the position of *cestuis que trust* of specifically devised real estate were held to come within the exception to this rule given by Turner, L.J., in *Briggs* v. *Wilson* (*sup.*), and so to be entitled to plead the statute against the plaintiff.]

[(*e*) *Midgley* v. *Midgley*, (1893) 3 Ch. 282.]

(*f*) *Alston* v. *Trollope*, 2 L. R. Eq. 205; *S. C.* 35 Beav. 466; and see *Dring* v. *Greetham*, 1 Eq. Rep. 442.

[(*g*) According to the principle of *Loy* v. *Duckett*, Cr. & Ph. 305, see *ante*, p. 566.]

[(*h*) *Trevor* v. *Hutchins*, (1896) 1 Ch. (C.A.) 844.]

the estate against demands which cannot be lawfully enforced, is anomalous, it will not be extended (*a*)].

Promise of subscription.

45. It sometimes happens that the deceased made some promise, written or verbal, to subscribe a certain sum for the promotion of some "charitable or public purpose." If nothing has been done in consequence of such promise, the executor or administrator must treat the promise as voluntary, and therefore null. [It has been said, and some authorities have been thought to lend countenance to the view, that if] other persons have acted on the faith of the promise, and would suffer loss if it were not observed, the executor or administrator would be justified in giving it effect (*b*). [But in a recent case where a testator promised to give 20,000*l.* to the Congregational Union in five annual instalments, and having paid three instalments, died, leaving the remaining instalments unpaid and unprovided for, and the Union had incurred liabilities in consequence of the promise, it was, nevertheless, held that there was no enforceable contract (*c*).

[When trustees may apply under Settled Estates Act.]

46. If an estate is vested in trustees, and there is not for the time being any beneficial owner of the rents and profits, the trustees are the proper persons to apply to the Court under the 23rd section of the Settled Estates Act, 1877, to exercise the powers conferred by the Act (*d*).]

Power to release or compound debts.

47. A trustee may, under circumstances, release or compound a debt (*e*). But if a trustee release or compound a debt without some sufficient ground in justification (*f*), or if he sell the debt for a grossly inadequate consideration (*g*), he will clearly be answerable to the *cestuis que trust* for the amount of the *devastavit*.

Lord Cranworth's Act.

Executors under wills *executed after the 28th August*, 1860, were expressly authorised "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they should think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever

[(*a*) *Midgley* v. *Midgley*, (1893) 3 Ch. 282, 299; *Re Rownson*, 29 Ch. D. 358, where it was held that an executor is bound to plead the Statute of Frauds.]

(*b*) See *Cooper* v. *Jarman*, 3 L. R. Eq. 98; *Baxter* v. *Gray*, 3 Man. & G. 771; *Shallcross* v. *Wright*, 12 Beav. 558.

[(*c*) *Re Hudson*, 33 W. R. 819.]

[(*d*) *Vine* v. *Raleigh*, 24 Ch. D. 238.]

(*e*) *Blue* v. *Marshall*, 3 P. W. 381; and see *Ratcliffe* v. *Winch*, 17 Beav. 216; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

(*f*) *Jevon* v. *Bush*, 1 Vern. 342; *Gorge* v. *Chansey*, 1 Ch. Rep. 125; *Wiles* v. *Gresham*, 5 De G. M. & G. 770. A trustee is not liable for omitting to compound; *Ex parte Ogle*, 8 L. R. Ch. App. 715, *per Cur.*

(*g*) *Re Alexander*, 13 Ir. Ch. Rep. 137.

relating to the estate of the deceased, without being responsible for any loss to be occasioned thereby" (*a*). [But this section has been repealed, and its place is now supplied by the Trustee Act, 1893 (*b*), which as to executorships and trusts constituted or created either before or after the commencement of the Act, provides by sect. 21, that "an executor or administrator (*c*) may pay or allow any debt or claim on any evidence that he thinks sufficient"; and that "an executor or administrator, or two or more trustees, acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust," and may execute and do all such releases and things as may seem expedient without being responsible for any loss occasioned by anything done in good faith. But the section is subject to any contrary intention expressed in the instrument creating the trust. [Trustee Act, 1893.]

In exercising the powers of this section in a case where there are several trustees, it is conceived that *all the trustees* must act together, except in cases in which, independently of the section, a majority of the trustees are by law capable of binding the minority (*d*). It was not the object of the section to enable some of the trustees to act without the concurrence of their co-trustees.

It will be observed that the powers of this section are exercisable by a sole acting trustee only in cases where a sole trustee is by the instrument, if any, creating the trust "authorised to execute the trusts and powers thereof," but by the 22nd section (*e*), as to trusts created by instruments coming into operation after the 31st December, 1881, any trust or power vested in two or more trustees jointly, in the absence of a contrary intention in the instrument creating the trust or power, may be exercised or

(*a*) 23 & 24 Vict. c. 145, s. 30. [This section was held not to be confined to claims in the nature of debts, but to extend to claims of legatees; *Re Warren*, 53 L. J. N.S. Ch. 1016; 51 L. T. N.S. 561; 32 W. R. 916.]

[(*b*) 56 & 57 Vict. c. 53, s. 21, reproducing s. 37 of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41.]

[(*c*) The words "or administrator" were not in the Conveyancing Act.]

[(*d*) As to a majority binding a minority in charity trusts, see *ante*, pp. 635, 642; and see *post*, p. 747.]

[(*e*) Reproducing s. 38 of the Act of 1881.]

performed by the survivor for the time being, and it seems to follow that in the case of trusts falling within this section the powers of sect. 21 may be exercised by a sole surviving trustee.

This enactment has largely extended the powers of executors and trustees, and it would seem that in future the only question will be whether the executors or trustees have acted in good faith in relation to any of the matters authorised by the section.

[Discretion of executors.]

Independently of the enactment, executors have a discretion whether they will press a debtor for payment, and will not be held liable for wilful neglect or default if they have exercised their discretion honestly and fairly in giving time to a debtor, although loss may result from the delay (*a*); and it has recently been held that, in a proper case, it is competent to an executor to compromise the claim of his co-executor against the estate (*b*).]

Settlement with one residuary legatee.

48. Executors and trustees of a will, when they have discharged the funeral and testamentary expenses, debts and legacies, may come to a final account with any of the residuary legatees, [including one of themselves (*c*)] separately, and if such residuary legatee be paid only what is his fair share at the time, he will not be made to account to the other residuary legatees, if the undistributed part afterwards become depreciated or lost (*d*). [And it is competent for an executor or trustee to appropriate a mortgage belonging to the testator to a legatee of a share of residue in respect of his share, and such an appropriation, if made *bonâ fide*, will stand, though the legatee's legal title to the mortgage has not been completed by actual transfer (*e*). Where there is a trust for sale and conversion, the principle upon which this right of appropriation is based is that the executors and trustees have power to sell the particular asset to the legatee and to set off the purchase-money against the legacy; and the doctrine is not confined to pure personal estate, but extends to leaseholds, and, it would seem, to real estate which is subject to a trust for sale (*f*).]

Appropriation of residue.

49. Where the residue consists of a great variety of securities, the question arises whether the trustees, in the absence of any special power, can *virtute officii*, where infants are concerned, divide the residue by appropriating some securities to one residuary legatee and other securities to another, but so that

[(*a*) *Re Owens*, 47 L. T. N.S. 61.]

[(*b*) *Re Houghton*, (1904) 1 Ch. 622; but it was intimated that in such a case an executor would be well advised if he came to the Court for directions.]

[(*c*) *Re Richardson*, (1896) 1 Ch. 512.]

(*d*) *Peterson* v. *Peterson*, 3 L. R. Eq. 111; [*Re Winslow*, 45 Ch. D. 249; *Re Lepine*, (1892) 1 Ch. (C.A.) 210.]

[(*e*) *Re Lepine*, (1892) 1 Ch. (C.A.) 210; and see *Re Nickels*, (1898) 1 Ch. 630.]

[(*f*) *Re Beverly*, (1901) 1 Ch. 681.]

the distribution is a fair one according to the market price of the day of the funds so appropriated. [It has been held by Stirling, J., that trustees, acting fairly in the administration of the trust, do possess such a power (*a*); but in any case of difficulty it will be safer for them to resort to the Court, and obtain its sanction to the appropriation in the presence of parties separately representing the interests of the infants.] Where trustees are directed to invest the infants' share on any particular securities, they might, it would seem, accept securities of the nature prescribed at the market price, as the transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees [might be justified in turning] the whole of the irregular species of property into money, and dividing the proceeds.

[Where a testator directed sale and conversion of his estate, and empowered his trustees to postpone the sale and conversion and payment of legacies (which were numerous and many of them to infants), and declared that all legacies not paid within a year from his death should carry interest at 4 per cent., it was held that the trustees could not free the residue by setting apart proper securities to answer the legacies to infants, but could pay the legacies into Court under sect. 42 of the Trustee Act, 1893 (*b*), whereupon the clause as to interest would cease to operate (*c*).

[Appropriation under Land Transfer Act, 1897.]

By the Land Transfer Act, 1897 (*d*), sect 4, sub-s. 1, the personal representatives of a person dying on or after 1st January, 1898, are empowered in the absence of any express provision to the contrary contained in the will of the deceased person, with the consent of the person entitled to any legacy given by the deceased person, or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, to appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and for that purpose to value, in accordance with the prescribed provisions, the whole or any part of the property of the deceased person in such manner as they think fit; but it is provided that, before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and

[(*a*) *Re Nickels*, (1898) 1 Ch. 630.]
[(*b*) See *ante*, p. 424 *et seq.*]
[(*c*) *Re Salaman*, (1907) 2 Ch. 46.]
[(*d*) 60 & 61 Vict. c. 65.]

appropriation is to be conclusive save as otherwise directed by the Court. This enactment applies as well to personal as to real estate, but it has not taken away from executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for sale and conversion (*a*).]

Release of equity of redemption.

50. Trustees of an *equity of redemption* of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure suit, the cost of which, so far as incurred by themselves, would fall upon the trust estate.

Whether trustees who are mortgagees can release part of the land in mortgage.

51. Where trustees are *mortgagees* they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would, of course, be a gross breach of trust to deteriorate the security. But suppose the value of the part left in mortgage to be (say) double the amount of the debt, may the trustees release the residue? It is presumed that trustees can never justify the abandonment of any part of the security on the mere ground of consulting the convenience of the mortgagor; and they must be prepared to show that the act was calculated under the circumstances to promote the interest of the *cestuis que trust.* But if the mortgagor be ready to pay off the mortgage on a transfer of the security, unless the trustees will consent to release, and the existing mortgage, even when confined to the narrower parcels, is a clearly beneficial one, and the value still abundantly ample, the trustees would surely incur no responsibility by acceding to the arrangement (*b*). The prevailing opinion of conveyancers appears to be that where trustees have a power of investing on mortgage and of varying securities, the transaction will be considered as tantamount to repayment of the mortgage money, and reinvestment by the trustees on a mortgage of the hereditaments retained as a security, and that the purchaser of the released hereditaments is not bound to see to the sufficiency of the new security, or that the acceptance of the new security does not involve a breach of trust (*c*).

[Whether bound to consolidate mortgages.]

[52. It is conceived that although trustees holding independent securities from the same mortgagor may have the right to

[(*a*) *Re Beverly*, (1901) 1 Ch. 681.]

(*b*) See *Whitney* v. *Smith*, 4 L. R. Ch. App. 513; *Pell* v. *De Winton*, 2 De G. & J. 13. [But the prudent course, in this as in other similar cases, would be for the trustees to apply by originating summons for the direction of the Court.]

(*c*) See Davidson's Preced. Vol. II. p. 285, 4th ed.; Dart's V. & P. Vol. II. p. 689, 6th ed.

consolidate them, it is not imperative upon them to do so, but that they may deal with the securities independently, or allow one or more of them to be redeemed, without incurring any liability for loss which may arise from subsequent depreciation in the other securities. They should, however satisfy themselves, before parting with any of the securities, or allowing any of them to be redeemed, that the margin of value on those which are retained is then sufficient to justify a present advance to the amount remaining due to the trustees upon such securities.]

Discharge of a mortgage on a settled estate.

53. Trustees of a settled estate with a power of sale and reinvestment may, it is conceived, sell part of the estate to pay off a mortgage affecting the estate, though not mentioned in the settlement, for this in substance is a reinvestment, and *a fortiori* if the trustees have a power of investing on real securities until a purchase can be found, they can sell part of the estate and apply the proceeds in taking a transfer of the mortgage, provided it be an adequate security (*a*).

Sale of limited interests.

54. Trustees for sale of a limited interest in an estate (as a remainder), or of an aliquot part of the estate (as an undivided one-fourth), may concur with the other parties in a sale of the whole estate for one entire sum (*b*), and may agree afterwards as to the apportionment of the purchase-money, and if the parties cannot agree the apportionment will be made by the Court (*c*). But otherwise, if there be not any intelligible principle upon which the apportionment can be made (*d*).

Reimbursement of expenses on account of the trust.

55. A trustee may reimburse himself a sum of money *bonâ fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office. For "As it is a rule," said Lord Chancellor King, "that the *cestui que trust* ought to save the trustee harmless, so within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole

[(*a*) As to the discharge of mortgages under the powers of the Settled Land Acts, see *ante*, p. 682.]

[(*b*) See now s. 13 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as to trusts created by instruments coming into operation after 31st December, 1881.]

(*c*) *Clark* v. *Seymour*, 7 Sim. 67; *Rede* v. *Oakes*, 32 Beav. 555; see *Earl Poulett* v. *Hood*, 5 L. R. Eq. 115, and *ante*, p. 509.

(*d*) *Rede* v. *Oakes*, 32 Beav. 555; 10 Jur. N.S. 1246; *S. C.* 4 De G. J. & S. 505.

money lent, or from a plain and great hazard of being so, he ought to be repaid" (*a*).

Power of trustees for sale to clear the estate.

56. A trustee for sale has been held to be justified in applying part of the purchase-money in paying off a charge without satisfaction of which the purchaser refused to complete, and which the trustee was professionally advised was still subsisting, though the charge itself was open to doubt (*b*).

Power to grant leases.

57. A trustee of lands may grant a reasonable husbandry lease (*c*) in the fair management of the estate (*d*). But he has no power to demise where it is a simple trust, and the *cestui que trust* is in possession, except he do it with the *cestui que trust's* concurrence. And *primâ facie* a trustee for *sale* would not be justified in granting a lease (*e*). And though a trustee may grant a farming lease, it does not follow that he could grant a *mining lease*, for the latter is *pro tanto* a destruction of the *corpus* (*f*).

[Trustees having power to grant leases to "any person or persons" may lease to a limited company (*g*). A wide power of leasing in indefinite terms was held to extend to building leases (*h*). A lease by a trustee to himself and others would appear to be objectionable (*i*). Under powers to grant building and mining leases, a building lease with reservation of minerals may be granted (*j*).

By sect. 43 of the Agricultural Holdings (England) Act, 1883 (*k*), when, by any instrument, a lease of a holding is authorised to be made, provided that the best rent or reservation in the nature of rent is reserved, on a lease to the tenant of the holding, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase

(*a*) *Balsh* v. *Hyham*, 2 P. W. 453. [As to the trustee's general right to indemnity, see *post*, p. 799.]

(*b*) *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

(*c*) See *Naylor* v. *Arnitt*, 1 R. & M. 501; [*Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35;] *Bowes* v. *East London Waterworks Company*, Jac. 324; *Drohan* v. *Drohan*, 1 B. & B. 185; *Middleton* v. *Dodswell*, 13 Ves. 268; [and cf. *Ferraby* v. *Hobson*, 2 Phil. 255]. But see *contra*, *Wood* v. *Patteson*, 10 Beav. 541; *Re Shaw's Trust*, 12 L. R. Eq. 124.

(*d*) See *Attorney-General* v. *Owen*, 10 Ves. 560; [and see *Re North*, (1909) 1 Ch. 625, where trustees of an open brickfield were held to have power under the will to let the brickfield from year to year.]

(*e*) *Evans* v. *Jackson*, 8 Sim. 217; and see *Micholls* v. *Corbett*, 34 Beav. 376, and *ante*, p. 502.

(*f*) *Wood* v. *Patteson*, 10 Beav. 544; [but see *Re Barker*, 88 L. T. 685].

[(*g*) *Re Jeffcock's Trusts*, 51 L. J. N.S. Ch. 507; as to the power of trustees to grant leases in Ireland to a sanitary authority, see 48 & 49 Vict. c. 77.]

[(*h*) *Re James*, 64 L. J. Ch. 686].

[(*i*) See *Boyce* v. *Edbrooke*, (1903) 1 Ch. 836.]

[(*j*) *Re Duke of Rutland's Settled Estates*, (1900) 2 Ch. 206.]

[(*k*) 46 & 47 Vict. c. 61.]

(if any) in the value of such holding arising from improvements made or paid for by him.]

Powers of directors, &c.

58. The managers of a trading company or partnership have no power, whatever the necessity of the case, to borrow money beyond the capital prescribed by the Act or deed of settlement, so as to give the lenders a remedy against the company (*a*). And where, without any special authority being conferred by the deed of settlement, money is borrowed for launching or enlarging the concern, the managers (though made to pay upon their personal liability under the contract) have no remedy over against the other members of the company (*b*). But every business must be carried on at either a profit or loss, and as the members of the company take the profit, they must also bear the loss, and therefore if the managers incur debts or expenses by employing labour or ordering goods *in the ordinary course of business*, or borrow money and apply it to these purposes, they must be indemnified in equity by the other members of the company (*c*).

Trustees' shares.

59. Trustees of shares in an unlimited banking company have no power, unless specially authorised by their settlement, to accept *new shares* allotted to them, though issued at a premium (*d*). [But such a transaction may be sanctioned by the Court under its administrative jurisdiction in a case of emergency (*e*).]

Enfranchisement of copyholds.

60. By 15 & 16 Vict. c. 51, sect. 32, trustees of *copyholds* were empowered on *enfranchisement* to charge the expenses on the estate enfranchised, but this section was repealed by 21 & 22 Vict. c. 94, sect. 2, and re-enacted in effect by the 21st section, which authorises all persons enfranchising to charge the expenses, with the consent of the commissioners (*f*), on the estate. [Further powers are conferred by the Copyhold Act, 1894 (*g*), which provides, by sect. 44, sub-sect. 1, that anything by that Act required or authorised to be done by a lord of a manor or by a tenant may

[Copyhold Act, 1894.]

(*a*) *Burmester* v. *Norris*, 6 Exch. 796; *Ricketts* v. *Bennett*, 4 C. B. 686; and see *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Hawken* v. *Bourne*, 8 M. & W. 703.

(*b*) *Re Worcester Corn Exchange Company*, 3 De G. M. & G. 180; *Ex parte Chippendale*, 4 De G. M. & G. 43; see *Australian, &c., Company* v. *Mounsey*, 4 K. & J. 733.

(*c*) *Ex parte Chippendale*, 4 De G. M. & G. 19; *Troup's case*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225; Brice on Ultra vires, 2nd ed. p. 776; [*Towers* v. *African Tug Company*, (1904) 1 Ch. 558].

(*d*) *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232; [and see *Re Morris*, W. N. 1885, p. 31; 54 L. J. N.S. Ch. 388; 52 L. T. N.S. 462; 33 W. R. 445; and see *Re Pugh*, W. N. 1887, p. 143, where the Court approved the acceptance of the new shares by the trustees, but intimated the opinion that they ought to realise them as speedily as possible.]

[(*e*) *Re New's Settlement*, (1901) 2 Ch. (C.A.) 534, see *ante*, p. 392.]

[(*f*) Now the Board of Agriculture.]

[(*g*) 57 & 58 Vict. c. 46.]

be done by him, notwithstanding that he is a trustee, and by subsect. 2, that where the lords or the tenants are trustees, and one or more of the trustees is abroad, or is incapable or refuses to act, any proceedings necessary to be done by the trustees for effecting an enfranchisement under that Act may be done by the other trustee or trustees.]

Any enfranchisement of a trust estate should be made to the trustee who has the legal estate, and not to the *cestui que trust* (*a*).

[Enlarging long term into fee.]

[61. By the Conveyancing and Law of Property Act, 1881, trustees in receipt of the income in right of a long term, or having the term vested in them in trust for sale, may exercise the powers of the Act for enlargement of the term into a fee simple. The estate in fee simple so acquired is to be subject to all the same trusts, powers, executory limitations over, rights, and equities as the term would have been subject to if it had not been enlarged. But where such long leaseholds have been settled in trust by reference to freeholds so as to go along with them as far as the law permits, and at the time of the enlargement the ultimate beneficial interest in the term has not become absolutely and indefeasibly vested, the estate in fee simple is, without prejudice to any conveyance for value previously made, to be conveyed and settled, and devolve in the same manner as the freeholds (*b*).

[Compensation for agricultural improvements.]

62. By the Agricultural Holdings (England) Act, 1883, sect. 1 (*c*), a tenant who has made on his holding certain improvements specified in the first schedule to the Act is entitled, on quitting his holding at the determination of his tenancy, to compensation from the landlord for such improvements, to be ascertained as provided by the Act. But by sect. 31, where the landlord is a trustee, the amount of compensation is not to be recoverable from him personally, but is to be charged on and recoverable against the holding only. And by sect. 42, subject to certain provisions as to Crown, duchy, ecclesiastical and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements, in respect of which compensation is payable under the Act, as if he were, in the case of an estate of inheritance, owner thereof in fee, and in the case of a leasehold, possessed of the whole estate in the leasehold.

(*a*) See *Minton* v. *Kirwood*, 3 L. R. Ch. App. 614.

[(*b*) 44 & 45 Vict. c. 41, s. 65; and see 45 & 46 Vict. c. 39, s. 11.]

[(*c*) 46 & 47 Vict. c. 61.]

By the Extraordinary Tithe Redemption Act, 1886, a tenant for life of land subject to an extraordinary charge or a rent-charge under the Act, may borrow any money required for redemption thereof, or may charge the inheritance with repayment of the money so borrowed with interest (*a*).]

Powers of majority of trustees.

63. The general powers allowed to trustees must in a private trust be exercised by all the trustees as a *joint body*, but in *charitable* or *public* trusts the voice of the *majority* will bind the rest (*b*), and in certain cases the majority can give effect to their resolution by passing the legal estate under a statutory power (*c*), but of course, in the absence of express statutory authority, a majority of trustees cannot pass the legal estate (*d*).

Case of suit instituted and a decree made.

64. The powers assigned in the preceding pages to trustees must be taken subject to the qualification, that, if a *suit* has been instituted, *and a decree made*, for the execution of the trust, the powers of the trustees are thenceforth so far paralysed that the authority of the Court must sanction every subsequent proceeding (*e*). Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing (*f*); a trustee for sale cannot sell (*g*); the committee of a lunatic cannot make repairs (*h*); an executor cannot pay debts (*i*), or deal with the assets for the purpose of investment (*j*). But an executor as to a chattel, not the subject of the suit *specifically*, can after decree give a good title to a *bonâ fide* purchaser not having actual notice of the *lis pendens* (*k*), and it is presumed that he can equally, where there is no receiver appointed, sign a valid receipt for any part of the testator's personal estate (*l*). [And where an

[(*a*) 49 & 50 Vict. c. 54, s. 6 (2).]

[(*b*) See *ante*, p. 291, and *Re Whiteley*, (1910) W. N. 63.]

(*c*) See *ante*, pp. 635, 642.

[(*d*) See *Re Ebsworth and Tidy's Contract*, 42 Ch. D. (C.A.) 23.]

(*e*) *Mitchelson* v. *Piper*, 8 Sim. 64; *Sheven* v. *Vanderhorst*, 2 R. & M. 75; *S. C.* affirmed, 1 R. & M. 347; *Minors* v. *Battison*, 1 App. Cas. 428.

(*f*) See *Jones* v. *Powell*, 4 Beav. 96. The Court [was formerly in some cases] reluctant to give leave to institute or defend a suit, but held out that if the trustee or executor acted *bonâ fide* the Court would protect him. [But under the modern procedure, the Court will always grant leave in a proper case,] and a trustee or executor cannot be advised to commence or defend a suit without, at least, submitting the case to the Court.

(*g*) *Walker* v. *Smalwood*, Amb. 676; *Annesley* v. *Ashurst*, 3 P. W. 282.

(*h*) *Anon. case*, 10 Ves. 104.

(*i*) *Mitchelson* v. *Piper*, 8 Sim. 64; *King* v. *Roe*, L. J. 27th May, 1858; *Irby* v. *Irby*, 24 Beav. 525; and see *Jackson* v. *Woolley*, 12 Sim. 13.

(*j*) *Widdowson* v. *Duck*, 2 Mer. 494; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*k*) *Berry* v. *Gibbons*, 8 L. R. Ch. App. 747; [*Re Hoban*, (1896) 1 I. R. 401].

[(*l*) And see *post*, p. 771.]

administration action has been heard on further consideration, and no subsequent further consideration has been reserved, but general liberty to apply has been given, trustees may exercise their power without obtaining the sanction of the Court (*a*).]

Case of suit and no decree.

65. An action in which a *writ* merely has been issued is distinguishable from one in which a *decree* has been made, for until decree the plaintiff may dismiss his action at any moment, and should he do so, the progress of the trust may have been arrested for no purpose (*b*). However, even in this case the trustees cannot be advised to act without first consulting the Court, and if by their acting independently of the Court expenses be incurred which might have been avoided had the trustees applied to the Court, they may be made to bear them personally (*c*).

Duties of executor after decree.

66. After *decree* made the trustee is not absolved from the duties imposed by his office. Thus after a decree in an administration suit an executor was held liable for having allowed a policy of insurance to drop without any sufficient reason (*d*).

SECTION II

THE SPECIAL POWERS OF TRUSTEES

UPON this branch of our subject we shall consider, *First*, The different kinds of powers; *Secondly*, The construction of powers; *Thirdly*, The effect of disclaimer, assignment of the estate, and survivorship among the trustees; *Fourthly*, The control of the Court over the exercise of powers; [and *Fifthly*, The restrictions on the powers of trustees imposed by the Settled Land Acts.]

First. Of the different kinds of powers.

Powers legal and equitable distinguished.

1. In applying the doctrine of powers to the subject of trusts it may be useful to regard powers as either *legal* or *equitable:* the former, such as operate upon the legal estate, and so are matter of cognisance in Courts of common law; the latter, such as affect the equitable interest only, and so fall exclusively under the notice of Courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under

[(*a*) *Re Mansel*, 54 L. J. N.S. Ch. 883; 52 L. T. N.S. 806; 33 W. R. 727.]

(*b*) *Cafe* v. *Bent*, 3 Hare, 249; *Neeves* v. *Burrage*, 14 Q. B. 504.

(*c*) *Attorney-General* v. *Clack*, 1 Beav. 467; and see *Cafe* v. *Bent*, 3 Hare, 249.

(*d*) *Garner* v. *Moore*, 3 Drew. 277.

the Statute of Uses be given to C., the execution of the power works a conveyance of the legal estate; but if lands be limited to the use of A. and his heirs upon trust for B. for life, and after his death for C. and his heirs, and a power not operating under the Statute of Uses be given either to the trustee or to the *cestui que trust*, the execution of such a power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

Equitable powers, whether annexed to the estate or simply collateral.

2. An *equitable*, the same as a legal power, may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will depend on the question, whether the donee of the power be possessed of the *equitable*, that is, of the *beneficial* interest or not. Thus, where a testator devised an estate to his *sister* and her heirs for ever, upon trust to settle it on such of the descendants of the testator's mother as his *sister* should think fit, [with a direction whereby in effect the appointment was not to take place until the sister's death or the previous determination of her life interest,] and the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke held that this was a power *without an interest*, *i.e.* without any beneficial interest, and could therefore be executed by the *feme covert* (*a*). On the other hand, where the legal estate was devised to *trustees* in fee upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *feme covert* his heiress-at-law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, that this was a power *coupled with an interest*, which was always considered different from naked powers: it was admitted that if this execution was to operate on the estate of the infant it might not be good: now this was clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the meantime, so that this was directly a power over *her own inheritance*, which could not be executed by an infant (*b*).

(*a*) *Godolphin* v. *Godolphin*, 1 Ves. 21; Belt's Supplement, p. 22.

(*b*) *Hearle* v. *Greenbank*, 1 Ves. 298, see 306; and see *Blith's case*, Freem. 91; *Penne* v. *Peacock*, For. 43.

[Exercise of powers by infant.]

[3. In the case of personal estate, however, an infant may exercise a power in gross. Thus, where under a marriage settlement an infant *feme covert*, to whom the income of the settled property was given for her life for her separate use, had, in the events which happened, a general power of appointing the trust funds, in default of issue and subject to the interest of her husband, by deed or will, and she exercised the power by deed, and died an infant, it was held by Sir G. Jessel, M.R., and affirmed by the Court of Appeal, *dissentiente* Cotton, L.J., that the power was well exercised, and the M.R. observed: "If it is clearly settled that the first class of powers—powers simply collateral—can be exercised by an infant, there can be no reason why the second class of powers—powers in gross—should not be so exercised when the exercise cannot affect the infant's interest; I can see no sufficient distinction between the two cases. It can make no difference that the infant has some interest under the settlement, so long as that interest cannot be affected by the exercise of the power" (*a*).]

Bare powers, and powers coupled with a trust.

4. Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust* (*b*). The former are powers in the proper sense of the word—that is, *not imperative*, but purely *arbitrary;* powers which the trustee cannot be compelled to execute, and which, on failure of the trustee, cannot be executed vicariously by the Court (*c*). The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts (*d*). "It is perfectly clear," said Lord Eldon, "that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only *a mere trust* and a *mere power*, but there is also known to this Court *a power which the party to whom it is given is intrusted with and required to execute;* and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the

[(*a*) *Re D'Angibau*, 15 Ch. D. (C.A.) 228; and see *ante*, p. 38.]

(*b*) See *Gower* v. *Mainwaring*, 2 Ves. 89; *Cole* v. *Wade*, 16 Ves. 43; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332.

(*c*) See *Cowper* v. *Mantell*, 22 Beav. 231, and cases there cited; and *Re Eddowes*, 1 Dr. & Sm. 395.

(*d*) *Godolphin* v. *Godolphin*, 1 Ves. 23.

person who has the duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place" (*a*).

Strict powers, and powers directory.

5. Again, powers have been dealt with by the Court as either of a *strict* or of a *directory* character: the former such as only arise under the exact circumstances prescribed by the settlement; the latter such as being merely monitory may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered that the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed (*b*). So, where six trustees were empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number (*c*). And where in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the Court that, although seventeen remained, the survivors were at *liberty* to exercise their power, but that, when reduced to only fifteen, they were *compellable* to do so (*d*).

Charity.

6. These were cases of *charitable* trusts, in which it seems a greater latitude of construction is allowed. But in another case, where the trusts were not charitable, and estates were devised to trustees upon trust to sell "with all convenient speed, and within *five years* after the testator's decease," it was held that these words were directory only, and that the trustees could sell and make a good title, although the five years had expired (*e*).

Secondly. We proceed to consider the *construction* of powers. As the powers of trustees are regulated by the doctrines applicable to powers in general, and as the admirable treatise of Lord St. Leonards is in every one's hands, we shall advert only to some cases of most frequent occurrence.

Power to "A. and B. and their heirs."

1. If a power be given to "A. and B. and *their heirs*," it is perfectly clear, that, although the limitation of an *estate* in such

(*a*) *Brown* v. *Higgs*, 8 Ves. 570; [and see *Re Weekes' Settlement*, (1897) 1 Ch. 289, and *ante*, p. 17. Whether it is possible, as a matter of law, to execute by anticipation a special power not created until after the alleged execution, *quære; Re Hayes*, (1901) 2 Ch. (C.A.) 529].

(*b*) *Attorney-General* v. *Scott*, 1 Ves. 413, see 415.

(*c*) *Attorney-General* v. *Floyer*, 2 Vern. 748; and see *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139; but see *Foley* v. *Wontner*, 2 J. & W. 245.

(*d*) *Doe* v. *Roe*, 1 Anst. 86.

(*e*) *Pearce* v. *Gardner*, 10 Hare, 287; and see *Cuff* v. *Hall*, 1 Jur. N.S. 973.

terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is not to be construed as intended in like manner to be assignable and devisable (*a*).

Chief Justice Wilmot's opinion.

Upon the subject of such a power where it was given *personally*, and unaccompanied by any estate, to A. and B. and their heirs, Lord Chief Justice Wilmot observed: "It is asked, What must become of the power upon the death of one of the trustees? It must be considered as a tenancy in common. Had the words been 'their several and respective heirs,' it would have been clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; and when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both*" (*b*).

Mere power.

But this was where A. and B. had a mere power, for where A. and B. are trustees of an estate limited to them and their heirs, and the power constitutes an essential part of the trust, it will pass with the estate to the survivor (*c*).

Townsend *v.* Wilson.

In *Townsend* v. *Wilson* (*d*), a power of sale was given to *three trustees* to preserve contingent remainders *and their heirs;* and it was directed that the money to arise from the sale should be paid into the hands of the trustees *or the survivors or survivor of them,* and the executors, administrators, or assigns of such survivor, and there was a *power of appointment of new trustees,* with a direction that such appointment should take place as often as any one or more of the trustees should die, &c. One of the trustees died, and it was determined by the Court of Queen's Bench, that the *survivors* alone were incapable of exercising the power of sale. Lord Eldon was dissatisfied with this decision, and asked: "Did the Court of Queen's Bench consider that the two surviving trustees and *the heir of the deceased trustee* were to act together? for it was one thing to say that the survivors could not act *until another was appointed;* and a different thing to say, the *heir* of the deceased trustee could act in the

(*a*) *Cole* v. *Wade*, 16 Ves. 46, *per* Sir W. Grant.

(*b*) *Mansell* v. *Vaughan*, Wilm. 50, 51.

(*c*) See *post*, p. 763.

(*d*) 1 B. & Ald. 608; 3 Mad. 261; and see *Cooke* v. *Crawford*, 13 Sim. 91.

meantime" (*a*). But his Lordship so far bowed to the authority of the decision, that he refused under similar circumstances to compel a purchaser to accept the title (*b*). In *Townsend* v. *Wilson* the trustees had not the *fee*, and the power was not to be executed as part of a trusteeship, and it is therefore no authority against the execution of a *trust* by the surviving trustees. Indeed, where an estate was devised to three trustees and their *respective* heirs, upon trust that they and their *respective* heirs should sell, the word "respective" was rejected for surplusage, and it was held that the survivors could make a title (*c*).

Execution of trust by surviving trustees.

2. In *Hewett* v. *Hewett* (*d*), a testator devised his estate to four persons to uses in strict settlement, with a power to the tenants for life, when in actual possession, to cut such trees as the *four devisees to uses, or the survivors or survivor of them* (omitting the words "and the heirs of the survivor") should direct; and all the trustees being dead, the question was whether the power was gone. Lord Henley held, that, upon the construction of the will, the testator intended the power to be co-extensive with the life-estates, and that the trustees were interposed as supervisors only to prevent destruction; and that the office of the trustees was not personal, but such as might be executed by the Court. He, therefore, considered the power as subsisting, and referred it to the Master to inquire what timber was fit to be cut. The Court, therefore, did not regard the authority to the trustees as a mere power, but as a trust.

Hewett v. Hewett.

Power co-extensive with life estate.

3. Where a discretionary *legal power* is expressly limited to "A. and his *assigns*," the grantee or devisee of A., and even a claimant under him by operation of law as an heir or executor, may exercise the power (*e*); but in a *trust*, if an estate be vested in a trustee upon trust that he, his heirs, executors, administrators or *assigns* shall sell, *&c.*, the introduction of the word *assigns* will not authorise the trustee to assign the estate to a stranger (*f*), nor, if the assignment be made, will the stranger be capable of exercising the power (*g*).

Power to "trustee and his assigns."

4. In a *mortgage*, with a power of sale limited to the mortgagee, his heirs, executors, administrators, *and assigns*, the intention is that the power should go along with, and be annexed

Power given to a mortgagee.

(*a*) *Hall* v. *Dewes*, Jac. 193; and see *Jones* v. *Price*, 11 Sim. 557.
(*b*) *Hall* v. *Dewes*, Jac. 189.
(*c*) *Jones* v. *Price*, 11 Sim. 557.
(*d*) 2 Eden, 332; Amb. 508; and see *Bennett* v. *Wyndham*, 23 Beav. 528.
(*e*) *How* v. *Whitfield*, 1 Vent. 338, 339; 1 Freem. 476.
(*f*) The case of *Hardwick* v. *Mynd*, 1 Anst. 109, cannot in this respect be supported.
(*g*) See *post*, p. 760.

to, the security; and therefore, if the mortgage be assigned to a stranger, and the legal estate be conveyed to the stranger or to a trustee for him, the stranger, alone or with the concurrence of the trustee, can give a good legal and equitable title (*a*); and even if a mortgage be made to A. and B. to secure a *joint* advance, and the power of sale and signing receipts be limited to A. and B., *their heirs and assigns*, it has been held that as the power and the security were plainly meant to be coupled together, and the security enures to the benefit of the survivor (the advance being a joint one), the survivor may also sell (*b*). [But where in a mortgage by way of trust for sale, it was provided that the trustee "and his heirs" should sell upon the request of the mortgagee, his executors, administrators, and assigns, it was held that the trust thus vested in the heirs of the trustee could not be exercised by an assign (*c*), and in a case where, in a mortgage to a building society, the power of sale was given to the trustees or trustee of the society for the time being, without any reference to "assigns," it was held that the power could not be exercised by a transferee of the mortgage (*d*).]

Power indicating personal confidence to "A. and his executors."

5. If a *power* indicating personal confidence be given to a "trustee and his *executors*," and the executor of the trustee dies having appointed an executor, the latter executor, though by law the executor not only of his immediate testator, but also of the trustee, will not, it is said, be so considered for the purposes of the power (*e*); for a matter of personal confidence is not to be extended beyond the express words and clear intention of the settlor, and in this case, the settlor may have meant the power to be exercised exclusively by the executors whom the trustee had himself named, and not by a person who is executor of the trustee by operation of law only. This, however, is a narrow construction, and the liberality of modern times may not improbably hold that, if a power be given to executors, the settlor must be taken to have contemplated generally every one whom the law invests with that character (*f*).

Power to "executors," "trustees," &c.

6. A power limited to "executors" or "sons-in-law" may be

(*a*) *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

(*b*) *Hind* v. *Poole*, 1 K. & J. 383.

[(*c*) *Bradford* v. *Belfield*, 2 Sim. 264.]

[(*d*) *Re Rumney*, (1897) 2 Ch. (C.A.) 351.]

(*e*) See *Cole* v. *Wade*, 16 Ves. 44; *post*, p. 761; *Stile* v. *Tomson*, Dyer, 210, a; Perk. s. 552; Moore, 61, pl. 172; Sugd. Powers, 129, 8th ed.

[(*f*) See *Re Smith; Eastwick* v. *Smith*, (1904) 1 Ch. 139, referred to *post*, p. 755, note (*d*), dissenting from the general principle of *Cole* v. *Wade* (*sup.*), as being inconsistent with *Crawford* v. *Forshaw*, *post*, p. 755.]

exercised by the survivors so long as the plural number remains (*a*), and if a power be limited to a number of "trustees," we may reasonably conclude that, whether they have any estate or not—*i.e.* whether the power be an adjunct to the trust or collateral to it, it may be exercised by the surviving trustees. And a power given to "executors" will, if annexed to the executorship, be continued to the single survivor (*b*); [and where a power of selection was given to "my executors herein named," it was held to be so annexed and not to be personal (*c*)]. So a power given to "trustees" will, as annexed to the estate and office, be exercisable by the single survivor (*d*); but it cannot be exercised by one trustee in the lifetime of the other who has not effectually disclaimed (*e*). And it has been said that if a power to vary the rights of parties be communicated to the "*trustees for the time being*," it cannot be exercised by a single trustee (*f*). And where there was a trust for sale, but no sale was to be made without the consent of the testator's *sons and daughters*, and he left seven sons and daughters, and one died, it was held that a sale with the consent of the survivors was too doubtful a title to be specifically enforced (*g*).

Power to "trustees and survivors."

7. A discretionary power to four trustees "and the *survivors* of them" cannot, it seems, be executed by the last survivor (*h*); for though a power to trustees may, in general, be held to survive, an intention to the contrary may be fairly inferred; the settlor may be supposed to have said: "I repose a confidence in any two

(*a*) Sugd. Powers, 128, 8th ed.

(*b*) Sugd. Powers, 128, 8th ed.; *Houell* v. *Barnes*, Cro. Car. 382; *Brassey* v. *Chalmers*, 4 De G. M. & G. 528, reversing the decision of the Master of the Rolls, 16 Beav. 231.

[(*c*) *Crawford* v. *Forshaw*, (1891) 2 Ch. (C.A.) 261.]

(*d*) *Lane* v. *Debenham*, 11 Hare, 188; [and see *Re Smith; Eastwick* v. *Smith*, (1904) 1 Ch. 139, 144, where it was said by Farwell, J., that the result of the authorities and of sections 22 and 37 of the Trustee Act, 1893, is that every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption, and little regard is now paid to such minute differences as those between "my trustees," "my trustees A. and B.," and "A. and B., my trustees": the testator's reliance on the individuals to the exclusion of the holders of the office for the time being, must be expressed in clear and apt language].

(*e*) *Lancashire* v. *Lancashire*, 2 Ph. 664.

(*f*) *Lancashire* v. *Lancashire*, 2 Ph. 664.

(*g*) *Sykes* v. *Sheard*, 2 De G. J. & S. 6.

(*h*) *Hibbard* v. *Lamb*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors; see *Eaton* v. *Smith*, 2 Beav. 236.

of the trustees jointly, but in neither one of them individually."

To "trustees and survivor."

But if a power be limited to four trustees "and the *survivor* of them," it may well be argued that, on the death of one, the power may still be exercised by the survivors; for there can be no valid reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being (*a*).

Trower *v.* Knightley.

8. In a case before Sir J. Leach, a testator devised an estate to trustees upon trust as to one moiety for A. for life, remainder to her children at twenty-one, and as to the other moiety for B. for life, remainder to her children at twenty-one, and gave the trustees a power of sale "*during the continuance of the trust.*" A. died, and her children attained twenty-one, and the question was whether the trustees could, under the power, sell the whole estate, the children of B. being infants. The Vice-Chancellor held that if the children of A. could call for a present conveyance of their moiety, it would have the effect of depriving B. and her children of the benefit of the power of sale, and also of the leasing power given to the trustees, for that an undivided moiety could not advantageously be sold or leased, and that the testator must have meant to continue the powers of ownership to the trustees until there were owners competent to deal with the whole estate (*b*).

Power "during the continuance of the trust."

9. But if a power be given to trustees to be exercised "during the continuance of the trust," it cannot be exercised after the time when the trust *ought* to have been completed, though, from the delay of the trustees, it happens that the trust has not in fact been executed (*c*).

[Power to postpone sale.]

[Where trustees for sale of land have a discretionary power of postponement, and the proceeds are settled in trust for several persons, the vesting in possession of the share of one of the beneficiaries does not determine the power, or entitle the beneficiary to call for an immediate sale of the entirety, or a conveyance of his undivided share (*d*).]

Powers cease when settlement is at an end, [except for purpose of division within period allowed by law].

10. And though the power be not confined expressly to the continuance of the trust, yet in [general, the power can be exercised only whilst the purposes of the settlement remain

(*a*) See *Crewe* v. *Dicken*, 4 Ves. 97; in which case it seems to have been assumed that the receipt of the survivors would be a sufficient discharge; [and see *Delany* v. *Delany*, 15 L. R. Ir. 55].

(*b*) *Trower* v. *Knightley*, 6 Mad. 134; and see *Taite* v. *Swinstead*, 26 Beav. 525.

(*c*) *Wood* v. *White*, 2 Keen, 664. It was determined on appeal that the trusts in this case were still in being, 4 M. & Cr. 460.

[(*d*) *Re Horsnaill*, (1909) 1 Ch. 631.]

unexhausted (*a*), and where the land is "at home," as it has been called, *i.e.* has vested in fee simple in possession in persons *sui juris*, the power is no longer exercisable. But it is a question of intention, on the construction of the instrument, whether or not the power is exercisable after the estates have thus become vested (*b*), and where a power of sale was given for the express purpose of division on the determination of a life interest, it was held by Sir G. Jessel, M.R., that the power did not determine on the death of the tenant for life, but was exercisable within a reasonable time afterwards, such time being well within the limit allowed by the law against perpetuities (*c*). In another case where the power was not expressed to be for the purpose of division, but was expressly limited to the period allowed by law, it was held by Fry, L.J., upon an examination of the limitations of the instrument, that an intention was sufficiently manifested that the power should continue to be exercisable after the beneficial interest in the property had become absolutely vested in persons *sui juris* (*d*); and in a recent case on the subject, the circumstance that the testator contemplated a distribution among a very numerous class of persons was regarded as an indication that the power, though not expressed to be for purposes of division, was intended so to be, and it was accordingly held that the power was exercisable within a reasonable time after the death of the tenant for life, which was the period of distribution (*e*). But the Court declined to draw this inference in the case of a direct gift to a small number of persons (*f*); and it is apprehended that such a construction could not prevail if the period of distribution might by possibility be postponed beyond the limit of time allowed by law (*g*).]

Joint powers.

11. Powers given to trustees must be exercised by them jointly, but an act by one trustee, with the sanction and approval of a co-trustee, will be deemed the act of both (*h*).

[(*a*) *Wolley* v. *Jenkins*, 23 Beav. 53; *Mortlock* v. *Buller*, 10 Ves. 315; *Wheate* v. *Hall*, 17 Ves. 86; *Lantsbery* v. *Collier*, 2 K. & J. 709.]

[(*b*) *Re Lord Sudeley*, (1894) 1 Ch. 334, *per* Chitty, J.; *Re Dyson and Fowke*, (1896) 2 Ch. 720, where the residuary realty being charged with debts and legacies according to the principle of *Greville* v. *Brown*, 7 H. L. C. 689, the power of sale was held to continue until those purposes were satisfied. In *Re Jump*, (1903) 1 Ch. 129, a power of sale for purposes of maintenance of a lunatic was held not to be determined by the lunatic's becoming absolutely entitled, he being unable to call for a conveyance.]

[(*c*) *Peters* v. *Lewes and East Grinstead Railway Company*, 18 Ch. D. (C.A.) 429, (but see *S. C.* 16 Ch. D. 703); *Re Tweedie and Miles*, 27 Ch. D. 318; *Re Lord Sudeley, sup.*; *Re Douglas and Powell*, (1902) 2 Ch. 296.]

[(*d*) *Re Cotton's Trustees and School Board for London*, 19 Ch. D. 624.]

[(*e*) *Re Lord Sudeley, ubi sup.*]

[(*f*) *Re Dyson and Fowke*, (1896) 2 Ch. 720.]

[(*g*) For cases in which a power has been held void *ab initio* for remoteness, see *ante*, p. 110.]

(*h*) *Messeena* v. *Carr*, 9 L. R. Eq. 260.

[Contract for lease by tenant for life carried out by trustees.]

[12. Where a power of leasing was given to a legal tenant for life, and after his death to trustees, during the minority of a legal tenant in tail, and the tenant for life entered into a contract to grant a building lease, but died before the lease was granted, it was held that the trustees had power to effectuate the contract of the tenant for life by executing a lease (*a*).]

Moral considerations.

13. Trustees in the exercise of their powers must act *bonâ fide* and impartially for the benefit of their *cestuis que trust—i.e.* the persons claiming under the settlement, and must not deviate from the terms of the trust from moral considerations, or seek to do what they may think right, if in excess of their trust (*b*).

Thirdly. Of the effect of *disclaimer*, *assignment*, and *survivorship* of the estate.

I. Of *disclaimer.*

Effect of disclaimer upon powers.

1. If a power be given to several trustees, and one of them *disclaims* [the trust], the power may be exercised by the continuing trustees or trustee (*c*).

In *Hawkins* v. *Kemp* (*d*), a purchaser at first objected that the accepting trustees could not exercise the power, or not without the appointment of a new trustee in the place of the trustee who had disclaimed, but the point was afterwards abandoned by the purchaser's counsel as untenable. And the late Vice-Chancellor of England, in a subsequent case, observed: "I have always understood, ever since the point was decided in *Hawkins* v. *Kemp*, or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for, that where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one" (*e*).

Adams *v.* Taunton.

Adams v. *Taunton* (*f*) is a direct decision by Sir J. Leach to the same effect. A testator had devised his estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be

[(*a*) *Davis* v. *Harford*, 22 Ch. D. 128; and a succeeding tenant for life can make any conveyance which is necessary for giving effect to a contract validly made by his predecessor, Settled Land Act, 1890, s. 6; and as to the exercise of powers by trustees where the tenant for life is an infant, see Settled Land Act, 1882, s. 60, and *ante*, p. 694.]

(*b*) *Ellis* v. *Barker*, 7 L. R. Ch. App. 104.

(*c*) Jenk. 44; *Crewe* v. *Dicken*, 4 Ves. 97; *Earl Granville* v. *M'Neile*, 7 Hare, 156; *White* v. *M'Dermott*, 7 I. R. C. L. 1.

(*d*) 3 East, 410.

(*e*) *Cooke* v. *Crawford*, 13 Sim. 96.

(*f*) 5 Mad. 435; and see *Bayly* v. *Cumming*, 10 Ir. Eq. Rep. 410; *Cooke* v. *Crawford*, 13 Sim. 96; *Sands* v. *Nugee*, 8 Sim. 130.

sufficient discharges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said: "It being now settled that a devise to A., B., and C. upon trust is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipt of the trustees is to be intended the receipt of those who accept the trust" (*a*).

Power to "trustees" or "executors."

2. If the power be not given to the trustees by *name*, but to the "trustees" or "executors," it is *clear*, *a fortiori*, that if one disclaim, the acting trustees or executors may exercise the power (*b*).

[Disclaimer of power under Conveyancing Act, 1882.]

[3. By the Conveyancing Act, 1882, sect. 6, which applies to powers created by instruments coming into operation either before or after the commencement of the Act, "a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power" (*c*). But this section does not authorise a trustee to disclaim a particular power so as to vest the exercise of it in his co-trustees while he continues a trustee for other purposes (*d*).

[Renunciation.]

4. It has been held in Ireland that the renunciation by one executor, by an instrument under seal, of the office of executor operates as a disclaimer under this section of powers annexed to the executorship (*e*).]

II. Of *assignment*.

Effect of assignment of the estate.

1. The *power* is not appendant to the *estate*, so as to follow along with it in every transfer by the trustee, or devolution by course of law (*f*). But where the estate is duly transferred to

(*a*) From his Honour's words, "the receipt of the trustees," it might be thought the power had been given, not to A. and B. by name, but to "the trustees": the Reg. Lib. has been consulted, and it appears, as stated in the report, that the power was given to "the said A. and B."

(*b*) *Worthington* v. *Evans*, 1 S. & S. 165; *Boyce* v. *Corbally*, Ll. & G. *t.* Plunket, 102; and see *Clarke* v. *Parker*, 19 Ves. 1; *White* v. *M'Dermott*, 7 I. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55; *Crawford* v. *Forshaw*, (1891) 2 Ch. (C.A.) 261].

[(*c*) 45 & 46 Vict. c. 39, s. 6.]

[(*d*) See *Re Eyre*, 49 L. T. N.S. 259.]

[(*e*) *Re Fisher and Haslett*, 13 L. R. Ir. 546. A renunciation by an executor was held by Kekewich, J., not to preclude such executor from exercising a power of selection or distribution conferred on "my executors herein named," *Crawford* v. *Forshaw*, 43 Ch. D. 643; but this decision was reversed on appeal on the ground that on the true construction of the will the power was given to the executors in their official capacity, (1891) 2 Ch. 261.]

(*f*) *Cole* v. *Wade*, 16 Ves. 47, *per* Sir W. Grant; *Crewe* v. *Dicken*, 4 Ves.

persons regularly appointed trustees under a power in the settlement creating the trust, the transferees take the estate and the office together, and can exercise the power. Where the settlement contains no such power, it seems that the appointment of new trustees by the Court would not, but for recent Acts, communicate arbitrary or special discretionary powers (*a*), unless they were expressly (*b*), or in fair construction, limited to the trustees for the time being (*c*). If powers be given to trustees, their heirs, executors, administrators, and *assigns*, and the Court appoints new trustees and makes a vesting order, the new trustees are duly constituted assigns, and may therefore be justly considered within the purview of the settlement. But assigns from a trustee *mero motu*, and without competent authority, would not be so considered.

[Trustee Act, 1893, s. 37.]

[2. By a recent enactment "every trustee appointed by any Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally nominated a trustee by the instrument creating the trust" (*d*).]

Release with intention of disclaiming.

3. We have seen that if one trustee *disclaims* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee instead of *disclaiming* had *assigned* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee (*e*); but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer (*f*).

Whether the power will remain in the trustee after alienation of the estate.

4. Though an assignment of the *estate* will not carry the *power* to the assignee, it does not follow that the power will remain in the assignor, so as to be transmissible to his representative; for where it was the settlor's intention that the

97; *Re Burtt's Estate*, 1 Drew. 319; *Wilson* v. *Bennett*, 5 De G. & Sm. 475. The case of *Hardwick* v. *Mynd*, 1 Anst. 109, is an anomaly.

(*a*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Fordyce* v. *Bridges*, 2 Ph. 497, see 510; *Newman* v. *Warner*, 1 Sim. N.S. 457; *Cooper* v. *Macdonald*, 35 Beav. 504; and see *Cole* v. *Wade*, 16 Ves. 44, 47; *Hibbard* v. *Lamb*, Amb. 309.

(*b*) *Bartley* v. *Bartley*, 3 Drew. 384; *Brassey* v. *Chalmers*, 4 De G. M. & G. 528.

(*c*) *Byam* v. *Byam*, 19 Beav. 66.

[(*d*) 56 & 57 Vict. c. 53, reproducing 44 & 45 Vict. c. 41, s. 33, which section took the place of the corresponding section in Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 27.]

(*e*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Crewe* v. *Dicken*, 4 Ves. 97.

(*f*) *Ante*, p. 220.

estate and power should be coupled together, the trustee, by severing the union through the alienation of the estate, may intercept the execution of the power by the representative. Thus [where, prior to the Conveyancing and Law of Property Act, 1881, an estate was] limited to A. and his heirs upon a trust to be executed by A. and his *heirs*, and A. in his lifetime conveyed away the estate, or devised it by his will, it was held that the heir of A. could not execute the power (*a*); for the heir was no heir *quatenus* this estate; for it was not allowed to *descend*, but was aliened or devised away from the person who would have been heir; [and the same principle equally applies to a case falling under the Conveyancing Act (*b*), where the estate is conveyed away by the trustee in his lifetime, so as not to vest in his personal representative, who consequently cannot execute the power].

Case of real and personal estate coupled together.

5. In *Cole* v. *Wade* (*c*), a testator gave the residue of his real and personal estate to Ruddle and Wade (whom he appointed his executors), their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and personal estate unto and amongst such of his relations and kindred, in such proportions, manner and form, as *his said executors* should think proper, his intention being that everything relating to that disposition should be entirely at the discretion of the said *trustees and executors, and the heirs, executors and administrators of the survivor of them* (*d*). Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators, and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was discussed whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said: "The original trustees and executors were the same persons; all the real and personal estate was vested equally in them; but the heirs and executors of the surviving trustee might be different persons; yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and

(*a*) *Wilson* v. *Bennett*, 5 De G. & Sm. 475; and see *Re Burtt's Estate*, 1 Drew. 319.

[(*b*) 44 & 45 Vict. c. 41, s. 30.]

(*c*) 16 Ves. 27.

(*d*) The testator used this last form of expression elsewhere in the will.

settle the proportions in which they are to take; but if the real estate is to go to one, and the personal estate to another, the testator has left it entirely uncertain how the power is to be executed. Whether the Messrs Bray can in any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His Honour, therefore, decided that the power had become extinguished.

The estate may be severed from the powers.

6. But the existence of a power annexed to a trust and forming an integral part of it does not depend on the continuance of the legal estate *per se* in the donee of the power, where there is no express declaration to the contrary; as, where a testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff of the city, and the elder churchwarden of a parish, the dividends to be applied to certain purposes as the trustees should approve, and the bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock, the Court ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the charity should be nominated and approved in the manner pointed out by the will (*a*).

[Release of powers under Conveyancing Act.]

[7. By the Conveyancing and Law of Property Act, 1881, "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power"; and that, whether the power was created by an instrument coming into operation before or after the commencement of the Act (*b*). The section has been held not to apply to a power coupled with a duty; as to which Kay, J., observed: "A trustee who has a power coupled with a duty is bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise whether the power shall be used or not, and can no more by his own voluntary act destroy a power of that sort than he can voluntarily put an end to any other trust that may be committed to him" (*c*); but unless the power is coupled with a duty to exercise it, there is nothing to prevent the donee of the power from releasing it (*d*),

[Does not apply to power coupled with a duty.]

(*a*) *Ex parte Blackburne*, 1 J. & W. 297; and see *Hibbard* v. *Lamb*, Amb. 309.

[(*b*) 44 & 45 Vict. c. 41, s. 52.]

[(*c*) *Re Eyre*, 49 L. T. N.S. 259; *Saul* v. *Pattinson*, 55 L. J. Ch. 831.]

[(*d*) *Smith* v. *Houblon*, 26 Beav. 482; *Re Little*, 40 Ch. D. (C.A.) 418; *Re Radcliffe*, (1892) 1 Ch. (C.A.) 227; *Re Somes*, (1896) 1 Ch. 250; whether a trustee in bankruptcy can release a special power of appointment for the benefit of the bankrupt's estate, *quære*; see *Re Rose*, (1904) 2 Ch. 348; (1905) 1 Ch. (C.A.) 94].

though his object in so doing is to benefit himself; and therefore, where a parent has a power of appointment amongst his children, it is competent to him to release the power either for the purpose of vesting a share of the fund in himself as the administrator of a deceased child (*a*), or to enable himself with the concurrence of a child to obtain money for his own purposes (*b*). The enactment enables a married woman who is entitled for life subject to a restraint on anticipation, with a power of appointment amongst her children, to release the power by deed unacknowledged (*c*).]

III. As to *survivorship*.

Survivorship of powers.

1. The survivorship of the *estate* carries with it the survivorship of such *powers* as are annexed to the trust. If a *mere* power be given to A., B., and C., and one of them die, it is perfectly clear that the power cannot be exercised by the survivors; but if trustees have an *equitable* power annexed to the trust, and forming an integral part of it, as if an estate be vested in three trustees upon trust to sell, then, as the power is coupled with an interest, and the interest survives, the power also survives (*d*).

Trust powers.

The principle that *trust powers* survive with the *estate* appears to be as old as the time of Lord Coke, for he observes: "If a man *deviseth land to his executors to be sold*, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the *estate*, so the *trust* shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest*" (*e*). At the present day a *trust*, that is, a *power imperative*, whether a bare power, or a power coupled with an interest, would be

[(*a*) *Re Radcliffe*, (1892) 1 Ch. (C.A.) 227, where it was held that the parent, being tenant for life, must surrender his life interest in order to entitle himself to a transfer, as there could be no merger of estates held in different rights, and *Cunynghame* v. *Thurlow*, 1 Russ. & M. 436, n, was commented on; and see *Re French-Brewster's Settlements*, (1904) 1 Ch. 713, 716.]

[(*b*) *Re Somes*, (1896) 1 Ch. 250, where Chitty, J., observed: "There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this—that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power. The donee of the power may or he may not be acting in his own interest, but he is at liberty in my opinion, to say that he will never make any appointment under the power, and to execute a release of it."]

[(*c*) *Re Chisholm's Settlement*, (1901) 2 Ch. 82.]

(*d*) *Lane* v. *Debenham*, 11 Hare, 188; and see Gouldsb. 2, pl. 4; *Peyton* v. *Bury*, 2 P. W. 628; *Mansell* v. *Vaughan*, Wilm. 49; *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 108, 121, 124; *Butler* v. *Bray*, Dyer, 189, b.; *Byam* v. *Byam*, 19 Beav. 58; Jenk. 44; Co. Lit. 112, b, 113, a; *Flanders* v. *Clark*, 1 Ves. 9; *Potter* v. *Chapman*, Amb. 100; *Jones* v. *Price*, 11 Sim. 557.

(*e*) Co. Lit. 113, a; and see Ib. 181, b.

equally carried into execution in the *forum* of a Court of Equity; for the maxim now is, The trust or power imperative is the estate. But in the time of Lord Coke, had a bare power been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B., during their joint lives were compellable by *subpœna* in Chancery to execute for the benefit of the creditors; but if A. happened to die before the sale was carried into effect, the trust was extinguished, and the heir, who had always retained a right to the intermediate rents and profits, was then seised of the absolute and indefeasible inheritance. But in case the testator had *devised the estate* to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more liberal construction, and as upon the death of A. the whole estate passed by survivorship to B., the power, being annexed to the estate, was held to survive with it (1).

Survivorship where the power is given to trustees by name.

2. A distinction may perhaps be thought to exist between cases where the language of the trust is indefinite as to the persons by whom it is to be exercised (for example, where an

Before Statute of Uses a power given by will over the legal estate was void.

But over the use was good.

The execution of the power over the use passed the legal estate.

The power might be vested in the feoffees.

Until the power was executed the feoffees were trustees for the heir.

The object of the power could have compelled the execution.

If no specific object of the power, the execution was optional.

(1) In examining the cases of powers before the Statute of Uses, the following points may be usefully noticed: 1. A person seised of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void. 2. But a *use* was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the Statute of Richard the Third, which made mention of feoffments and grants, not extending to wills), the devisee might still have sued his *subpœna* in Chancery, and have compelled the feoffees to execute a conveyance of the estate. 3. If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the Statute of Richard, served to pass even the legal estate. 4. And *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger. Thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B. on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under the power, although they had parted with the legal fee. 5. Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made. 6. So long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by filing a bill in Chancery, to execute the power. 7. But if the proceeds of the sale were to be distributed *in pios usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpœna*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case *temp.* H. 7, Treat. of Powers, Appendix No. 1, 6th ed.

estate is vested in trustees and their heirs *in trust to sell*, &c.)' and those cases where the estate is limited to *persons by name*, as upon trust that "the said A. and B.," or that "the *said* trustees" (which is equivalent to naming them), shall sell; but the Courts have never relied upon any distinction of the kind, and it seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust (*a*); and the *rule* of survivorship applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are meant to form an integral part of it (*b*).

Powers not annexed to the trust.

3. But powers which are purely *arbitrary*, and independent of the trust, and not intended in furtherance of the trust, must, it is conceived, be construed strictly, and be governed by the rules applicable to ordinary powers. If, for instance, the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is evidently meant to be personal, and not to be annexed to the estate or office (*c*).

[Trustee Act, 1893, s. 22.]

[4. Now, as to trusts constituted after or created by instruments coming into operation after the 31st December, 1881, it is enacted that "where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being" (*d*). But it is conceived that this section does not apply to a purely arbitrary and personal power given to trustees *nominatim*.]

Fourthly. Of the *control of the Court* over the exercise of powers.

Control of the Court over arbitrary powers.

1. Where a power is given to trustees to do, or not do, a particular thing at their discretion, the Court has no discretion to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bonâ fide*, and their determination is not influenced by improper motives (*e*).

(*a*) *Lane* v. *Debenham*, 11 Hare, 188; *Hall* v. *May*, 3 K. & J. 585; [*Re Cooke's Contract*, 4 Ch. D. 454].

(*b*) *Warburton* v. *Sandys*, 14 Sim. 622; [*Crawford* v. *Forshaw*, (1891) 2 Ch. (C.A.) 261; *Re Waidanis*, (1908) 1 Ch. 123].

(*c*) See *Lane* v. *Debenham*, 11 Hare, 192.

[(*d*) 56 & 57 Vict. c. 53, s. 22, reproducing 44 & 45 Vict. c. 41, s. 38.]

(*e*) *Thomas* v. *Dering*, 1 Keen, 729; *Re Eddowes*, 1 Dr. & Sm. 395; *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285; *French* v. *Davidson*, 3 Mad. 396; *Sillibourne* v. *Newport*, 1 K. & J. 602; *Walker* v. *Walker*, 5 Mad. 424; *Bankes* v. *Le Despencer*, 11 Sim. 527,

Pink *v.* De Thuisey.

Thus, in *Pink* v. *De Thuisey* (*a*), a testatrix gave 1000*l.* to A. upon a condition precedent, but left "her executor *at liberty* to give the said sum if he found the thing proper" though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his personal representative filed a bill against the executor of the testatrix to compel payment of the legacy. A. in his lifetime had applied or the money, but the executor had not thought right to comply with the request. Sir T. Plumer, in dismissing the bill, observed: "The executor says *he did not think proper to advance the legacy:* is the Court to decide upon the propriety of the executor's withholding the legacy? That would be assuming an authority confided by the will to the discretion of the executor: it would be to *make* a will for the testatrix, instead of *expounding* it." [So, where trustees were given an absolute discretion to pay the whole or only a portion of the annual income of a specified fund to A., the assignee of A. had no higher right than A. had, and could not call upon the trustees to pay over the whole income (*b*).

But where a testator bequeathed certain moneys to his executor upon trust for such charitable purposes as he might think right, the Court, in an administration action, while holding that it had no right to interfere with the discretion given to the executor, refused to allow the fund to be paid out of Court without an affidavit by the trustee, showing how he proposed to apply it, on the ground that the trustee might possibly consider some application of it as charitable which the Court would not so regard (*c*).]

Power with a duty.

2. But where the power is *accompanied with a duty*, and meant to be exercised (as a power of leasing), the Court will compel the execution or execute it in the place of the trustees (*d*). So where

per Sir L. Shadwell; *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 551; *Cowley* v. *Hartstonge*, 1 Dow, 378, *per* Lord Eldon; *Potter* v. *Chapman*, Amb. 99, *per* Lord Hardwicke; *Carr* v. *Bedford*, 2 Ch. Rep. 146; *Wain* v. *Earl of Egmont*, 3 M. & K. 445; *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837-38, 472; *Kekewich* v. *Marker*, 3 Mac. & G. 326, *per* Lord Truro; *Re Coe's Trust*, 4 K. & J. 199; *Brophy* v. *Bellamy*, 8 L. R. Ch. App. 798; [*Gisborne* v. *Gisborne*, 2 App. Cas. 300, *per* Lord Cairns, at p. 367; *Tabor* v. *Brooks*, 10 Ch. D. 273; *Marquis Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. D. (C.A.) 571, *per* Jessel, M.R., at p. 578; *Thomas* v. *Williams*, 24 Ch. D. 558; *Re Blake*, 29 Ch. D. (C.A.) 913; *Re Courtier*, 34 Ch. D. (C.A.) 136; *Re Burrage*, 62 L. T. N.S. 752; *Re Lever*, 76 L. T. N.S. (C.A.) 71; reversing *S.C.* 75 L. T. N.S. 383].

(*a*) 2 Mad. 157.

[(*b*) *Train* v. *Clapperton*, (1908) A.C. (H. L.) 342.]

[(*c*) *Hagan* v. *Duff*, 23 L. R. Ir. 516.]

(*d*) *Tempest* v. *Lord Camoys*, 21 Ch. D. (C.A.) 576, note; [*Re Burrage*, 62 L. T. N.S. 752; and see *Re Bryant*, (1894) 1 Ch. 324].

the trustees had a power of sale, "if they should consider it advisable, but not otherwise," it was held that the power, though discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it (*a*).

Where trustees are *required* to do an act.

3. The Court will not in general control the discretion of trustees in reference to the adoption of any particular species of investment (*b*). But where trustees were "authorised and *required*," with the consent and *direction* of the tenant for life, to invest in leaseholds, the clause was held to be imperative upon the tenant for life's demand, and the trustees were not even allowed to say that the leaseholds would impose personal liabilities upon themselves, for by being parties to the settlement they had engaged to do it (*c*). But where the trustees were *required* to lend money to the husband on his bond, and he took the benefit of the Insolvent Debtors Act, it was held that, under such altered circumstances, the trustees were justified in refusing a loan to the husband (*d*); and where a variation of securities was to be with the consent of the tenant for life, and the fund was in danger, the Court called in the fund, though the consent of the tenant for life was refused (*e*).

[Maintenance of lunatic.]

[4. Where property was held upon trust to pay the income in such way, at such time, and in such manner, as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the Court to apply the income in the lunatic's maintenance in exoneration of her absolute property (*f*).]

Maintenance of infants.

5. If a fund be applicable to the *maintenance of children* at the discretion of trustees, the Court will not take upon itself to regulate the maintenance, but will leave it to the trustees (*g*). [But the discretion must be exercised within the limits of a sound

(*a*) *Nickisson* v. *Cockill*, 3 De G. J. & S. 622; 2 New Rep. 557; [and see *Re Courtier*, 34 Ch. D. (C.A.) 136].

(*b*) *Lee* v. *Young*, 2 Y. & C. C. C. 532.

(*c*) *Beauclerk* v. *Ashburnham*, 8 Beav. 322; *Cadogan* v. *Earl of Essex*, 2 Drew. 227.

(*d*) *Boss* v. *Godsall*, 1 Y. & C. C. C. 617.

(*e*) *Costello* v. *O'Rorke*, 3 I. R. Eq. 172.

[(*f*) *Re Weaver*, 21 Ch. D. (C.A.) 615.]

(*g*) *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837-38, 472; *Brophy* v. *Bellamy*, 8 L. R. Ch. App. 798; [*Re Bryant*, (1894) 1 Ch. 324, where, under the peculiar circumstances, the Court held that the trustees were justified in declining to exercise the discretionary trust].

and honest execution of the trust (*a*): and where the Court was of opinion that the exercise of the discretion had not been proper, it set it aside and regulated the maintenance irrespective of the wishes of the trustees (*b*). But the Court has no jurisdiction on a summons for maintenance intituled only "in the matter of the infant" to control the discretion of the trustees; this can only be done in an action, or on an originating summons, to which the trustees are made parties (*c*).

[Payment by guardian to co-guardian.]

6. Where trustees are guardians of infants, and one guardian pays the income to the other guardian for the maintenance and education of the infants, he will not be discharged by such payment, but must show that the infants have been properly maintained and educated, and that the amount paid to the other guardian was a proper allowance for the purpose (*d*).]

Mode of execution of trust.

7. Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose *in such manner as the executors or trustees may think fit*, the executors or trustees, if willing to execute the trust, will not, even on a suit being instituted for carrying the trusts into execution, be deprived of their discretionary power, but may propose a scheme before the judge in chambers for the approbation of the Court (*e*).

Power as to the objects of the trust.

8. Where the *objects* of a charity are from time to time to be at the discretion of the trustees (as if annual sums be made distributable *either* to private individuals *or* public institutions, *as the trustees may think fit*), the Court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply (*f*).

Selection of particular objects.

9. So where trustees had the power of selecting a lad for education from certain parishes, and if there were no suitable candidate, then from any other parish, and the trustees upon consideration rejected the candidate from the specified parishes, and selected a lad from another parish, it was held that the Court could not control the discretion. The trustees had assigned no

[(*a*) *Costabadie* v. *Costabadie*, 6 Hare, 410; *Davey* v. *Ward*, 7 Ch. D. 754.]

[(*b*) *Davey* v. *Ward*, 7 Ch. D. 754; *Re Roper's Trusts*, 11 Ch. D. 272.]

[(*c*) *Re Lofthouse*, 29 Ch. D. (C.A.) 921.]

[(*d*) *Re Evans*, 26 Ch. D. (C.A.) 58.]

(*e*) *Brunsden* v. *Woolredge*, Amb. 507; *Bennett* v. *Honywood*, Id. 708; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Supple* v. *Lowson*, Amb. 729, &c.

(*f*) *Waldo* v. *Caley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 M. & K. 59; and see *Powerscourt* v. *Powerscourt*, 1 Moll. 616; *Holmes* v. *Penney*, 3 K. & J. 103; [*Re Lea*, 34 Ch. D. 528; *Shuldham* v. *Royal National Lifeboat Institution*, 56 L. J. Ch. 784; 57 L. T. N.S. 17; 35 W. R. 710; *Warren* v. *Clancy*, (1898) 1 I. R. (C.A.) 127].

reason for their choice, but that the Court said was not necessary, and in many cases would not be proper (*a*). [And so where a scholarship was to be awarded to the qualified candidate who should pass the best examination, the trustees were justified in withholding the scholarship from the candidate who obtained the highest number of marks, on the ground that he was not deserving of so valuable a scholarship (*b*).]

Reasons for exercise of the power.

10. But though trustees invested with a discretionary power are not bound to assign their reasons for the way in which they exercise it; yet, if they do state their reasons, and it thereby appears that the trustees were labouring under an error, the Court will set aside the conclusion to which they came upon such false premises (*c*).

Powers not to be exercised *nunc pro tunc*.

11. Where the trustees have a discretionary power they must exercise their judgment according to the *circumstances as they exist at the time*, and they cannot, therefore, anticipate the arrival of the proper period by affecting to release it or by pledging themselves beforehand as to the mode in which the power shall be executed *in futuro* (*d*).

[Exercise of the power by will.]

[12. Where a trustee had an absolute discretion to apply the trust funds for certain charitable purposes as he might think fit, and he died without exercising the power by act *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised (*e*).]

Fraud.

13. There is sufficient ground for the interference of the Court, wherever the exercise of the discretion by the trustees is infected with fraud (*f*), or misbehaviour (*g*), or they decline to undertake

(*a*) *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440.

[(*b*) *Rooke* v. *Dawson*, 65 L.J. Ch. 31.]

(*c*) *Re Beloved Wilkes's Charity*, 3 Mac. & G. 448; *King* v. *Archbishop of Canterbury*, 15 East. 117.

(*d*) *Weller* v. *Ker*, 1 L. R. Sc. App. 11; [*Moore* v. *Clench*, 1 Ch. D. 447, 453; *Chambers* v. *Smith*, 3 App. Cas. 795, 815; *Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch.D. (C.A.) 236; *Saul* v. *Pattinson*, 55 L. J. Ch. 831; 54 L. T. N.S. 670; 34 W. R. 562; and see *Thacker* v. *Key*, 8 L. R. Eq. 408; *Re Wise*, (1896) 1 Ch. 281, and *ante*, p. 350; and similarly, a covenant to exercise a special testamentary power in a particular way is void: *Re Bradshaw*, (1902) 1 Ch. 436. Executors selling some shares in a company and retaining others may agree with the purchaser to vote as members in a particular way, if such agreement is beneficial to the estate, and the agreement being valid may be enforced by injunction: *Greenwell* v. *Porter*, (1902) 1 Ch. 530].

[(*e*) *Copinger* v. *Crehane*, 11 I. R. Eq. 429.]

(*f*) *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 552, *per* Lord Hardwicke; *Potter* v. *Chapman*, Amb. 99, *per eundem*; *Richardson* v. *Chapman*, 7 B. P. C. 318; *French* v. *Davidson*, 3 Mad. 402, *per* Sir J. Leach; *Talbot* v. *Marshfield*, 4 L. R. Eq. 661; and on appeal, 3 L. R. Ch. App. 622; *Thacker* v. *Key*, 8 L. R. Eq. 408.

(*g*) *Maddison* v. *Andrew*, 1 Ves. 59, *per* Lord Hardwicke; *Attorney-General* v. *Glegg*, Amb. 585, *per eundem*; *Willis* v. *Childe*, 13 Beav. 117; and see *Re*

the duty of exercising the discretion (*a*); or generally where the discretion is *mischievously and ruinously* exercised, as if a trustee be authorised to lay out money upon Government, *or* real *or* personal security, and the trust fund is outstanding upon any *hazardous* security (*b*). [But where the course pursued by the trustees is within the letter of the power, the *onus* is on the persons challenging their conduct to show that their discretion has been mischievously, or ruinously, or fraudulently exercised (*c*).]

Powers in case of charity.

14. And where the trustees of a *charity* were empowered to lease for three lives or thirty-one years, the Court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon (*d*).

The Court will exercise a surveillance where the trustees are before it.

15. Where proceedings had been taken for controlling the discretion of the trustees, Lord Hardwicke said: "Though he could not contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information but would still *keep a hand over them*" (*e*).

After decree trustee cannot exercise even a special power without the sanction of the Court.

16. Where a suit has been instituted for the administration of the trust, *and a decree has been made, that* attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court: as if a trustee have a power of investment, he cannot make any investment without the approval of the Court (*f*); or if a trustee have a power of appointment of new trustees, he is not excluded from the right of nominating the person, but the Court must give its sanction to the choice (*g*); [and if the Court does not approve the nominee of

Beloved Wilkes's Charity, 3 Mac. & G. 440; *Byam* v. *Byam*, 19 Beav. 65.

(*a*) *Gude* v. *Worthington*, 2 De G. & Sm. 389. This was apparently the ground on which the case was decided, but the refusal of the trustees to act does not sufficiently appear on the report. And see *Mortimer* v. *Watts*, 14 Beav. 622; *Re Sanderson's Trust*, 3 K. & J. 497; *Prendergast* v. *Prendergast*, 3 H. L. Cas. 195; *Palmer* v. *Newell*, 25 L. T. N.S. 892; *Bennett* v. *Wyndham*, 23 Beav. 528; *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218; 13 Ir. Ch. Rep. 404.

(*b*) *De Manneville* v. *Crompton*, 1 V. & B. 359; *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172; and see *Lee* v. *Young*, 2 Y. & C. C. C. 532.

[(*c*) *Re Brittlebank*, 30 W. R. 99; and where trustees have an absolute discretion as to the payment of the income of a fund, there is no jurisdiction to appoint a receiver; *Reg.* v. *Judge of County Court of Lincolnshire*, 20 Q. B. D. 167.]

(*d*) *Ex parte Berkhampstead Free School*, 2 V. & B. 138.

(*e*) *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 551.

(*f*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*g*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; —— v. *Robarts*, 1 J. & W. 251; *Middleton* v. *Reay*, 7 Hare, 106; *Kennedy* v. *Turnley*, 6 Ir. Eq. Rep. 399; *Consterdine* v. *Consterdine*, 31 Beav. 333; *Gray* v. *Gray*, 13 Ir. Ch. Rep. 404; [*Minors* v. *Battison*, 1 App. Cas. 428; *Tempest* v. *Lord Camoys*, 21 Ch. D. (C.A.) 571; *Re Norris*, 27 Ch. D. 333; *Cecil* v. *Langdon*, 28 Ch. D. (C.A.) 1; *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S. Ch. 527].

the trustee, it will call upon the trustee to make a new nomination, and will not appoint a person not nominated by the trustee merely on the ground that the nominee was not approved. Nor will the Court appoint a person not nominated by the trustee on the mere ground of such person being more eligible than the nominee of the trustee (*a*).

[Effect of Order 55.]

Where an action was commenced by writ for the general execution of the trusts of a will, and an order was made under Order 55, Rule 3, directing certain inquiries, including an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for the appointment of new trustees, and pending the inquiry the surviving trustee appointed a new trustee under the powers of the Conveyancing and Law of Property Act, 1881, it was held, that by the order the powers of the trustee were not interfered with, except so far as the exercise of them must necessarily clash with the particular inquiries directed; that it was the duty of the trustee not to fill up the vacancies in the trusteeship without the approval of the Court; and that the proper course would have been for the trustee to apply in chambers, stating that he intended to appoint the new trustee, and if it was found that there was no objection to the appointment, it would have been approved (*b*).]

Acts before decree.

17. But if *no decree has been made*, then, as the plaintiff may abandon his suit at any moment, the trustee must not assume that a decree will be made, but must proceed in all necessary matters with the due execution of the trust (*c*). It would not be prudent, however, except in formal matters, to act without first consulting the Court. It was held in one case, that the trustees had not exceeded their duty by appointing new trustees after the filing of a bill, as no extra costs had been thereby occasioned (*d*); but in another case it was said that the trustees ought, under the difficulties in which they were placed, to have consulted the Court, and as, instead of so doing, they had acted independently and made an appointment, which, though they entered into evidence, they could not justify, and great extra costs had arisen out of their conduct, the extra costs which had been occasioned were thrown upon the trustees personally (*e*).

[(*a*) *Re Gadd*, 23 Ch. D. (C.A.) 134; and see *Middleton* v. *Reay*, 7 Hare, 106; *Thomas* v. *Williams*, 24 Ch. D. 558, 567; *Re Higginbottom*, (1892) 3 Ch. 132.]

[(*b*) *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S. Ch. 527; 33 W. R. 509.]

(*c*) See Williams on Executors, p. 891, 4th ed.; p. 1915, 9th ed.

(*d*) *Cafe* v. *Bent*, 3 Hare, 245; [*Thomas* v. *Williams*, 24 Ch. D. 558, 567].

(*e*) *Attorney-General* v. *Clack*, 1 Beav. 467; and see *Turner* v. *Turner*,

Lord St Leonards' Act, and Amendment Act.

18. [By 22 & 23 Vict. c. 35, sect. 30, amended by 23 & 24 Vict. c. 38, sect. 9, trustees were authorised to] apply to any judge of the Court of Chancery, by petition or *summons* in chambers, for the opinion or direction of the judge respecting the management or administration of the trust property; [but the improved procedure under the new Rules of Court (*a*) rendered these enactments obsolete, and they have been repealed by the Trustee Act, 1893 (*b*).

[Order 55.]

19. Attention has already been called to the Rules of the Supreme Court, 1883, Order 55, Rule 3, under which an originating summons may be taken out in the chambers of a judge of the Chancery Division for directing executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees; and the scope and effect of this rule has been considered (*c*). By Rule 12, the issue of the summons is not to interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought; and an order made upon such a summons will not interfere with the powers or discretions, except so far as they necessarily clash with the directions of the order (*d*).

[Questions under Settled Land Act.]

20. If any question arises, or doubt is entertained, respecting any matter within sect. 56 of the Settled Land Act, 1882, being the section which saves powers of the tenant for life, or trustees under a settlement, which are concurrent with those under the Act, and restricts the exercise by trustees of such powers to the extent to be presently pointed out, the Court may on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon (*e*).

The application should be by summons to be served upon the tenant for life, if not the applicant. But unless the judge otherwise direct, no person except the tenant for life need be served in any case (*f*).

Fifthly. Of the restrictions on the powers of trustees imposed by the Settled Land Acts.

30 Beav. 414; *Talbot* v. *Marshfield*, 4 L. R. Eq. 661; 3 L. R. Ch. App. 622; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

[(*a*) *Ante*, p. 420.]

[(*b*) 56 & 57 Vict. c. 53, s. 51, & sched.]

[(*c*) See *ante*, p. 420.]

[(*d*) *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S. Ch. 527; 33 W. R. 509.]

[(*e*) 45 & 46 Vict. c. 38, s. 56, (3).]

[(*f*) Settled Land Act Rules, 1882, Rules 4, 5.]

[Powers under Settled Land Act cumulative.]

1. The Settled Land Act, 1882, vests in the tenant for life, including any other limited owner to whom under sect. 58 the powers of a tenant for life are given, large powers of dealing with the settled land (*a*), which powers cannot be released, or defeated, or avoided, either by the tenant for life or the settlor; but sect. 56 enacts as follows: "Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by this Act are cumulative." This enactment does not take away from the trustees named in any settlement the powers given to them by that settlement, but leaves those powers exercisable concurrently with the powers created by the Act (*b*). To obviate, however, the difficulty which might arise from the existence of concurrent powers, and in order to give full effect to the powers given by the Act to the tenant for life, the section further enacts as follows:—"But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

[Consent of tenant for life to exercise of powers.]

This clause has given rise to some difficulty, but has been interpreted by Pearson, J., by treating the first part of it as relating to concurrent powers in the tenant for life; in which case, if the powers under the settlement are less beneficial to him than those under the Act, he is entitled to exercise the powers under the Act notwithstanding any restriction in the settlement. The latter part of the clause, however, relates to the case of concurrent powers in the trustees of the settlement, or some other person under the settlement, and in the tenant for life, and requires the consent of the tenant for life to the exercise of the powers in addition to the requirements of the settlement (*c*); and such concurrence is necessary, although the tenant for life

[(*a*) As to what is included in the term "settled land", see sect. 2 of the Act.]

[(*b*) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

[(*c*) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

be a lunatic not so found (*a*). The "conflict" referred to, means a conflict between provisions connected with the execution of the power, as, for example, the consent of a third person, and not with the results of such execution, and therefore where a tenant for life has under the settlement a power of leasing which is more advantageous than that given by the Act, the provisions of the Act will not override those of the settlement (*b*). Where by a will a power of sale is given to the trustees of the whole estate, but undivided shares are separately settled, the consents of all the persons who are tenants for life, or persons having the powers of tenants for life, of the undivided shares are necessary to the exercise of their power of sale by the trustees of the will (*c*). Where the tenant for life is capable of exercising his powers, the Court will not, even though he be a bankrupt, make an order under the Settled Estates Act, giving general powers of sale or of leasing to any other person, but if the tenant for life wrongfully refuse to exercise his powers, so as to prevent obvious and practicable improvements from being effected, and the persons interested come before the Court with a well-considered scheme, and show that it is for the benefit of the estate that some particular lease should be granted, and that the tenant for life without sufficient reason refuses to exercise his power, the Court will make an order under the Settled Estates Act (*d*).

[Settled Estates Act.]

Powers already given by an order of the Court under the Settled Estates Act are not affected by sect. 56 of the Act of 1882, and the proper course, if it is desired to supersede them, is to apply under the Settled Estates Act for that purpose (*e*).

[General powers of trustees not affected.]

2. It may be observed that the powers of the trustees, for the exercise of which the consent of the tenant for life is required, are those *conferred by the settlement*, and the enactment does not touch general powers exercisable by the trustees *virtute officii*.

[Effect of enactment.]

3. The effect of the enactment stated shortly is that any special power, given to trustees for any of the purposes for which similar powers are given by the Settled Land Acts to the tenant for life, cannot be exercised without his concurrence.

[Consent of all tenants for life in possession required by Act of 1882.]

4. By the definition of a tenant for life it is provided (*f*) that if, in any case, there are two or more persons entitled for life to

[(*a*) *Re Atherton*, W. N. 1891, p. 85.]

[(*b*) *Earl of Lonsdale* v. *Lowther*, (1900) 2 Ch. 687.]

[(*c*) *Re Osborne and Bright's Limited*, (1902) 1 Ch. 335.]

[(*d*) *Re Mansel's Settled Estates*, W. N. 1884, p. 209; and see *Cecil* v. *Langdon*, 54 L. T. N.S. 418.]

[(*e*) *Re Poole's Settlement*, 32 W. R. 956; 50 L. T. N.S. 585; *Re Barrs Haden's Settled Estates*, 32 W. R. 194; 49 L. T. N.S. 661.]

[(*f*) Sect. 2, sub-s. 6.]

possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. And by sect. 58, the limited owners therein specified are to have the powers of a tenant for life, and the provisions of the Act referring to a tenant for life are to extend to each of such limited owners, and reading these provisions with the 56th section, it resulted that where several persons were concurrently entitled as tenants for life, or as such limited owners, in possession to the income of the settled land, the consent of all of them was necessary to the exercise by the trustees of the powers affected by the section (*a*). This was found in practice to lead to useless delay and expense, and to remedy the evil it was enacted by the Settled Land Act, 1884 (*b*), that where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then notwithstanding anything contained in sub-sect. 2 of sect. 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act. And the section applies to dealings as well before as after the passing of the Act.

[Consent of one sufficient under Act of 1884.]

As the law, therefore, now stands, the trustees can exercise their powers if the concurrence can be procured of any one of the persons concurrently interested under the settlement, as tenant for life, or limited owner in possession of any share of the settled property (*c*).

5. Hitherto we have been considering the case where there is no trust for sale, or imperative direction to the trustees to sell. Where, however, there is such a trust or direction the case falls within sect. 63 of the Act of 1882, and the right of the trustees to exercise their powers for any purpose for which similar powers are conferred by the Act is subject to restrictions of an entirely different nature, which we proceed now to consider.

[Case of trust for sale or direction to sell.]

6. By sect. 63 of the Act of 1882, sub-sect. 1, it is provided that any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender,

[Sect. 63.]

[(*a*) *Re Collinge's Settled Estates*, 36 Ch. D. 516.]

[(*b*) 47 & 48 Vict. c. 18, s. 6 (2).]

[(*c*) But not where the shares are separately settled, as then the tenants for life of undivided shares do not together constitute a tenant for life for the purposes of the Act of 1882; and see *Re Osborne and Bright's Limited*, (1902) 1 Ch. 335.]

copy of Court Roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of the Act, is subject to a trust or direction for sale (*a*) of that land, estate, or interest, and for the application or disposal of the money to arise from the sale or the income of that money, or the income of the land until sale, or any part of that money or income for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled (*b*) to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of that Act, are for purposes of the Act trustees of the settlement. And by sub-sect. 2, in every such case the provisions of the Act referring to a tenant for life and to a settlement, and to settled land, are to extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject to certain exceptions not material to the present purpose.

[(*a*) As to the meaning of these words, see *Re Horne's Settled Estate*, 39 Ch. D. (C.A.) 84, from which case it would seem that the trust or direction to which the property is "subject" must be presently exercisable and not postponed; but the fact that a trust for sale cannot be exercised without the consent of the tenant for life, does not prevent its being a trust or direction for sale within the section: *Re Wagstaff's Settled Estates*, (1909) 2 Ch. 201. A trust for sale that may never arise is not within the section; *Re Goodall's Settlement*, (1909) 1 Ch. 440. An implied trust or direction, *e.g.* by reason of a devise on trust to pay debts, is sufficient; *Re M'Curdy*, 27 L. R. Ir. 395; and a settlement of purely personal property with a power (which has been exercised) to invest in the purchase of land, may be within the section; *Re Child's Settlement*, (1907) 2 Ch. 348, *ante*, p. 695.]

[(*b*) That is, entitled *in præsenti*; see *Re Horne's Settled Estate*, 39 Ch. D. (C.A.) 84.]

This obscure section gave rise to many difficulties, and in many cases added considerably to the costs of administering trust estates, by unnecessarily obstructing the free disposition by the trustees of property vested in them upon trust for sale. Thus, the effect of the section was, where the proceeds of sale, or any share of the proceeds of sale, were held in trust for a person or several persons concurrently, any of whom had a life or other limited interest, to render various consents necessary (*a*); and it was a question of difficulty whether, even where the first trust affecting the proceeds of sale was for payment of debts, and the residue only, or a share of such residue, was held in trust for persons in succession, such consents could be dispensed with, though the better opinion seems to have been that such consents were in that case unnecessary. [Difficulties under the section.]

It is not proposed, however, to discuss what consents were required under the section, as the inconveniences which arose from requiring any consents were found to be so serious that the legislature intervened, and enacted by the Settled Land Act, 1884 (*b*), sect. 6, sub-sect. 1, that in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not, by force of anything contained in that Act, to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement. And by sub-sect. 3, the section applies to dealings before, as well as after, the passing of the Act. But sect. 7 provides that, with respect to the powers conferred by sect. 63 of the Act of 1882, the following provisions are to have effect:— [Remedy provided by Settled Land Act, 1884.]

(1) Those powers are not to be exercised without the leave of the Court.

(2) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(3) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(4) So long as an order under this section is in force, neither

[(*a*) In *Taylor* v. *Poncia*, 25 Ch. D. 646, a distinction was drawn between the case where there was an absolute trust for sale at a particular time, without any discretion in the trustees as to the time at which the sale should take place, and the ordinary case of a trust for sale with a discretion in the trustees to postpone the sale, and it was held that in the former case the section did not apply, and the trustees could sell without any consent.]

[(*b*) 47 & 48 Vict. c. 18.]

the trustees of a settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is, by the order, given to exercise a power conferred by the Act of 1882.

(5) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(6) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered, as a *lis pendens*.

(7) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of sect. 63 of the Act of 1882.

(8) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(9) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by sect. 63 of the Act of 1882, and shall have, and may exercise those powers accordingly.

(10) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

[Effect of enactments.]

7. The effect of these enactments is, that where property is subject to a trust or direction for sale, as distinguished from a mere power of sale, the trustees may execute the trust, and exercise their powers irrespective of the restrictions arising under the Settled Land Act, 1882, until an order has been made by the Court giving leave to some other person or persons to exercise all or any of the powers conferred by sect. 63 on the tenant for life; and that until such an order has been made no tenant for life or other limited owner is able, under the Act of 1882, to exercise any power conferred by that Act. But when such an order has been made, and so long as the order remains in force, the trustees cannot execute any trust or power created by the settlement for any purpose to which the leave given by the order extends (*a*). The powers under the settlement and

[(*a*) *Re Harding's Estate*, (1891) 1 Ch. 60, 64.]

the Act will thus never be concurrent, and as every order, to be effectual, must be registered, and re-registered as a *lis pendens*, there will never be any difficulty in ascertaining, by a search for *lites pendentes*, whether the trustees are in a position to execute their trusts and powers. Moreover, as the persons to whom leave is given to exercise the powers "are to be deemed the proper persons to exercise them, and may accordingly exercise them," any person dealing with such persons will acquire a statutory title from them, and will not be under any obligation to ascertain that the leave was properly given.

[Instrument creating the trust.]

8. It has been held that, in determining whether land vested in trustees upon trust for sale is subject to the provisions of the Settled Land Act, 1882, the Court must look simply at the instrument which created the trust for sale, and that if at the time when a contract for sale is entered into by the trustees, there is no person who, by virtue of the provisions of *that* instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life or any other limited period, sect. 63 does not apply, notwithstanding that, under other instruments subsequent to that creating the trust for sale, there may be tenants for life or persons with other limited interests (*a*).

[Leave to tenant for life to sell.]

9. Where the tenants for life of the income of the proceeds of sale were two elderly maiden ladies, and in default of their having children, the proceeds belonged beneficially to the persons who were constituted trustees for sale, leave was granted to the tenants for life to sell the land, North, J., observing that it was the simplest possible case, and if he were not to say that these tenants for life were to have leave he could not imagine any case in which leave should be given (*b*).

[Tenant for life let into possession.]

10. Where the tenant for life applies to the Court for possession, and leave to exercise the powers conferred by sect. 63, the Court, on being satisfied that the case is one in which possession ought to be granted, will insert in the order any such undertakings by him as are proper for the protection of all persons interested in the estate, and as the application is for his convenience, the costs must be borne by him (*c*).]

[(*a*) *Re Earle and Webster's Contract*, 24 Ch. D. 144.]

[(*b*) *Re Harding's Estate*, (1891) 1 Ch. 60, 65.]

[(*c*) *Re Bagot's Settlement*, (1894) 1 Ch. 177, where the tenant for life, a married woman restrained from anticipation, was let into possession, and leave given to her to exercise all the powers of a tenant for life under the Acts, except those of sale and exchange; and see *post*, Chap. XXVII. as to the circumstances under which the Court will let an equitable tenant for life into possession.]

CHAPTER XXV

OF ALLOWANCES TO TRUSTEES

Now that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon subjects very closely interwoven with the execution of the office, viz. First, Allowances to trustees for their *time and trouble;* and, Secondly, Allowances to trustees for *actual expenses.*

SECTION I

ALLOWANCES FOR TIME AND TROUBLE

General rule.

1. It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time. One reason given is, that on these pretences, if admitted, the trust estate might be loaded and rendered of little value; besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not (*a*). The true ground, however, is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty; and, as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position (*b*).

(*a*) *Robinson* v. *Pett*, 3 P. W. 251, *per* Lord Talbot; *Gould* v. *Fleetwood*, cited Ib. note (A.); *How* v. *Godfrey*, Rep. *t.* Finch, 361; *Brocksopp* v. *Barnes*, 5 Mad. 90; *Ayliffe* v. *Murray*, 2 Atk. 58; *Re Ormsby*, 1 B. & B. 189, *per* Lord Manners; *Charity Corporation* v. *Sutton*, 2 Atk. 406, *per* Lord Hardwicke; *Bonithon* v. *Hockmore*, 1 Vern. 316, &c.

(*b*) *New* v. *Jones*, Exch. 9th Aug. 1833, cited 9th Jarm. Prec. 338, *per* Lord Lyndhurst; and see *Burton* v. *Wookey*, 6 Mad. 368.

Executors, mortgagees, receivers, committees of lunatics.

2. And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators (*a*), mortgagees (*b*), receivers (*c*), committees of lunatics' estates (*d*), a surviving partner (*e*), &c.

Trustees of West India estates.

3. But trustees for absentees of estates in the *West Indies* are allowed a commission for their personal care in the management and improvement of the property. However, if, instead of remaining upon the island, they commit the management to the hands of agents, the Court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon his reward when he had been absent himself (*f*). But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper (*g*).

Executor in the East Indies.

4. An executor appointed in the *East Indies* and administering in that country, and then returning to England, was formerly, if called upon in a Court of Equity to render an account, allowed a commission of 5 per cent. upon the receipts *or* payments, [where, according to the existing practice of the Indian Courts, a similar allowance would have been made in India (*h*).] If, however, an

(*a*) *Scattergood* v. *Harrison*, Mos. 128; *How* v. *Godfrey*, Rep. *t.* Finch, 361; *Sheriff* v. *Axe*, 4 Russ. 33.

(*b*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *Langstaffe* v. *Fenwick*, 10 Ves. 405; *French* v. *Baron*, 2 Atk. 120; *Carew* v. *Johnston*, 2 Sch. & Lef. 301; *Arnold* v. *Garner*, 2 Ph. 231; *Matthison* v. *Clarke*, 3 Drew. 3; *Barrett* v. *Hartley*, 12 Jur. N.S. 426; [*Re Wallis*, 25 Q. B. D. (C.A.) 176; *Stone* v. *Lickorish*, (1891) 2 Ch. 363 (as to costs of solicitor-mortgagee)]. Mortgagees were also disabled formerly *by the effect of the usury laws* from claiming anything beyond their principal and legal interest. [As to professional charges by a solicitor who is a mortgagee, see the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), ss. 2, 3; *Day* v. *Kelland*, (1900) 2 Ch. (C.A.) 745; and as to opening settled accounts, see *Cheese* v. *Keen*, (1908) 1 Ch. 245, *post*, p. 783.]

(*c*) *Re Ormsby*, 1 B. & B. 189.

(*d*) *Anon. case*, 10 Ves. 103; *Re Walker*, 2 Ph. 630; *Re Westbrooke*, Ib. 631.

(*e*) *Burden* v. *Burden*, 1 V. & B. 170; *Stocken* v. *Dawson*, 6 Beav. 371.

(*f*) *Chambers* v. *Goldwin*, 9 Ves. 273.

(*g*) *Forrest* v. *Elwes*, 2 Mer. 68; and see Williams on Executors, 9th ed. pp. 1766, 1767.

(*h*) *Chetham* v. *Lord Audley*, 4 Ves. 72; *Matthews* v. *Bagshaw*, 14 Beav. 123. [But now by the India Act, No. II. of 1874, sect. 56, no person other than the Administrator-General acting officially is to receive or retain any commission or agency charges for anything done by the executor or administrator under any probate or letters of administration or letters *ad colligenda bona* which have been granted by the Supreme Court, or High Court at Fort William in Bengal, since the passing of the Act No. VII. of 1849, or by either of the Supreme or High Courts at Madras and Bombay, since the passing of the Act No. II. of 1850, or which have been or shall be granted by any Court of competent jurisdiction within the meaning of ss. 187 and 190 of the Indian Succession

Indian executor, after collecting part of the assets, came over to this country, he was allowed a commission on those assets only that were collected by himself in India, and not on the assets subsequently collected by his agents and transmitted to this country, for the Courts here allowed the commission because the Indian Courts allowed it, and the Indian Courts allowed it on the ground of residence in India (*a*).

Constructive trustees.

5. A person who has carried on a business with another man's money under circumstances which make him liable to account for profits, will be allowed a compensation for his *skill and exertions* in the management of the concern (*b*).

Express trustee has no allowance for management of a trade.

6. But a person will not be permitted, except under very special circumstances (*c*), to charge anything for his management of a trade or business, where he has been clothed in *express* terms with the character of a trustee or executor (*d*).

Solicitors.

7. A *solicitor* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements (*e*). Lord Lyndhurst observed: "It would be *placing his* INTEREST *at variance with the duties he has to discharge.* It is said, the bill may be taxed, but that would not be a sufficient check; the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee: a trustee placed in the situation of a solicitor might, if allowed to perform the duties of

Act, 1865. But this enactment is not to prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor, or by way of commission or otherwise. By the Indian Trusts Act, 1882 (Act II. of 1882), sect. 50, it is provided that "in the absence of express directions to the contrary, contained in the instrument of trust, or of a contract entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill, and loss of time in executing the trust," but nothing in this section is to apply to any official trustee, Administrator-General, Public Curator, or person holding a certificate of administration.]

(*a*) *Campbell* v. *Campbell*, 13 Sim. 168; and see 2 Y. & C. C. C. 607. An executor in India was only allowed the commission where the testator himself had not left him a legacy for his trouble: *Freeman* v. *Fairlie*, 3 Mer. 24; but if the amount of the legacy was an inadequate compensation for the duties of the office, the executor, so as he signified his resolution in proper time, might renounce the intended legacy, and take advantage of the commission, Id. 28.

(*b*) *Brown* v. *De Tastet*, Jac. 284; and see Sir Samuel Romilly's argument in *Crawshay* v. *Collins*, 15 Ves. 225; and *Wedderburn* v. *Wedderburn*, 22 Beav. 84. To this principle must also be referred the decision in *Brown* v. *Litton*, 1 P. W. 140; 10 Mod. 20.

(*c*) *Forster* v. *Ridley*, 4 N. R. 417; *S. C.* 4 De G. J. & S. 452.

(*d*) *Stocken* v. *Dawson*, 6 Beav. 371; *Burden* v. *Burden*, 1 V. & B. 170; *Brocksopp* v. *Barnes*, 5 Mad. 90. See *Marshall* v. *Holloway*, 2 Sw. 432.

(*e*) *New* v. *Jones*, Exchequer. 9th Aug. 1833, 9 Jarm. Prec. 338. See the result of the various decisions stated *ante*, pp. 312, *et seq.*

a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings which he would not do, if he were to derive no emolument from them himself, and if he were to employ another person" (*a*).

Settled accounts.

8. If a *cestui que trust* settle accounts with a trustee, who is a solicitor, and execute a general release, and the accounts contain items of charges for professional services, the *cestui que trust*, if he had no legal advice, and was not expressly informed that professional services might have been disallowed, may open the accounts as regards any objectionable items (*b*); but [in order to do this, the *cestui que trust* must at least make out a *primâ facie* case showing some error in the account (*c*), and if he] had independent legal assistance, he is bound by the release (*d*). [The trustee in such a case should cause a detailed bill of costs to be incorporated with the account (*e*).]

Purchaser.

9. The doctrine against professional charges by a trustee, who is a solicitor, is so rigidly applied, that where a security has been given for payment of such professional charges, it may be set aside, even as against a *purchaser for valuable consideration*, if he had *notice* (*f*).

Allowance directed by the settlor.

10. The rule against allowances to trustees is merely a general one in the absence of express directions to the contrary; for there is no objection to the settlor himself *directing compensation* to the trustee for his services, either by the gift of a sum in gross, or by the allowance of a salary (*g*).

Allowance does not cease on institution of a suit.

11. And if a testator give an executor a salary for his trouble, the allowance will not cease on the institution of a suit; for though the management be thenceforward under the direction of the Court, the executor is still called upon to assist the Court in the administration with his care and vigilance (*h*). If the executor be wholly incapacitated, even by the act of God, from discharging the duties of executor (*i*), and *a fortiori* if the

(*a*) *New* v. *Jones*, 9 Jarm. Prec. 338; *Clarkson* v. *Robinson*, (1900) 2 Ch. 722, *ante*, p. 313.

(*b*) *Todd* v. *Wilson*, 9 Beav. 486; [and see *Re Fish*, (1893) 2 Ch. (C.A.) 413; *Re Webb*, (1894) 1 Ch. (C.A.) 73, 83, 85; *Cheese* v. *Keen*, (1908) 1 Ch. 245 (case of mortgagee solicitor).]

[(*c*) *Re Webb*, *ubi sup.*]

(*d*) *Stanes* v. *Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209.

[(*e*) *Re Webb*, *ubi sup.*, *per* Davey, L.J.]

(*f*) *Gomley* v. *Wood*, 3 Jon. & Lat. 678, [where the solicitor having acted for the purchaser, the purchaser was treated as having notice of all that the solicitor knew, see p. 693].

(*g*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Robinson* v. *Pett*, 3 P. W. 250, *per* Sir J. Jekyll; *Willis* v. *Kibble*, 1 Beav. 559. [And as to the effect of such clauses, see *ante*, p. 312, *et seq.*]

(*h*) *Baker* v. *Martin*, 8 Sim. 25; see *ante*, p. 747.

(*i*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury* v. *Spooner*, 5 Beav. 630.

executor, being capable, do not act when there is nothing to prevent his acting (*a*), he cannot claim a legacy given to him for his trouble in the executorship (*b*), and an annuity, limited to a trustee during the continuance of his office, cannot be claimed when the duties of the office have ceased by the absolute vesting of the property (*c*).

Amount of allowance not expressed.

12. Where the settlor has directed a remuneration to the trustee, but has not declared the *amount*, a reference will be directed to settle the *quantum meruit*, according to the circumstances of the case (*d*).

Contract for an allowance with the *cestui que trust*.

13. The trustee may also, at the time of accepting the trust, *contract* for an allowance or remuneration for his services (*e*); but bargains of this kind are watched by the Court with exceeding jealousy (*f*), and must be freely made and not submitted to from pressure (*g*); and where the person about to become trustee and bargaining for remuneration is a solicitor, who is *acting as such in the preparation of the instrument of trust which purports to confer the right of remuneration*, there would seem to be considerable difficulty in upholding the contract unless the client had independent professional advice, or unless, at all events, the solicitor can show that the precise nature of the arrangement was distinctly explained to the client (*h*).

Terms of the contract must be fulfilled to the letter.

14. Where the contract is valid originally, the conditions of it must be *fulfilled to the letter*, or the trustee is not entitled to his reward. An executor, who had no legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands; but the Court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died before he had finished the affairs of the trust; and so the plaintiffs' demand was disallowed (*i*).

Contract for an allowance with the Court.

15. A trustee dealing with the *Court* is at liberty, before

(*a*) *Slaney* v. *Witney*, 2 L. R. Eq. 418.

(*b*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury* v. *Spooner*, 5 Beav. 630.

(*c*) *Hull* v. *Christian*, 17 L. R. Eq. 546.

(*d*) *Ellison* v. *Airey*, 1 Ves. 111, see 115; and see *Willis* v. *Kibble*, 1 Beav. 559.

(*e*) *Re Sherwood*, 3 Beav. 338; *Douglas* v. *Archbutt*, 2 De G. & J. 148.

(*f*) *Ayliffe* v. *Murray*, 2 Atk. 58.

(*g*) *Barrett* v. *Hartley*, 12 Jur. N.S. 426.

(*h*) *Moore* v. *Frowd*, 3 M. & Cr. 48.

(*i*) *Gould* v. *Fleetwood*, cited *Robinson* v. *Pett*, 3 P. W. 251, note (A).

accepting the trust, to stipulate for any remuneration which the Court may choose to give him (*a*). But if he omitted to contract with the Court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and we may add that in no case will the Court remunerate a trustee for his trouble by permitting him to make *professional charges* where the settlor has not so directed, but will compensate him for his trouble, if at all, by a regular and fixed salary (*b*).

Mortgagee.

16. During the continuance of the usury laws a *mortgagee* could not, as a general rule, have *bargained* for a compensation exceeding together with the actual interest the legal rate, for an agreement of this kind would have tended to usury (*c*). But after a long struggle certain special exceptions were established in favour of mortgagees *not in possession* of West Indian estates (*d*).

[Effect of repeal of usury laws.]

[The rule that the mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest does not depend on the laws against usury (*e*), and a stipulation by the mortgagee that he should receive a bonus was, under special circumstances, held invalid on this ground (*f*); and for the same reason, a covenant in a mortgage for payment of any sum which may become owing from the mortgagor to the mortgagee, who is a solicitor, will not include profit costs and agency charges (*g*); but sums actually deducted by a mortgagee for commission and bonus at the times of making the advances, in accordance with the mortgage contract, entered into deliberately and without any unfair dealing on the part of the mortgagee, were allowed, the return thus made by the mortgagor to the mortgagee being regarded as part of the consideration for the accommodation to him (*h*).]

Employment of agents.

17. As a trustee will not be permitted to charge for his

(*a*) *Marshall* v. *Holloway*, 3 Sw. 452, 453; *Newport* v. *Bury*, 23 Beav. 30; *Brocksopp* v. *Barnes*, 5 Mad. 90, *per* Sir J. Leach; *Re Freeman's Settlement*, 37 Ch. D. 148; and see *Morison* v. *Morison*, 4 M. & Cr. 215.

(*b*) *Bainbrigge* v. *Blair*, 8 Beav. 588. See the observations of Lord Langdale, pp. 595, 596; [and see *Re Freeman's Settlement*, 37 Ch. D. 148, where a commission of 5 per cent. was allowed to an English trustee for receiving rents, all the *cestuis que trust* and the other trustees being resident out of the jurisdiction].

(*c*) See *Chambers* v. *Goldwin*, 9 Ves. 271.

(*d*) See the history of the struggle detailed in Lord Brougham's judgment in *Leith* v. *Irvine*, 2 M. & K. 277.

[(*e*) *James* v. *Kerr*, 40 Ch. D. 449, 460, *per* Kay, J.]

[(*f*) *James* v. *Kerr*, *ubi sup.*]

[(*g*) *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218.]

[(*h*) *Mainland* v. *Upjohn*, 41 Ch. D. 126; following *Potter* v. *Edwards*, 26 L. J. Ch. 468; and see *Marquess of Northampton* v. *Pollock*, 45 Ch. D. (C. A.) 190, 212; *S. C.* in H. L. *nom. Salt* v. *Marquess of Northampton*, (1892) A. C. 1.]

personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate.

Collector of rents.

18. Thus a trustee, though he may not act as a collector himself with a commission (*a*), may, if the case require it, appoint a *collector of rents* (*b*), [or of book debts (*c*),] at a commission. [But trustees who under an order of the Court receive rents and are allowed a commission, will not be allowed additional charges in respect of a collector of rents (*d*).]

Bailiff.

19. As a man is not bound to be his own *bailiff*, if a trustee employ a skilful person in that capacity, the salary must be allowed (*e*); at least the Court will grant that indulgence where the estate is at such a distance that the trustee must have appointed a bailiff had the estate been his own (*f*).

Attorney.

20. An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the Master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "it was clear that if an executor paid an *attorney* for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the Master to tax the items of the bill (*g*).

Accountant.

21. If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an *accountant*, he is entitled to charge the trust estate with it under the head of expenses (*h*).

Weiss v. Dill.

22. In *Weiss* v. *Dill* (*i*), the executor of a trader had employed

(*a*) *Nicholson* v. *Tutin*, 3 K. & J. 159; [*Re Bedingfield*, 57 L. T. N.S. 332].

(*b*) *Davis* v. *Dendy* (the case of a mortgagee), 3 Mad. 170; *Stewart* v. *Hoare*, 2 B. C. C. 633; and see *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *Re Westbrooke*, 2 Ph. 631; [but as to the propriety of trustees employing the solicitor to the trust estate to collect rents and receive a commission, see *Re Weall*, 42 Ch. D. 674].

[(*c*) *Re Brier*, 26 Ch. D. (C.A.) 238.]

[(*d*) *Cox* v. *Bennett*, 39 W. R. 308.]

(*e*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *Chambers* v. *Goldwin*, 9 Ves. 272, *per* Lord Eldon.

(*f*) *Godfrey* v. *Watson* (as to a mortgage), 3 Atk. 518, *per* Lord Hardwicke. [As to the employment of professional advisers under the Public Trustee Act, 1906, see *ante*, p. 706.]

(*g*) *Macnamara* v. *Jones*, 2 Dick. 587.

(*h*) *New* v. *Jones*, Exch., 9th Aug. 1833, cited 9 Jarm. Prec. 338; *Henderson* v. *M'Iver*, 3 Mad. 275.

(*i*) 3 M. & K. 26; and see *Giles* v. *Dyson*, 1 Stark. N. P. C. 32; *Hopkinson* v. *Roe*, 1 Beav. 180; *Day* v. *Croft*, 2 Beav. 488.

an agent to *collect debts*, which were numerous and only paid after repeated applications, at a commission of 5 per cent. The Master had reduced the commission to $2\frac{1}{2}$ per cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said: "Executors, generally speaking, are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents; I have some doubt whether in this case the Master ought to have made *any* allowance, but with the allowance of $2\frac{1}{2}$ per cent. the executor must be content." The observations of Sir J. Leach might seem at first either to cast doubt upon the general right of a trustee to employ salaried agents in fitting cases, or to establish a distinction between the collection of *debts* and the collection of *rents*, but it cannot be supposed that his Honour intended to reverse his previously expressed views on the general principle (*a*), and there seems no ground for any such distinction as that adverted to. The decision in substance was, that the Court declined to overrule the Master's opinion on the question of *quantum*.

SECTION II

ALLOWANCES TO TRUSTEES FOR EXPENSES

General rule.

1. Though a trustee is allowed nothing for his *trouble*, he is allowed everything for his *expenses out of pocket* (*b*). "It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust" (*c*). Even where trustees had been *wrongfully appointed*, but acted *bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses, notwithstanding the defect of title (*d*).

(*a*) See *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; [and see *Re Brier*, 26 Ch. D. (C.A.) 238].

(*b*) *How* v. *Godfrey*, Rep. *t.* Finch. 361; *Re Ormsby*, 1 B. & B. 190, *per* Lord Manners; *Hide* v. *Haywood*, 2 Atk. 126; *Caffrey* v. *Darby*, 6 Ves. 497, *per* Sir W. Grant; *Godfrey* v. *Watson*, 3 Atk. 518, *per* Lord Hardwicke; *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & Fin. 512, 515, *per* Lord Cottenham.

(*c*) *Worrall* v. *Harford*, 8 Ves. 8; and see *Dawson* v. *Clarke*, 18 Ves. 254; *Attorney-General* v. *Mayor of Norwich*, 2 M. & Cr. 424; *Morison* v. *Morison*, 7 De G. M. & G. 214.

(*d*) *Travis* v. *Illingworth*, W. N. 1868, p. 206.

Travelling expenses.

2. A trustee will be entitled to be reimbursed his *travelling* expenses (*a*), provided they be properly incurred (*b*).

Employment of solicitor.

3. Trustees are justified in employing a *solicitor* for the better conduct of the trust (*c*). And a trustee is entitled to be paid all costs properly incurred for which he is liable to the solicitor so employed; as where *two* executors, defendants in an administration suit, gave a *joint retainer* to a firm of solicitors, and one of the executors became bankrupt and was a debtor to the estate, it was held that the other executor, being liable for the whole costs under the joint retainer, was entitled to the whole costs as against the estate (*d*). [But this case has been dissented from by Sir G. Jessel, M.R., who held, in a similar case, that the solvent executor should be allowed only his own proportion of the costs up to the bankruptcy out of the estate, the defaulter's proportion being set off against the debt due from him, but that the costs incurred by both subsequently to the bankruptcy should be allowed in full (*e*). And this view has since been approved (*f*). The proportion of the common costs which should be allowed to the solvent trustee is a matter for the Taxing Master (*g*).] And the sums paid will, at the instance of the *cestui que trust*, though not liable to taxation, be looked over and moderated (*h*). And trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences, if they be misled by the professional advice of such trustee solicitor (*i*).

(*a*) *Ex parte Lovegrove*, 3 D. & C. 763; and see *Ex parte Elsee*, 1 Mont. 1; *Ex parte Bray*, 1 Rose, 144. These were cases of assignees who by 6 G. 4. c. 16, s. 106 (the Bankrupt Act then in force), were to have "all just allowances," but trustees are equally entitled to all just allowances *virtute officii;* see *Blackford* v. *Davis*, 4 L. R. Ch. App. 305.

(*b*) *Malcolm* v. *O'Callaghan*, 3 M. & Cr. 62; and see *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

(*c*) *Macnamara* v. *Jones*, 2 Dick. 587.

(*d*) *Watson* v. *Row*, 18 L. R. Eq. 680.

[(*e*) *Smith* v. *Dale*, 18 Ch. D. 516. This case probably referred to a bankruptcy under the law as it existed prior to the Act of 1869, as under that Act the bankrupt trustee would not have been entitled to his costs after the bankruptcy until he had made good his default. See *post*, Chap. XXXIII. s. 5.]

[(*f*) *M'Ewan* v. *Crombie*, 25 Ch. D. 175.]

[(*g*) *Smith* v. *Dale*, *M'Ewan* v. *Crombie*, *ubi sup.*]

(*h*) *Johnson* v. *Telford*, 3 Russ. 477; *Langford* v. *Mahony*, 2 Conn. & Laws. 317.

(*i*) *Alton* v. *Harrison* (a legatee's suit), and *Poyser* v. *Harrison* (a residuary legatee's suit), cases which were consolidated and heard before V. C. Sir J. Stuart on 6th and 8th June, 1868. The testatrix, who died in 1851, devised her real and personal estate to two trustees, Ingle and Harrison (the former a solicitor, the latter a manufacturer), upon the usual trusts for sale and conversion; and as to the residue after payment of legacies and annuities to invest upon sufficient securities in trust for a class of persons. The trustees lent 500*l.* upon mortgage to one Thornley, and another 500*l.* to one Walker, and in 1853 Ingle died insolvent. It afterwards turned out that

[If in conveyancing matters regulated by the Solicitors Remuneration Act, 1881, the solicitor of the trustees elects under Rule 6 of the General Order of August, 1882, to be remunerated according to the old system, it may be matter for the consideration of the trustees whether they should continue to employ him on those terms (*a*).]

4. A trustee may give *fees to counsel* and shall have allowance thereof (*b*). Fees to counsel.

[5. A trustee will be allowed the costs of opposing a bill in Parliament which affects the trust estate (*c*). [Costs of opposing Bill in Parliament.]

And the Court will sanction the payment by the trustees of settled estates of costs which have been properly incurred by the [Of protecting the estate.]

both Thornley's security and Walker's security were second mortgages, and the whole money was lost. Ingle had been solicitor of the testatrix, and had made her will and acted as solicitor to the trust. The plaintiffs sought to make Harrison liable for the two sums of 500*l.* each as lent upon insufficient security. Harrison declared on oath that the value of the mortgaged property, free from incumbrance, was personally known to him, and was far in excess of the loan, and that the loss had arisen not from the inadequacy of value, but from the defect of title, viz. in the two mortgages being second mortgages; that when the advances were made he fully believed that in each case the security was a first mortgage, and that he had relied as to the title upon the legal advice of Ingle, who had frandulently represented the security as a fit and proper one; that the trustees had a right to employ one of themselves as solicitor to the trust (though no professional profits could be allowed), and that Harrison was entitled to the same protection from the legal advice given by Ingle, as if the trustees had employed a third person as solicitor, who had approved the title on their behalf. However, the Vice-Chancellor ruled that two trustees, one of whom was a solicitor, were liable to all the consequences if they employed one of themselves as such solicitor, instead of calling in a third person; and his Honour put the case of a single trustee, a solicitor, and asked whether it could be contended that such trustee was not liable for the consequences if he acted without other professional advice, and his Honour decided that Harrison was made liable for both the sums lent. This point seems to have arisen for the first time, and the judgment of the V.C. may be supported on principle; for if two persons be appointed trustees, they ought in matters of title to take professional advice, and for that purpose to employ a competent solicitor; but the selection of a proper legal adviser must be the *joint* act of the two, and as a man cannot be judge in his own case, they cannot appoint one of themselves to the office. *A fortiori* if there be a single trustee, a solicitor, he cannot act himself as solicitor and claim the same protection as if he had appointed another. When a settlor appoints a person as trustee, who is also a solicitor, he does not, in the absence of any special direction, mean him also to act as solicitor; for a person may be a very good trustee, and yet a very bad solicitor. The settlor selects his trustee, not because he is a solicitor or valuer, or fills any other scientific capacity, but because he is a person to be trusted with the property, and capable of managing it with the aid of professional advice.

[(*a*) See *Re United Kingdom Land and Building Association*, 37 W. R. 486; and see *Re Evans*, (1905) 1 Ch. 290, showing that the right of the solicitor to elect is not taken away by the fact that his clients are persons in a fiduciary capacity.]

(*b*) Cary, 14; *Poole* v. *Pass*, 1 Beav. 600.

[(*c*) *Re Nicoll's Estates*, W. N. 1878, p. 154; *Re Ormrod's Settled Estates*, (1892) 2 Ch. 318.]

tenant for life for the protection of the estates, whether as plaintiff or as defendant (*a*).

And costs incurred with a view to protect the trust estate in taking proceedings to establish a right to a several fishery (*b*), or to strike off the rolls a solicitor who is a defaulter to the trust, may be allowed (*c*).

The Settled Land Act, 1882, expressly authorises trustees of a settlement to reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (*d*).]

Extra costs.

6. If a trustee be sued by a stranger concerning the trust, and have his costs paid him as between *party and party*, and the *cestui que trust* afterwards institute proceedings for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation (*e*); and if a trustee as defendant be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by some misconduct, be entitled *as between him and his cestui que trust* to be reimbursed the costs which he has paid, and also those which he has himself incurred (*f*). The fact of a trustee having been unsuccessful in litigation, either as plaintiff or defendant, will not in the absence of misconduct disentitle him to be reimbursed his costs (*g*), but a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings were occasioned by his own negligence in the first instance (*h*); or were improperly instituted by himself (*i*); and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor; for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client), will be moderated by the Court by a deduction of such charges as may appear irregular and excessive (*j*); and the trustee will not be allowed interest on

Interest not allowed.

[(*a*) *Re Earl de la Warr's Estates*, 16 Ch. D. 587; 51 L. J. N.S. Ch. 407; *Re Lord Rivers' Estate*, 16 Ch. D. 588, n. And see 45 & 46 Vict. c. 38, s. 36.]

[(*b*) *Hamilton* v. *Tighe*, (1898) 1 I. R. 123; and see *How* v. *Winterton*, W.N. (1902) 230, where a subscription to a voluntary school, with a view to avoiding the increased expense of a board school, was allowed.]

[(*c*) *Re Davis*, 57 L. J. N.S. Ch. 3; 57 L. T. N.S. 755.]

[(*d*) Sect. 43.]

(*e*) *Amand* v. *Bradburne*, 2 Ch. Ca. 138; *Ramsden* v. *Langley*, 2 Vern. 536; and see *Fearns* v. *Young*, 10 Ves. 184.

(*f*) *Lovat* v. *Fraser*, 1 L. R. H. L. Sc. 37, *per* Lord Kingsdown.

(*g*) *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99.

(*h*) *Caffrey* v. *Darby*, 6 Ves. 497; *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99.

(*i*) *Peers* v. *Ceeley*, 15 Beav. 209; *Leedham* v. *Chawner*, 4 K. & J. 458.

(*j*) *Johnson* v. *Telford*, 3 Russ. 477; *Allen* v. *Jarvis*, 4 L. R. Ch. App. 616; [and see *Brown* v. *Burdett*, 40 Ch. D. (C.A.) 244, 254; *Re Scowby*, (1897) 1 Ch. (C.A.) 741]. As to the right of

the costs, though at the time he paid them he had no trust moneys in his hands (*a*).

[7. Where a bill was filed to set aside a decree for a compromise on the ground of personal fraud in one of the trustees in obtaining the decree, but the charge of fraud was disproved, and the bill dismissed with costs to be paid by the next friend of the plaintiff, who, however, was unable to pay them, it was held that the trustee was entitled to have his costs discharged out of the trust estate, for the defence was by him, not on his own behalf, but for the benefit of the trust estate, and his right was not affected by the fact that his character was incidentally cleared in the suit (*b*). And this decision has been referred to as a very strong illustration of the general rule that a trustee is entitled in an ordinary case to recover out of the trust estate, as costs, charges, and expenses properly incurred, all his costs of an action which he has properly defended, and as showing that where a tenant for life has properly defended an action to restrain him from exercising his powers under the Settled Land Act, the difference between solicitor and client and party and party costs may be treated as charges and expenses incidental to the exercise of the power (*c*). But in view of the ease and comparatively small expense with which a trustee can, under the present procedure, obtain the opinion of the Court as to the propriety of defending an action, he should, in all cases of doubt, adopt that course, and if, acting on a doubtful opinion of counsel, he defends an action

[Costs of trustee defending his conduct in the trust.]

the *cestui que trust* to obtain a taxation, as against the solicitor, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N.S. 29, and cases there cited; *Re Dawson*, 28 Beav. 605; *Re Press*, 35 Beav. 34; *Re Brown*, 4 L. R. Eq. 464, in which it was held, that the costs are to be taxed as between solicitor and client; but that if not proper having regard to the nature of the trust, they can only be recovered from the trustee personally, and are not chargeable as between the solicitor and the *cestui que trust*; [*Re Wellborne*, (1901) 1 Ch. (C.A.) 312, holding that the discretion given to the Court by section 39 of the Solicitors Act, 1843, is limited by the proviso in section 41, so that the application by the *cestui que trust* for taxation must be made within twelve months after payment: *Re Miles*, (1903) 2 Ch. 518, holding that the ultimate incidence of the costs amongst the beneficiaries is a question outside the scope of such a taxation].

(*a*) *Gordon* v. *Trail*, 8 Price, 416. But if he pays off a debt carrying interest, he stands in the place of the creditor in respect of interest; *Re Beulah Park Estate*, 15 L. R. Eq. 43; *Finch* v. *Pescott*, 17 L. R. Eq. 554.

[(*b*) *Walters* v. *Woodbridge*, 7 Ch. D. (C.A.) 504; but see *Hosegood* v. *Pedler*, 66 L. J. Q. B. 18, where an executor who separately defended an unsuccessful action brought against him and the residuary legatees, was held by Charles, J., not to be entitled to be indemnified by them, as the outlay, being to protect himself against a charge of devastavit, was not in the strict line of his duty towards his *cestuis que trust*; and see *Re Dunn*, (1904) 1 Ch. 648.]

[(*c*) *Re Llewellin*, 37 Ch. D. 317, 327, *per* Stirling, J., and see *ante*, p. 685.]

defence to which is hopeless, he will not be allowed his costs (*a*).]

Allowance for expenses besides remuneration for trouble.

8. Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for *expenses*. A testator bequeathed to his acting trustees for the time being the yearly sum of five guineas apiece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about fifty houses in London, thirty-four of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said: "The annuity was given to them as a recompense for the care and trouble which would attend the due execution of the office; and if it was consistent with the due execution of the office to employ a collector, they were entitled to the annuity. A provident owner might well employ a collector in such a case, and the labour of such a collection could not be imposed on the trustee" (*b*). [But where annuities were expressly given to trustees for "their services and collecting of rents" it was held that they could not claim the annuities in addition to a commission of greater amount allowed to a collector of rents (*c*).]

Account of expenses.

9. A regular account of the expenses should invariably be kept; but where this has not been done, the Court has ordered a *reasonable allowance* to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account should not meet with any encouragement. Thus in *Hethersell* v. *Hales* (*d*), the trustee put in a general claim for 2500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The Court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this nature; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning moneys to creditors, and treating with them and stating their debts, and procuring and

[(*a*) *Re Beddoe*, (1893) 1 Ch. (C.A.) 547.]

(*b*) *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; and see *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Fountaine* v. *Pellet*, 1 Ves. jun. 337; [and that an annual payment to trustees for their trouble in carrying on the testator's business after his death is liable to legacy duty, see *Re Thorley*, (1891) 2 Ch. (C.A.) 613; so also the benefit of a clause entitling a solicitor trustee to charge profit costs; see *Re White*, (1898) 1 Ch. 297; (1898) 2 Ch. (C.A.) 217].

[(*c*) *Re Muffet*, 56 L. J. Ch. 600; 56 L. T. N.S. 671.]

(*d*) 2 Ch. Rep. 158.

agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the Court was of opinion that the trustee might well deserve the whole 2500*l.*, yet would not allow but 2000*l.*, which the trustee was to have."

Extraordinary outlay.

10. As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a *plain and great hazard of it*, the trustee ought to be repaid (*a*). So where a trustee employed a bailiff to fell some trees, and the woodcutter allowed a bough to fall on a passer-by, who was injured, and recovered damages from the trustee, it was held that as the trustee had meant well, had acted with due diligence, and had employed a proper agent to do an act which was within the sphere of the trustee's duty, and the agent made a mistake, the trustee was entitled to charge the damages on the trust estate (*b*).

[Where a trustee, in the reasonable management and working of his testator's colliery business, let down the surface of the land and injured the buildings of an adjoining owner, it was held that the trustee was entitled to be indemnified out of the assets, and that the adjoining owner was entitled to stand in the place of the trustee, and to have the benefit of this right to indemnity so as to obtain payment, directly out of the testator's estate, of damages and costs recovered by him (*c*).

[Expenses of carrying on a business.]

11. If a trustee is authorised to carry on a business, and to employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business; but this right is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property; and

(*a*) *Balsh* v. *Hyham*, 2. P. W. 455, *per* Lord King; and see *Attorney-General* v. *Mayor of Norwich*, 2 M. & Cr. 424; *Attorney-General* v. *Pearson*, 2 Coll. 581; *Quarrell* v. *Beckford*, 1 Mad. 282; *Sandon* v. *Hooper*, 6 Beav. 246; *Bright* v. *North*, 2 Ph. 216; *James* v. *May*, 6 L. R. H. L. 328; [see *Re Bagnall's Trusts*, (1901) 1 I. R. 255, where profits or bonus on a policy, effected to secure repayment of money to a trust fund, were held to belong to a trustee who paid, out of his own money, an additional yearly premium in order to make the policy participating; and *Re Hope*, W.N. (1900) 76, where trustees were held entitled to retain out of income the loss occasioned to the trust estate by the carelessness of the tenant for life in allowing heirlooms left in his possession to be distrained upon by his landlord for arrears of rent].

(*b*) *Bennett* v. *Wyndham*, 4 De G. F. & J. 259.

[(*c*) *Re Raybould*, (1900) 1 Ch. 199.]

where the trustee is in default, and is not entitled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms (*a*). But where the trustee for sale of a business carries on the business without authority for the benefit of the *cestuis que trust*, and incurs liabilities to tradesmen in so doing, there is no right in the creditors to come against the trust estate, but they must look to the trustee personally (*b*).

In a case in Ireland it was held premature for creditors of the business to apply for leave to attend proceedings in an action for the administration of the testator's estate, until on further consideration the executors were proved not to be in default, as in that case alone would the creditors be entitled to stand in the place of the executors in their right to indemnity against the estate (*c*).

Where a business is carried on by trustees, a trustee who has a clear account is entitled to indemnity independently of any default or breach of trust on the part of another trustee, and therefore the right of the creditors to payment by virtue of the trustees' right of indemnity is not precluded by the fact that one of the trustees has been found a defaulter (*d*).

Where the business is carried on in accordance with a general direction empowering the executors to continue it, and to employ any part of the general estate therein, and *with the assent of the testator's creditors*, in their interest as well as in that of the beneficiaries, the executors will be entitled, in priority to the claims of the testator's creditors, to be indemnified out of the general estate against liabilities properly incurred, and the indemnity will not be limited to the portion of the assets which has come into existence since the testator's death (*e*).]

[(*a*) *Re Johnson*, 15 Ch. D. 548; *Ex parte Garland*, 10 Ves. 110; *Re Sumner*, W. N. 1884, p. 121; *Gallagher* v. *Ferris*, 7 L. R. Ir. 489; *Re Blundell*, 44 Ch. D. (C.A.) 1, 11. These authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned, *per* Selborne, L.C., *Strickland* v. *Symonds*, 26 Ch. D. (C.A.) 248; and see *Boylan* v. *Fay*, 8 L. R. Ir. 374.]

[(*b*) *Strickland* v. *Symons*, 22 Ch. D. 666; affirmed 26 Ch. D. (C.A.) 245; and see *Re Evans*, 34 Ch. D. (C.A.) 597; *Re Gorton*, 40 Ch. D. (C.A.) 536, 543; *inf.*, note (*e*); *Jennings* v. *Mather*, (1901) 1 K. B. 108; (1902) 1 K. B. (C.A.) 1.]

[(*c*) *Re Morris*, 23 L. R. Ir. 333.]

[(*d*) *Re Frith*, (1902) 1 Ch. 342; but see *M'Aloon* v. *M'Aloon*, (1900) 1 I. R. 367, referring to *Re Morris*, 23 L. R. Ir. 333.]

[(*e*) *Dowse* v. *Gorton*, (1891) A. C. 190, varying the decision of the Court of Appeal (see *Re Gorton*, 40 Ch. D.

Expenses a *lien* on the trust estate.

12. The expenses incurred by a trustee in the execution of his office are treated by the Court as a first charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of the trustee's just demands (*a*); and in a suit for the administration of the fund in respect of which the expenses have been incurred, the lien of the trustee will be paid even before the costs of suit (*b*); [and in priority to a charging order, obtained under the Solicitors Act, 1860, (23 & 24 Vict. c. 127), sect. 28, by the solicitors of the beneficiaries, plaintiffs in the action, in respect of property recovered and preserved (*c*). And the expenses are a first charge upon the income as well as upon the corpus of the estate, and the trustees have therefore the right to retain their expenses out of the income until provision can be made for raising them out of the corpus (*d*)]. The trustee of a *void* trust deed cannot charge his expenses as against persons who establish the invalidity of the deed (*e*), though he will be allowed for improvements (*f*). [Where, however, a settlement was set aside so far as it limited to the settlor a life interest enduring after his own bankruptcy, the trustees, who had acted properly, were allowed to retain their costs out of arrears of income (*g*); and where a voluntary settlement was set aside, at the instance of the settlor, on the ground of improvidence and having regard to her youth, the trustees, in the absence of any evidence

(C.A.) 536), limiting the indemnity in the manner indicated; and see *Re Brooke*, (1894) 2 Ch. 600; *Hodges* v. *Hodges*, (1899) 1 I. R. 480. So far as creditors are concerned, the existence of the direction in the will, which is in no way binding on them, seems to be material only as evidence tending to show assent on their part. The right will not be extended to creditors in respect of goods supplied after a decree for administration not authorising the continuance of the business; *M'Aloon* v. *M'Aloon*, (1900) 1 I. R. 367.]

(*a*) See *Ex parte James*, 1 D. & C. 272; *Hill* v. *Magan*, 2 Moll. 460; *Re Norwich Yarn Company*, 22 Beav. 143; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Re Exhall Coal Company*, 35 Beav. 449; *Oliver* v. *Osborn*, W. N. 1867, p. 245; *Re Layton's Policy*, W. N. 1873, p. 49; Brown, P. C. 266; and *Trott* v. *Dawson*, 1 P. W. 780, more fully referred to in the 8th edition of this work, p. 639, note (*c*), where it is shown that the case does not justify the erroneous inference which has been drawn from it, that a trustee gives credit for the expenses, not to the *estate*, but to the *person* of the *cestui que trust*, and that the assignee of the latter is not liable for the trustee's expenses incurred in the time of the assignor.

(*b*) See *Morison* v. *Morison*, 7 De G. M. & G. 226; *Re Exhall Coal Company*, 35 Beav. 449; [and see *Moore* v. *McGlyn*, (1904) 1 I. R. 334.]

[(*c*) *Re Turner*, (1907) 2 Ch. (C.A.) 126, 539 (notwithstanding that in the result the property became worthless and the action therefore disastrous).]

[(*d*) *Stott* v. *Milne*, 25 Ch. D. (C.A.) 710.]

(*e*) *Smith* v. *Dresser*, 1 L. R. Eq. 651; 35 Beav. 378; [and see *Ex parte Russell*, 19 Ch. D. (C.A.) 588, 602; *Dutton* v. *Thompson*, 23 Ch. D. (C.A.) 278].

(*f*) *Woods* v. *Axton*, W. N. 1866, p. 207.

[(*g*) *Merry* v. *Pownall*, (1898) 1 Ch. 306.]

of improper motive, were allowed their costs, charges, and expenses properly incurred (*a*); and where a settlement originally valid, is afterwards avoided under sect. 47 of the Bankruptcy Act, 1883, the trustees are entitled to their costs of an action unsuccessfully brought to set aside the settlement (*b*).] There will be no lien for expenses incurred by trustees in respect of an act done in excess of their powers, and therefore in breach of their duty (*c*). And the Court has refused to give effect to a trustee's lien by a foreclosure decree, or a sale, which would be the destruction of the trust itself; but the Court has gone as far as it could by delivering the deeds into his custody and prohibiting any disposition of the property without previous discharge of the trustee's lien (*d*).

[Enforcing right to indemnity.]

[13. Where a trustee has a right of indemnity out of the trust estate, he may at any time come to the Court to enforce it, and is under no obligation to wait until the trust estate has been turned into money under the trust (*e*).]

Advance by *cestui que trust.*

14. If trustees have to raise a certain sum which is properly chargeable on the corpus, and a *cestui que trust*, at the *request of the trustees*, advances money for the purpose, the *cestui que trust* stands in the place of the trustees and has a lien on the corpus for the amount (*f*).

Lien does not extend to the trustees' agents.

15. Although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien, [as they are the solicitors, &c., of the trustees personally, and not of the trust estate (*g*)]. And the law is so settled, notwithstanding an express declaration by the settlor that the trustees shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent. In every deed is *implied* a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*. It would be a mischievous principle to hold, that every person with whom

[(*a*) *Everitt* v. *Everitt*, 10 L. R. Eq. 405; and see *James* v. *Couchman*, 29 Ch. D. 212, 217.]

[(*b*) *Re Holden*, 20 Q. B. D. 43; and see *Re Carter* and *Kenderdine*, (1897) 1 Ch. (C.A.) 776, 782.]

(*c*) *Leedham* v. *Chawner*, 4 K. & J. 458, in which case the Court held that there was no lien even as against a *cestui que trust* who knew and approved of the proceedings, but otherwise remained passive. And see *post*, p. 800.

(*d*) *Darke* v. *Williamson*, 25 Beav. 622; [and see *Bowman* v. *Hill*, (1907) 1 I. R. 451].

[(*e*) *Re Pumfrey*, 22 Ch. D. 255, 262; and see *post*, pp. 799, 800.]

(*f*) *Todd* v. *Moorhouse*, 19 L. R. Eq. 69; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Clack* v. *Holland*, 19 Beav. 262.

[(*g*) *Staniar* v. *Evans*, 34 Ch. D. 470; and that a trustee or executor may retain a solicitor upon the terms that he is to look only to the estate for repayment, see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 359.]

the trustees had incurred a just and fair demand might sue the trustees, and come for an account of the whole administration (*a*).

16. But a *solicitor* in accounting for his receipts to the trustees may *set off his costs* (*b*). And a *positive direction* to the trustees to employ a particular person as auditor or receiver, and allow him a proper salary, will constitute a trust in his favour, and, of course, give him a claim against the trust fund (*c*). But if a testator merely *recommend or express a desire* that his trustees should employ him as receiver, the question is, whether the words used amount to a trust, or only to an expression of opinion and advice: and to discover the meaning, the Court examines the provisions of the will, and if it finds that to consider the words as a trust would be inconsistent with the general character of the will, which assumes that the administration of the estate is to be unfettered by such a trust, the Court comes to the conclusion that the words were meant only by way of suggestion (*d*). [And where a will contained a direction that "the testator's solicitor should be the solicitor to his estate and to his trustees in the management and carrying out the provisions of his will," it was held that no trust or duty was imposed on the trustees to continue the testator's solicitor as their solicitor (*e*).

Secus if there be a positive direction to employ a particular agent.

17. Where after the death of an administratrix her solicitor, acting upon the instruction of a relative of the deceased person whose estate was being administered, continued to do work for the benefit of the estate, and the person who afterwards took out administration declined to pay the costs incurred during the period while there was no legal personal representative, it was held that there was no obligation upon him to do so (*f*).]

[Costs incurred while there was no personal representative.]

18. The agent of a trustee is accountable to the employer only, the trustee, and not to the *cestui que trust* (*g*); and an action by a *cestui que trust* against the trustee and *his solicitor*, alleging improper payments out of the trust fund by the trustee to the

Trustee's agents not accountable to the *cestuis que trust*.

(*a*) *Worrall* v. *Harford*, 8 Ves. 4, see 8; *Hall* v. *Laver*, 1 Hare, 571; *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & Fin. 507; *Francis* v. *Francis*, 5 De G. M. & G. 108; [and see *Staniar* v. *Evans*, 34 Ch. D. 470].

(*b*) *Re Sadd*, 34 Beav. 650.

(*c*) *Williams* v. *Corbet*, 8 Sim. 349; *Hibbert* v. *Hibbert*, 3 Mer. 681; *Consett* v. *Bell*, 1 Y. & C. C. C. 569.

(*d*) *Shaw* v. *Lawless*, 1 Ll. & G. *t.* Sugd. 154; reversed 1 Dr. & Walsh, 512; 5 Cl. & Fin. 129; Ll. & G. *t.* Plunk. 559; *Finden* v. *Stephens*, 2 Ph. 142; *Knott* v. *Cottee*, 2 Ph. 192.

[(*e*) *Foster* v. *Elsley*, 19 Ch. D. 518.]

[(*f*) *Re Watson*, 18 Q. B. D. 116; 19 Q. B. D. (C.A.) 235.]

(*g*) *Myler* v. *Fitzpatrick*, 6 Mod. 360, *per* Sir J. Leach; *Attorney-General* v. *Earl of Chesterfield*, 18 Beav. 596; and see *Langford* v. *Mahony*, 2 Conn. & Laws. 317; *Lockwood* v. *Abdy*, 14 Sim. 441; *Keane* v. *Robarts*, 4 Mad. 350; *Archer* v. *Lavender*, 9 Ir. R. Eq. 225, *per Cur.*

solicitor, [cannot be maintained as against] *the solicitor* (*a*). But under the special provisions of the Solicitors Act, 1843 (*b*), *cestuis que trust* may, at the discretion of the Court, obtain an order to tax the bill of the solicitor employed by the trustee (*c*), and generally *cestuis que trust* may proceed against an agent where he has not confined himself to the duties of an agent, but by accepting a delegation of the *trust* (*d*), or by fraudulently mixing himself up with a breach of trust (*e*), has himself become a trustee by construction of law.

Agent when liable as trustee *de son tort*.

Moneys in hands of Secretaries of State.

19. Moneys voted by Act of Parliament for the *public service*, are not trust funds in the hands of the *Secretaries of State* for any particular individual, but for the general purposes of the office. The persons employed by them, therefore, have no lien which they can enforce in equity (*f*).

Trust of two estates.

20. If a person be trustee of different estates for the *same cestuis que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is presumed that he may apply to their discharge any money which has come to his hands from any other of the estates (*g*); but he would not be justified in mixing up claims under one instrument of trust with those under another (*h*). [But where different estates are held under the same instrument for different *cestuis que trust*, the trustee cannot reimburse himself from one estate losses incurred in a *bonâ fide* administration of the other estate (*i*).]

(*a*) *Maw* v. *Pearson*, 28 Beav. 196; [*Re Spencer*, 51 L. J. N.S. Ch. 271; 30 W. R. 435; 45 L. T. N.S. 645; *Re Jackson*, 40 Ch. D. 495].

(*b*) 6 & 7 Vict. c. 73, s. 39.

[(*c*) *Re Spencer*, *ubi sup.*] As to the circumstances under which the Court will direct taxation at the instance of a *cestui que trust*, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N.S. 29, and cases there referred to; and *Re Dawson*, 28 Beav. 605; [*Re Jackson*, *ubi sup.*]

(*d*) *Myler* v. *Fitzpatrick*, 6 Mad. 360; and see *Pollard* v. *Downes*, 1 Eq. Ca. Ab. 6; *Lee* v. *Sankey*, 15 L. R. Eq. 204; [but as to the last case, see observation of Kay, L.J., in *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 403; and see *M'Ardle* v. *Gaughan*, (1903) 1 I.R. 107.]

(*e*) See *Fyler* v. *Fyler*, 3 Beav. 550; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199; *Portlock* v. *Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176; *Pannell* v. *Hurley*, 2 Coll. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Morgan* v. *Stephens*, 3 Giff. 226; *Hardy* v. *Caley*, 33 Beav. 365; [*Re Barney*, (1892) 2 Ch. 265; *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199; *Midgley* v. *Midgley*, (1893) 3 Ch. (C.A.) 282].

(*f*) *Grenville-Murray* v. *Earl of Clarendon*, 9 L. R. Eq. 11.

[(*g*) But see *Re Munster Bank*, 17 L. R. Ir. 341, and observations of Fitzgibbon, L.J., at p. 348. It would, however, seem that in that case the *cestuis que trust* were not the *same*, and that the decision in no way affects the limited proposition stated above.]

(*h*) *Price* v. *Loaden*, 21 Beav. 508.

[(*i*) *Fraser* v. *Murdoch*, 6 App. Cas. 855; and cf. *Re Johnson*, 15 Ch. D. 548.]

How expenses recoverable where no trust estate.

21. If the trust estate fail, the trustee may then institute proceedings against the *cestuis que trust* on whose *behalf* and at whose *request* he acted, to recover from him personally the amount of the money expended (*a*); and the rule applies to the case of a *cestui que trust* under *coverture*, to the extent of any property settled to her *separate use*, and where her anticipation is not restrained (*b*); and, generally, trustees acting with the sanction of their *cestuis que trust*, and not exceeding their powers, may call upon their *cestuis que trust* personally to reimburse them any necessary outlay (*c*). [This right arises wherever the relation of trustee and *cestui que trust* is established (*d*), unless precluded by the nature of the transaction (*e*), and is independent of any request from the *cestui que trust* to incur the liability (*f*); thus, the legal owner of shares, being made to pay calls, has a right to be indemnified by the equitable owner of the shares for the time being (*g*);] and it has been held that a trustee who, in that character, had incurred a legal liability, might call upon the *cestui que trust* in equity to give an *indemnity* against the liability before any actual loss had accrued (*h*). [In a recent case, where the plaintiff was holding, as a trustee for the defendant, shares in a company in liquidation which were not fully paid up, but on which no call had been actually made, Fry, J., refused relief by way of indemnity, and observed that the action was a mere action *quia timet*, and that if it could be maintained it would follow that every person who had undertaken any position of responsibility for another which entitled

[Right to indemnity against *cestui que trust* personally.]

(*a*) *Balsh* v. *Hyham*, 2 P. W. 453; *Ex parte Watts*, 3 De G. J. & S. 394; *Re Southampton Imperial Hotel Company*, 26 L. T. N.S. 384; 20 W. R. 435; *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18; [and see *Fraser* v. *Murdoch*, 6 App. Cas. 855, 872; and *Re Knott*, 56 L. J. Ch. 318; 56 L. T. N.S. 161; *Hobbs* v. *Wayet*, 36 Ch. D. 256; *Whitaker* v. *Kershaw*, 45 Ch. D. (C.A.) 320.]

(*b*) *Butler* v. *Cumpston*, 7 L. R. Eq. 16; [*Whitaker* v. *Kershaw*, *ubi sup.*]

(*c*) *Ex parte Chippendale*, 4 De G. M. & G. 19, see 54; *Re Exhall Coal Company*, W. N. 1867, p. 244; *Ex parte Challis*, 16 W. R. 451; 17 L. T. N.S. 637; *James* v. *May*, 6 L. R. H. L. 328; and see *Hemming* v. *Maddick*, 9 L. R. Eq. 175.

[(*d*) *Hardoon* v. *Belilios*, (1901) A.C. (P.C.) 118.]

[(*e*) *Wise* v. *Perpetual Trustee Company*, (1903) A.C. (P.C.) 139, where the *cestuis que trust* were the members of a club, and it was held that trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on behalf of the club, may be entitled to indemnity out of property of the club, but are not entitled to a personal indemnity from the members, unless there is a rule of the club to that effect.]

[(*f*) *Hardoon* v. *Belilios*, (1901) A.C. (P.C.) 123.]

[(*g*) *Hardoon* v. *Belilios*, *sup.*]

(*h*) *Phené* v. *Gillan*, 5 Hare, 1, see pp. 9, 13; [the indemnity was ordered to be given by the recognisance of the defendant, see p. 14;] and see *Re Southampton Imperial Hotel Company*, 26 L. T. N.S. 384; 20 W. R. 435; [and *Re Blundell*, 40 Ch. D. 370, 376].

him to indemnity might sue before the right to indemnity accrued, and before the damage had accrued which gave rise to the right to indemnity (*a*). But where the right to indemnity was denied, it was held that the executor of the sole trustee of shares in a bank which was being wound up, who had received notice from the liquidator that he would be placed on the list of contributories, was entitled to a declaration of indemnity before he was actually placed on the list or any call was made against him (*b*). Where the trustee acts at the instance of the maker of the trust, at any rate where the maker of the trust is not also beneficially interested under the trust instrument, the trustee has no right to personal indemnity from him, but must look exclusively to the trust funds to make good his expenses or losses (*c*).]

Where trustee has acted in breach of duty.

22. But the trustee can establish no claim to reimbursement either against the *cestuis que trust* personally, or against the trust estate, where he has incurred the outlay not in the strict line of his duty, and without either the request or the implied assent of the *cestuis que trust* (*d*).

Funds out of which expenses payable.

23. Questions occasionally arise respecting the proper fund for payment of expenses. In one case (*e*), Sir John Leach decided that a provision made in a will for payment of *debts and funeral and testamentary expenses* out of a particular fund, did not make that fund *primarily* liable for *costs of administration*. In a subsequent case, Lord Langdale arrived at a different conclusion (*f*); [and after considerable variation of judicial opinion, the later cases have established the rule that the words *testamentary expenses* include the *costs of administration* (*g*)].

[(*a*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company*, 22 Ch. D. 561, 564; but see *Lord Ranelagh* v. *Hayes*, 1 Vern. 189; *Phené* v. *Gillan*, 5 Hare, 1; *Wooldridge* v. *Norris*, 6 L. R. Eq. 410; *Hobbs* v. *Wayet*, 36 Ch. D. 256, 259; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 362.]

[(*b*) *Hobbs* v. *Wayet*, 36 Ch. D. 256, 259; and see *Re Blundell*, 40 Ch. D. 377.]

[(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, 872.]

(*d*) *Leedham* v. *Chawner*, 4 K. & J. 458; [*Hosegood* v. *Pedler*, 66 L. J. Q. B. 18, 21; *Ecclesiastical Commissioners* v. *Pinney*, (1900) 2 Ch. (C.A.) 736]. In *Collinson* v. *Lister*, 20 Beav. 368, where the advances were not proper, the M.R. said: "No assets exist out of which the executor could seek for payment, and, of course, it could not be contended that the plaintiffs (who were the *cestuis que trust*) were liable to repay the advances."

(*e*) *Brown* v. *Groombridge*, 4 Mad. 495.

(*f*) *Wilson* v. *Heaton*, 11 Beav. 492.

[(*g*) *Miles* v. *Harrison*, 9 L. R. Ch. App. 316; *Harloe* v. *Harloe*, 20 L. R. Eq. 471; *Sharp* v. *Lush*, 10 Ch. D. 468; *Penny* v. *Penny*, 11 Ch. D. 440; *Morrell* v. *Fisher*, 4 De G. & Sm. 422; *Re Chapman*, 71 L. T. N.S. 778; *Re Clemow*, (1900) 2 Ch. 182; but see *contra*,] *Stringer* v. *Harper*, 26 Beav. 585; *Linley* v. *Taylor*, 1 Giff. 67; *Webb* v. *De Beauvoisin*, 31 Beav. 573; *Gilbertson* v. *Gilbertson*, 34 Beav. 354;

Where the trust was for "payment of debts, funeral expenses, *and the costs and charges of proving and attending the execution of the will, and the several trusts therein contained*" (*a*), [and where the trust was "to pay debts and *executorship expenses* and probate duty" (*b*),] it was held that the words included costs of administration. [Where the will contained a gift of a considerable sum for the benefit of a class of persons, the costs of ascertaining the members of the class, except so far as they were increased by incumbrances on the shares, were held to be "testamentary expenses" payable out of residue (*c*).

[Costs of administration of real estate.]

Increased costs arising from administering the real estate are, as a general rule, thrown upon the real estate (*d*); and where a testatrix died intestate as to her real estate, having by her will directed that testamentary expenses should be paid out of her personal estate, the costs of an inquiry as to the heir at law were nevertheless to be borne by the realty (*e*).]

Exoneration of personalty.

24. Where a testator bequeathed "a *leasehold* house and all other his *personal property*" to his wife, and then devised his *real estate* to be sold, the proceeds to be applied in "payment of *funeral and testamentary expenses and debts,*" and the "*residue*" to be invested, it was held that the funeral and testamentary expenses and debts were thrown upon the *real estate* in exoneration of the *personal estate*, but that the costs of the special case for taking the opinion of the Court were not "testamentary expenses," and therefore fell upon the

Hill v. *Challinor*, W. N. 1867, p. 139; *Lees* v. *Lees*, 6 I. R. Eq. 259; *M'Cormick* v. *Patten*, 5 I. R. Eq. 295; *Re Biel's Estate*, 16 L. R. Eq. 577. [In *Webb* v. *De Beauvoisin*, *sup.*, where the trust was for "payment of debts, testamentary and *other* expenses and legacies under the will," and in *Coventry* v. *Coventry*, 2 Dr. & Sm. 470, where the trust was "to pay funeral and testamentary and *legal* expenses," it was held that the words included costs of administration. In *Re Clemow*, *sup.*, it was held that the expression "testamentary expenses" may include estate duty; and that the word "testamentary" applies to administration although there is no testament. But estate duty payable in respect of the real estate of a testator dying after the Land Transfer Act, 1897, will not be included in "testamentary expenses": *Re Sharman*, (1901) 2 Ch. 280, nor will settlement estate duty be included; *Re King*, (1904) 1 Ch. 363. Estate duty in respect of property appointed in exercise of a general testamentary power, is not payable out of that property, but out of the general personal estate: *Re Orlebar*, (1908) 1 Ch. 136; *Re Hadley*, (1909) 1 Ch. (C.A.) 20.]

(*a*) *Alsop* v. *Bell*, 24 Beav. 451, see p. 469.

[(*b*) *Sharp* v. *Lush*, 10 Ch. D. 468.]

[(*c*) *Re Vincent*, (1909) 1 Ch. 810.]

[(*d*) *Patching* v. *Barnett*, (A.D. 1881) 51 L. J. Ch. 74; see (1907) 2 Ch. (C.A.) 154 note.]

[(*e*) *Re Betts*, (1907) 2 Ch. 149: and so legacies, so far as they are by the will chargeable on the realty, must bear their own estate duty, notwithstanding a direction to pay "testamentary expenses" out of a mixed fund of residue; *Re Spencer Cooper*, (1908) 1 Ch. 130.]

personalty (*a*); [but having regard to the present rule, it is conceived that this case would not now be followed on the question of costs. An intention to exonerate the personal estate must be shown by express words or necessary implication, and where the real estate is merely devised to the trustees subject to the payment of debts, the personalty is not exonerated (*b*).]

Trust to pay costs of trust.

25. A trust in a will of real and personal estate to pay out of a fund of personal estate directed to be set apart, the expenses of probate and "the *execution of the trusts* of the will," was held not to authorise the trustees to apply the fund in payment of any other expenses than those which would be payable by the *executors* in that character, and therefore not to authorise the application of the personal estate in payment of the expenses incurred in the execution of trusts declared of the testator's *real* estate (*c*).

(*a*) *Gilbertson* v. *Gilbertson*, 34 Beav. 354; [and see *Re Groom*, (1897) 2 Ch. 407; and *Re Prince*, (1898) 2 Ch. 225 (where it was held that costs of unsuccessfully resisting the will in a probate action, by a plaintiff who sought to set up a previous will, were not testamentary expenses).]

[(*b*) *Re Banks*, (1905) 1 Ch. 547.]

(*c*) *Lord Brougham* v. *Lord Poulett*, 19 Beav. 119; and see *Sanders* v. *Miller*, 25 Beav. 154.

CHAPTER XXVI

OF THE DISCHARGE OF A TRUSTEE FROM OFFICE AND THE APPOINTMENT OF NEW TRUSTEES

THE subject of the *Office* of Trustee may fitly be concluded by considering in what manner he may divest himself of that character.

How the trust may be relinquished.

The only modes by which he can accomplish this object are the following: *First*, He may have the universal consent of all the parties interested; *Secondly*, He may retire by virtue of a special power contained in the instrument creating the trust, [or a statutory power applicable to the trust;] or, *Thirdly*, He may obtain his release by application to the Court.

First. By consent.

Trustee may retire with consent of *cestuis que trust.*

1. As no *cestui que trust* who concurs in a breach of trust by the trustee can afterwards call him to account for the mischievous consequences of the act, it follows that where *all* the *cestuis que trust*, being *sui juris*, lend their joint sanction to the trustee's dismissal, they are precluded from ever holding him responsible on the ground of delegation of his office (*a*).

All must concur.

2. But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest (*b*).

Cestuis que trust not *sui juris.*

3. And the *cestuis que trust* who join must be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent. But a *feme covert* is considered to be *sui juris* as to her separate estate where there is no restraint against anticipation (*c*); and as to *real estate* she can, with the consent of her husband, bind her interest by an assurance under the Fines and Recoveries Act.

Not in existence.

4. If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear that, as the trustee cannot have the sanction

(*a*) *Wilkinson* v. *Parry*, 4 Russ. 276, *per* Sir J. Leach.

(*b*) See *ante*, p. 584.

(*c*) See *post*, Chap. XXVIII. s. 6.

of all the parties interested, he cannot with safety be discharged from the trust.

Secondly. A trustee may retire by virtue of a special power contained in the original instrument, [or a statutory power applicable to the trust].

Trustee may retire under a power.

1. The person who creates the trust may mould it in whatever form he pleases, and may therefore provide, that on the occurrence of certain events and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted (1).

Usual form of the power.

2. The form of power most commonly in use has been, that in case the trustees appointed by the instrument of trust, or to be appointed under the power (*a*), or any of them, shall "die or be abroad for twelve calendar months, or be *desirous of being discharged from,* or refuse, decline, or become incapable (*b*) to act in the trusts," it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee (*c*), or the executors (*d*)

(*a*) The best modern forms contained the additional words, "*or by the Court of Chancery or other competent authority,*" in order to obviate the break in the chain of trusteeship which would otherwise have been occasioned by a resort to the Court, but the addition is now unnecessary [for that purpose; see the Trustee Act, 1893, (56 & 57 Vict. c. 53) s. 37; but see *Cecil* v. *Langdon*, 28 Ch. D. (C.A.) 1, where the power authorised the appointment of new trustees in the place of those originally appointed or *to be appointed under the power*, and the Court held that the power came to an end when new trustees were appointed by the Court, so that thenceforth the statutory power was alone available, and that a fetter imposed on the exercise of the former power did not affect the latter; and see *Cradock* v. *Witham*, W. N. (1895) p. 75].

(*b*) "Unfit" may be usefully added; see p. 818, *post.*

(*c*) The best forms provide that a refusing or retiring trustee shall, *if willing to execute the power*, be deemed to be a continuing trustee. As to the object of this addition, see p. 824, *post.* But it is attended with this inconvenience, that if the refusing or retiring trustee do not join, evidence may be called for that he was *not willing.* Sometimes the power is given to the surviving, continuing, or *other* trustee, an addition which has been found useful in practice. See *Lord Camoys* v. *Best*, 19 Beav. 414.

(*d*) Better to say "*acting* executors or executor or administrators or administrator," as otherwise if several executors be appointed, and one only, proves, it may be objected (though the objection may be untenable) that the other executors must actually

(1) Every instrument where there is a continuing trust of an active character, *should*, of course, until the modern Acts, have contained a power of appointment of new trustees, but, singularly enough, Lord Thurlow omitted to insert one in his own will, of which Lord Eldon and two others were named trustees. The defect was supplied by a private Act of Parliament, 15th June, 1809 (49 G. 3 cap. clxxv.), by which power was given to the Court of Chancery, in case any of the three trustees "should die, or be desirous of being discharged from, or should refuse, or decline, or become incapable to act in the trusts," to appoint a new trustee in a summary way upon petition.

or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee; and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees, and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.

Several sets of trustees.

3. It often happens that in a settlement there are several sets of trustees—a term of 99 years, for instance, is vested in A. and B., and a term of 500 years in C. and D., and there is a limitation to E. and F. for the life of a person, with powers of sale and exchange, &c., and then a power of appointment of new trustees is given to "the surviving or continuing trustees or trustee." If A. die who can appoint in his place? Is the power in B. as the survivor in that particular trust, or in B., C., D., E., and F. jointly as the survivors of the trustee *en masse?* This doubt has occasionally in practice led to expense, which might easily have been avoided by a few words in the power declaratory of the intention, as by limiting the power to "the surviving or continuing trustees or trustee *of the class in which any such vacancy or disqualification shall occur.*"

Lord Cranworth's Act.

4. Lord Cranworth's Act (23 & 24 Vict. c. 145), provided against the omission of a power of appointment of new trustees in any instrument of trust, and also against defects in the power, by enacting generally, by the 27th section, that "whenever any *trustee,* either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die or desire to be discharged from, or refuse or become unfit or incapable to act in the trusts," it should be lawful for the person nominated for that purpose by the instrument creating the trust, or if there should be no such person, or he should be unable or unwilling to act, then "for the surviving or continuing trustees or trustee for the time being, or the acting executor or administrator of the last surviving *and* continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees," and the Act gave the usual directions for vesting the trust estate (*a*); and the following section made the Act apply to the case of a trustee dying in the testator's lifetime. But it

renounce before the acting executor can exercise the power, see *White* v. *M'Dermott*, 7 Ir. R. C. L. 1; *Worthington* v. *Evans*, 1 S. & S. 165; *Clarke* v. *Parker*, 19 Ves. 1; see *post*, p. 817, note (*e*).

(*a*) 23 & 24 Vict. c. 145, s. 27.

will be observed that the Act did not provide for the case of a trustee *going abroad*, and it cannot be safely assumed that the word "*refuse*" was meant to include a *disclaimer* (for a disclaiming trustee never was a trustee (*a*)); and its operation was, by the 34th section of the Act, restricted to instruments *inter vivos* executed after the passing of the Act (*28th August*, 1860), and to wills and codicils made, confirmed, or revived after that date.

[Where probate of a will was granted to one only of three executors, power to prove being reserved to the other two, who died without taking probate, an appointment of new trustees by the proving executor in the lifetime of the other two, was held to be a good appointment by an "acting executor" within the section (*b*).]

Two trustees in place of one.

It has been held that the donee of the power under this Act could appoint two trustees in the place of an only trustee appointed by the settlor's will (*c*).

[Trustee Act, 1893.]

[5. The above provisions of Lord Cranworth's Act were, however, repealed by the Conveyancing and Law of Property Act, 1881 (*d*), and their place is now supplied by sect. 10 of the Trustee Act, 1893 (*e*), which enacts that "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for *the purpose of appointing new trustees* (*f*), by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act (*g*),

(*a*) In *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was within the Act, and it was held that an appointment of a new trustee by the continuing trustee under the Act did not take away the general jurisdiction of the Court to appoint in proper cases an additional trustee; and see *Re Jackson's Trusts*, 16 W. R. 572; 18 L. T. N.S. 80; and *post*, p. 816.

[(*b*) *Re Boucherett*, (1908) 1 Ch. 180.]

(*c*) *Re Breary*, W. N. 1873, p. 48.

[(*d*) 44 & 45 Vict. c. 41; and see *Re Lloyd's Trusts*, 57 L. J. N.S. Ch. 246, in which case it was held by North, J., that where a special Act incorporated s. 27 of Lord Cranworth's Act with a qualifying proviso requiring that every new trustee should be appointed with the sanction of the Court of Chancery, the effect of the repeal by the Act of 1881 was to repeal the proviso.]

[(*e*) 56 & 57 Vict. c. 53, s. 10, replacing s. 31 of 44 & 45 Vict. c. 41.]

[(*f*) The words in the Act of 1881 were "for that purpose," but the alteration appears to be merely verbal; see *Re Wheeler and De Rochow*, (1896) 1 Ch. 315.]

[(*g*) *E.g.*, where the power was vested in husband and wife who were living apart and were unable to agree: *Re Sheppard's Trusts*, W.N. 1888, p. 234.]

then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid." And the Act authorises an increase or reduction in the number of trustees, so that "except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust, unless there will be at least two trustees to perform the trust," and provides for the vesting of the trust property, and makes the provisions of the section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee; and the section applies to trusts created either before or after the commencement of the Act.

It would seem, however, that the section only authorises an increase in the number of trustees when an appointment is being made to supply a vacancy in the trusteeship, and that if a mere addition of a trustee is required recourse must be had to Part III. of the Act (*a*).

The section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust; but where a power of appointing new trustees had been given by a settlement, made in 1849, to "the surviving or continuing trustees or trustee," which they or he were required to exercise with the consent of the tenant or tenants for life or in tail for the time being entitled in possession, it was held that the fetter imposed by the settlement did not apply to an appointment under the powers of the Act, and that the continuing trustee could appoint new trustees under the Act; the power in the settlement having in the events which had happened, ceased to be exercisable (*b*). [Contrary intention.]

It would seem that an appointment under this section may be made by the personal representative of a sole trustee (*c*), but [Section when applicable.]

[(*a*) *Re Gregson's Trusts*, 34 Ch. D. 209; see *post*, pp. 817, *et seq.* as to the provisions of Part III. of the Act.]

[(*b*) *Cecil* v. *Langdon*, 28 Ch. D. (C.A.) 1; and see *Cradock* v. *Witham*, W. N. 1895, p. 75; and as to the effect of an appointment of new trustees in displacing trustees who have become such under section 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), see *Re Routledge's Trusts*, (1909) 1 Ch. 280, ante, p. 248.]

[(*c*) *Re Shafto's Trusts*, 29 Ch. D. 247.]

the section does not apply where the sole trustee or all the trustees of a will have predeceased the testator (*a*).

[Appointment by will.]

The section does not enable a sole surviving trustee to appoint by his *will* trustees in continuation to himself on his decease, and, notwithstanding any such appointment, the power will remain exercisable by his "personal representatives," which expression (in the case of executors) means the persons in possession of a general grant of probate, and does not include special or limited executors, whether appointed for the express purpose of executing the trust, or otherwise (*b*).

["Personal representatives."]

[Trustee out of the United Kingdom.]

Where an appointment is made under the Act in the place of a trustee who has been out of the United Kingdom for more than twelve months, the concurrence of such trustee in the appointment is not necessary unless he is willing and competent to concur, and the onus of showing that he was willing and competent is upon the person disputing the validity of the appointment (*c*).

[Events not contemplated by settlement.]

A settlement made in 1878 contained a declaration that the husband and wife during their joint lives should have power to appoint new trustees of the settlement. After the Conveyancing and Law of Property Act, 1881, came into operation, the husband and wife executed a deed appointing a new trustee in the place of one of the trustees who had *remained out of the United Kingdom for more than twelve months*, and it was held that the appointment was valid under sect. 31 of the Act; and North, J., observed: "The intention of sect. 31 is that, whenever a person has been nominated by the instrument creating the power as the person to appoint new trustees, he has the power of filling up any vacancy occurring under the provisions of the section" (*d*).

In this case the husband and wife were nominated to fill up vacancies in the trusteeship generally, and the decision has no application to cases where the settlement has given a power of appointing new trustees in certain special events which do not comprise all the events provided for by the Act, and in such a case the statutory power of appointing new trustees in any of the

[(*a*) *Nicholson* v. *Field*, (1893) 2 Ch. 511; *Re Orde*, 24 Ch. D. (C.A.) 271; *Re Ambler's Trust*, 59 L. T. N.S. 210; *Re Lightbody*, W. N. 1885, p. 3. The section applies to the case of a lunatic tenant for life being one of the trustees, and the person nominated by the settlement to appoint new trustees; *Re Blake*, W. N. 1887, p. 173.]

[(*b*) *Re Parker's Trusts*, (1894) 1 Ch. 707.]

[(*c*) *Re Coates to Parsons*, 34 Ch. D. 370.]

[(*d*) *Re Walker and Hughes' Contract*, 24 Ch. D. 698.]

events not contemplated by the settlement will be in the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee. Thus in a recent case where the husband and wife were empowered to appoint new trustees in the event of a trustee becoming incapable, but not in the event of a trustee becoming unfit, and one of the trustees became unfit but not incapable, an appointment of new trustees by the husband and wife was held to be invalid (*a*).

[Court will not override statutory power.]

The Court will not interfere with the exercise of the statutory power by the donee of it who is willing to exercise it, even though the application to the Court to appoint new trustees is made by the majority of the beneficiaries (*b*).

[Trustee Act 1893.]

6. It was doubted whether section 31 of the Act of 1881 applied to trustees appointed for the purposes of the Settled Land Acts (*c*), but this doubt was removed by an express provision in the Settled Land Act, 1890, and now, by the Trustee Act, 1893 (*d*), it is provided that all the powers and provisions therein contained, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

[Costs of application under Act.]

7. The representatives of a deceased trustee do not, by declining to exercise the statutory power of appointment, render themselves liable to the costs of an application to the Court to appoint new trustees (*e*).]

Whether a new trustee is actually such until transfer of the estate to him.

8. The words contained in the ordinary form which expressly confer all powers on the new trustee before the estate has been conveyed, show that a doubt has been felt by the profession whether in the absence of these words the powers could be exercised until after *conveyance*, and the late Vice-Chancellor of England, in a case where the words referred to did not occur, but there was simply a power of nomination and no direction for a conveyance, expressed his opinion to be that the person to be appointed was not invested with the character of trustee until he had both been nominated to the office by the donee of the power, and the *trust property* had also been duly conveyed or assigned (*f*). But in a more recent case before Sir John

Noble *v.* Meymott.

[(*a*) *Re Wheeler and De Rochow*, (1896) 1 Ch. 315.]

[(*b*) *Re Higginbottom*, (1892) 3 Ch. 132.]

[(*c*) *Re Wilcock*, 34 Ch. D. 508; *Re Kane's Trusts*, 21 L. R. Ir. 112.]

[(*d*) 56 & 57 Vict. c. 53, s. 47, replacing the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 17; see *ante*, p. 655.]

[(*e*) *Re Sarah Knight's Will*, 26 Ch. D. (C.A.) 82.]

(*f*) *Warburton* v. *Sandys*, 14 Sim. 622.

Romilly, M.R. (*a*), where A. and B. were appointed trustees of a settlement, and after a lapse of 18 years A. disclaimed, and B. was desirous of retiring, and the donee of the power nominated C. in the place of A., and D. in the place of B., and B. professed to assign the trust fund (consisting of a share of 3000*l.* in the hands of trustees of another settlement) to C. and D., who filed their bill without their *cestuis que trust* to have the trust fund paid to them, it was objected against the validity of the appointment that A. had acted, and that consequently B. could not alone pass the trust fund, and that therefore the appointment of trustees was incomplete; but the Master of the Rolls held that, whether A. had acted or not, his disclaimer was a wish to retire, and that C. and D. were duly appointed, and were entitled to call for payment of the trust fund: that the *appointment* of new trustees and the *conveyance* of the trust property to them were *two distinct and separate matters*, that the transfer could only take place when the appointment was complete, and that various difficulties would arise from holding that the transfer of the trust fund was necessary to perfect the appointment. And in a subsequent case before the same learned judge, where there was the usual power of appointment of new trustees, with a direction for the conveyance of the trust estate, and the donee of the power appointed a new trustee in the place of a deceased trustee, but the trust estate was not conveyed, and the surviving trustee and new trustee then sold the estate and signed a receipt for the purchase-money, it was held that the purchaser acquired a good title (*b*). It would appear, therefore, that at the present day an actual conveyance of the legal estate, unless the power be specially worded, is not essential to the valid appointment of new trustees (*c*).

[In one case it was held that a renewed lease of part of a testator's property made to four persons, by the direction of the donee of the power of appointing new trustees of the will, coupled with a statement in the lease that the four lessees were "the present trustees" of the will, operated as an exercise of the power of appointing new trustees (*d*).

Mode of vesting trust estate.

9. Should the trust estate consist of Bank Annuities, or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the

(*a*) *Noble* v. *Meymott*, 14 Beav. 471.
(*b*) *Welstead* v. *Colvile*, 28 Beav. 537.
[(*c*) And see *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199, 213, *per* Rigby, L. J.]
[(*d*) *Re Farnell's Settled Estates*, 33 Ch. D. 599.]

new trustee, and the old and new trustee may execute a declaration of trust of the stock or other property intended to be transferred, and after the execution of the deed the stock may be transferred into their joint names accordingly. If the trust estate consisted of *chattels real, or other personal estate legally assignable*, two deeds, until a modern Act, were necessary. By the first, the old trustee assigned the chattel interest to A., and then A. by indorsement reassigned it to the old and new trustees as joint tenants. But now, by the Law of Property Amendment Act, 1859 (*a*), a person may assign personal property by law *assignable*, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another, so that in such cases one deed will now be sufficient (1); [and the power has, by the Conveyancing and Law of Property Act, 1881 (*b*), been extended to things in action]. If the trust estate be of a *freehold* nature, and by the terms of the instrument of trust the whole legal estate is to be vested in the trustees, there needs, in general, no other machinery than a simple conveyance under the Statute of Uses; for the old trustee may convey the lands to the joint *use* of himself and the new trustee, and the statute will operate to transfer the possession. In *settlements which invested the trustees with powers*, the established form of the proviso [was] thought to occasion the necessity of resorting to the use of two deeds (*c*); but the prevalent and better opinion is, that a simple conveyance from the old trustee to the use of the old and new trustees will be sufficient (*d*).

[10. By the Trustee Act, 1893 (*e*), sect. 12, reproducing sect. 34 of the Conveyancing and Law of Property Act, 1881 (*f*), a new and [Statutory mode of vesting the trust property in new or continuing trustees.]

(*a*) 22 & 23 Vict. c. 35, s. 21 (Lord St Leonards' Act).

[(*b*) 44 & 45 Vict. c. 41, s. 50.]

[(*c*) For the reasoning on which this view was grounded, see the eighth edition of this work, pp. 651, 652.]

(*d*) See Sugd. Powers, 884, note (1), 8th ed.; Davidson's Preced. Vol. III., p. 521, and Vol. IV., p. 609, 2nd edition.

[(*e*) 56 & 57 Vict. c. 53.]

[(*f*) 44 & 45 Vict. c. 41.]

(1) The Act does not authorise an assignment by a person to himself (as by an executor to himself as legatee), nor by himself and another or others to himself, as by two co-executors to one of them as trustee, for in the first case he has the legal estate already and a declaration will shift the equitable interest, and in the second case so far as he has not the legal estate in himself the other or others can assign it or release it independently of the Act. The operation of the Act is limited to property *assignable at law*, for mere equitable interests shift according to the intention, and no legislative interference was required as to them.

simple method of transferring trust property without conveyance or assignment has been introduced, which is now generally adopted where applicable. That section provides, by sub-s. 1, that, "where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right."

But the section does not extend "to any legal estate or interest in copyhold or customary land, or to *land conveyed by way of mortgage for securing money subject to the trust*, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament." The exception as to land in mortgage applies to the common practice of keeping notice of the trust off mortgages to trustees (*a*). But for this provision, when new trustees were appointed, a vesting declaration might be made which would have the effect of transferring the legal estate, but notice of the trust would be fixed on the title (*b*).

It is to be observed that the declaration of vesting can only be made by the *deed by which a new trustee is appointed*, and the section will not apply in cases where the appointment is made otherwise than by deed. The expression "the persons who by virtue of the deed become and are the trustees for performing the trust," is not happily worded, but the intention of the legislature, undoubtedly, was to vest the trust property in the persons who immediately upon the execution of the deed of appointment are the trustees for performing the trust, and it is conceived that this intention is sufficiently expressed. The expression "trustees for performing the trust," is not to be limited to trustees with substantial duties to perform, and trustees appointed by mortgagees in lieu of the mortgagor under a power in the mortgage deed were held in a recent case to be within the expression (*c*).

[Effect of vesting declaration.]

In the case last referred to, the owner of land, on the occasion of his making an equitable mortgage of the land, by deed declared himself to be a trustee of the legal estate for the mortgagees, and

[(*a*) See *ante*, pp. 386, 387.]

[(*b*) *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642, 649, *per* North, J.]

[(*c*) *London and County Banking Company* v. *Goddard*, (1897) 1 Ch. 642.]

thereby authorised the mortgagees to remove him from being a trustee, and to appoint new trustees. He subsequently conveyed the legal estate to an incumbrancer with notice of the equitable mortgage. After this had been done, the mortgagees appointed new trustees by a deed which contained a vesting declaration in accordance with the statute, and it was held that the effect of the declaration was to take the legal estate out of the subsequent incumbrancer, and vest it in the new trustees (*a*). But this decision, so far as it attributes to a vesting declaration under the statute a more extensive operation than a conveyance by the old trustee to the new trustees could have had, seems to be open to question.]

Stamp on appointment of new trustees.

11. By [the Stamp Act, 1891 (54 & 55 Vict. c. 39)], the appointment of a new trustee requires a 10*s. stamp*, and by sect. 62, "every instrument and every *decree or order* of any Court, or of any commissioners, whereby any property on any occasion, except a sale or mortgage is *transferred* to or *vested* in any person, is to be charged with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee, is not to be charged with any higher duty than 10s." By sect. 4, "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters." [Where by an order of the Charity Commissioners new trustees were appointed of a charity, and a vesting order was also made, it was held, under the corresponding provisions in the Stamp Act, 1870 (*b*), that two duties of 10s. each were payable, one in respect of the appointment, and the other in respect of that part of the order which vested the trust estate in the new trustees (*c*). And on the same principle it would seem that a double duty is payable in the ordinary case of an appointment of new trustees by deed with a consequent transfer of the estate.

[Trustee retiring without appointing a new trustee.]

12. Previously to the Conveyancing and Law of Property Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless the settlement contained a special power authorising him to do so, a circumstance which seldom occurred; but now by the Trustee Act, 1893 (*d*), sect. 11, replacing sect. 32 of the Act of 1881, it is enacted that—

[(*a*) *London and County Banking Company* v. *Goddard*, (1897) 1 Ch. 642.]

[(*b*) 33 & 34 Vict. c. 97, ss. 8, 78.]

[(*c*) *Hadgett* v. *The Commissioners of Inland Revenue*, 3 Ex. D. 46.]

[(*d*) 56 & 57 Vict. c. 53; as to the extension of this enactment in the case where the public trustee is appointed a trustee, see *ante*, Chap. XXIII. pp. 701, 702.]

"(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act."

By sect. 12, sub-s. 2, where a deed by which a retiring trustee is discharged under the Act contains a declaration by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust (*a*), that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.]

Trustee must see that the power contemplated the precise case.

13. It must be carefully ascertained by the trustee that the circumstances under which he retires from the trust are precisely those which are contemplated in the terms of the proviso; for if the case be not within the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office.

[(*a*) As to the effect of the declaration, see *ante*, p. 812.]

14. And a trustee on retiring must [if a new trustee is to be substituted in his place] be careful not to part with the control of the fund before the new trustee has been actually appointed, for if he transfer it into the name of the intended new trustee, and by some accident the appointment fails to be completed, he still remains a trustee, and will be answerable for the trust fund (*a*). Retiring trustee must see to completion of the appointment.

If the old trustee obstinately and perversely, without any sufficient reason, *refuse* to transfer the fund to new trustees duly appointed, he will be visited with the costs occasioned by his wilfulness (*b*).

15. It is somewhat surprising, considering the frequency of this power, how few questions until recent times arose upon its construction.

In *Sharp* v. *Sharp* (*c*), heard in the Court of Queen's Bench, the terms in which the power was expressed were as follows:— Sharp *v.* Sharp.

"In case *either* of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts, it shall be lawful for the *survivors or survivor* of the trustees *so acting* in the trusts, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee." Neither of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be new trustees; and the question was raised, whether the power of appointment had, under the circumstances, been effectually exercised, and it was determined in the negative. Lord Tenterden said that by the word "survivor" he understood merely the trustee "continuing to act"; for it was throughout the intention of the testator, that, in case of the death, or incapacity, or refusal of some *one* of the trustees, the *remaining trustee* who had been named by him, and was the object of his confidence, should have the power of associating with himself some other person: but it would be giving a much larger construction to the words than they fairly imported, if the trustees, in the event of the whole class declining to act, were to nominate such other persons as they might think fit. Mr Justice Bayley observed, that the word "either" was not uselessly introduced: that it was in effect a proviso that if *either* of the trustees named in the will should refuse to act, still the testator should have the benefit of the judgment of the other: that the testator might have

(*a*) *Pearce* v. *Pearce*, 22 Beav. 248.
(*b*) *Re Wise's Trust*, 3 Ir. R. Eq. 599.
(*c*) 2 B. & Ald. 405.

had good reason for confining the power to the care of one trustee, for he might have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if the words were to be read as if they were "*both* or either," the case would be different; for if both the persons should decline to act, the testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a Court of Equity: that under the words of the power the testator meant by the word "*acting*" to designate those who had taken upon themselves to perform some of the trusts mentioned in the will, and that he did not contemplate one who *in limine refused to act*: that the word "*survivor*" must therefore mean the "*continuing*" trustee, as contradistinguished both from those who might refuse to act, and those who might be desirous to discontinue acting.

"Refusing or declining" includes "disclaiming."

16. If *one* trustee *disclaims*, may the continuing trustee appoint another, or do the words of the power, "if any trustee shall *refuse or decline*" apply, not to the case of a *disclaimer*, but only to *a refusal after having acted*? Although the point decided in *Sharp* v. *Sharp* was as stated above, yet from the language of the judges it appears that, had only one trustee disclaimed, the other might have exercised the power; and such, it is presumed, is clearly the rule where there is nothing to narrow the meaning of the words "refusing or declining." There generally follows in the power a direction that the estate "vested in the trustees so refusing or declining" shall be transferred to the new trustee; and hence it has been argued, that as no estate vests in a disclaiming trustee, the power did not contemplate such a case. However, there seems to be but little weight in the argument; for when it is said that the words "if any trustee shall refuse or decline" apply to disclaimer, it is not meant that they do not also apply to a subsequent refusal. At all events, therefore, the direction for the transfer of the estate is not nugatory (*a*).

"Refusing" or "declining" means also after having acted.

17. On the other hand, it has been doubted whether the words "refusing" or "declining" may not refer exclusively to disclaimer, and have no application to the case of a trustee who, *after having accepted* the trust, *refuses* to act any longer in it.

(*a*) *Re Roche*, 1 Conn. & Laws. 306; *Walsh* v. *Gladstone*, 14 Sim. 2; *Mitchell* v. *Nixon*, 1 Ir. Eq. Rep. 155; *Crook* v. *Ingoldsby*, 2 Ir. Eq. Rep. 375; *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19.

This proposition is also thought to be untenable (*a*), though some cases have an opposite tendency (*b*).

Payment into Court is "declining."

18. It has been held that a *payment of the trust money into Court* under the Trustee Relief Act (*c*), stamps the trustee with the character of a "*refusing* or *declining* trustee" (*d*).

Power to executors and administrators.

19. If a power of appointing new trustees be given to a person, his executors and administrators, and the donee of the power dies, having appointed three executors, one of whom renounces, the *acting* executors can exercise the power (*e*).

[Limited administration for purpose of appointing new trustees.]

[20. In a case in Ireland, where the power of appointing new trustees was given to the acting executors or administrators of the last surviving trustee, and the last surviving trustee was dead, but there was no legal personal representative of his estate, and the persons entitled to take out letters would not do so, the Court of Probate granted administration to the guardian of the infant *cestuis que trust*, limited to the purpose of appointing himself and A. B. new trustees of the settlement, and to the purpose of transferring to, and vesting in, such new trustees the trust funds (*f*).]

Death of the trustee in the testator's lifetime.

21. Suppose a testator to appoint two trustees with the *usual power of appointment* of new trustees, and a trustee *dies in the testator's lifetime*, can the surviving trustee appoint a new trustee? The late Vice-Chancellor of England in one case expressed a doubt upon it (*g*), and in a subsequent case decided in the negative (*h*); but this was a narrow construction of the power, and it has since been ruled that a trustee who has survived the testator may appoint a new trustee in the place of one who predeceased the testator (*i*).

Morris *v.* Preston.

22. In *Morris* v. *Preston* (*j*), the proviso was, that "in case of

(*a*) *Travis* v. *Illingworth*, 2 Dr. & Sm. 344.

(*b*) See *Re Woodgate's Settlement*, and *Re Armstrong's Settlement*, 5 W. R. 448.

[(*c*) Replaced now by section 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), see *ante*, p. 424.]

(*d*) *Re Williams's Settlement*, 4 K. & J. 87.

(*e*) *Earl Granville* v. *M'Neile*, 7 Hare, 156. The Reporter speaks of the third executor as "declining," but renunciation is meant, as assumed by the judgment, and expressly stated; 13 Jur. 252. It would seem, from the principle laid down by the Court, that, had the third executor declined only to act as executor without actual renunciation, the Judge would have arrived at the same conclusion; and see *ante*, p. 226.

[(*f*) *Re Jackson*, 7 L. R. Ir. 318.]

(*g*) *Walsh* v. *Gladstone*, 14 Sim. 2.

(*h*) *Winter* v. *Rudge*, 15 Sim. 596.

(*i*) *Re Hadley*, 5 De G. & Sm. 67; *Nicholson* v. *Wright*, 26 L. J. N.S. Ch. 312; *S. C. nomine Nicholson* v. *Smith*, 3 Jur. N.S. 313; *Noble* v. *Meymott*, 14 Beav. 477. As regards the statutory power conferred by 23 & 24 Vict. c. 145, s. 27, the doubt was guarded against by express enactment; see sect. 28; [and so also as regards the statutory power conferred by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, replacing 44 & 45 Vict. c. 41, s. 31].

(*j*) 7 Ves. 547.

the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living." Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that, as the proviso clearly contemplated the case of *one* trustee surviving, an appointment of new trustees after the decease of *both* the original trustees was not warranted by the power. The purchaser abandoned the objection at the hearing without argument — a circumstance much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject. However, the case as it stands has been said by the Lord Chancellor of Ireland to be of great authority—viz. in favour of the validity of the appointment (*a*).

Power to tenant for life with the surviving or continuing trustee.

23. In another case, where two trustees had been appointed by the settlement, and the power was, "that if either of the trustees should die, or reside beyond the seas, or become incapable or *unfit to act* in the trusts, it should be lawful for the tenants for life, *together with the surviving or continuing or acting trustee for the time being*, to nominate a new trustee, and that *the trust estate should thereupon be vested in the newly-appointed trustee, jointly with the surviving or continuing trustee*," upon the trusts of the settlement, and one trustee died and the other became bankrupt, on the suggestion by counsel that there was *no surviving or continuing trustee*, and therefore the power was gone, the Lord Chancellor of Ireland observed: "That happens in many cases, without the power being affected. The construction is not so strait-laced as all that" (*b*).

Bankrupt trustee is "unfit."

24. It was ruled in the same case, that a trustee who became *bankrupt* was "unfit" within the words of the power. But if the power be worded "in case the trustee shall become *incapable* to act," without the addition of the words "or unfit," a bankrupt

(*a*) *Re Roche*, 1 Conn. & Laws. 308. 2 Dru. & War. 287.
(*b*) *Re Roche*, 1 Conn. & Laws. 306;

trustee is not within the description, for by "incapable" is meant *personal incapacity* and not pecuniary embarrassment (*a*). And a *bankrupt*, who has obtained a first-class *certificate*, [and has since the bankruptcy made a fresh start in life, and ceased to be impecunious,] cannot be regarded as unfit to be a trustee (*b*). [But the mere fact that the bankruptcy arose from misfortune, and not from any fault on the part of the bankrupt, does not remove his unfitness unless it can also be shown that since his bankruptcy he has become a person of means (*c*).]

Trustee resident abroad.

25. The Court held in one case that a trustee who went to reside permanently *abroad*, came within the description of a trustee "*incapable to act*" (*d*), but this seems scarcely in harmony with correct principle (residence abroad being rather a question of unfitness than incapacity), and cannot be reconciled with other authorities (*e*). And the Court has since intimated an opinion that incapacity means *personal* incapacity (*f*).

"Unable" to act.

26. If the power provide that if any one of three trustees become "unable" to act, "the *trustees or trustee for the time being*, whether continuing or declining to act," may appoint a new trustee, the two trustees who remain capable can appoint a new trustee in the place of a lunatic trustee (*g*).

Temporary absence.

27. If the settlement provide that a trustee shall cease to be such "on *departing the United Kingdom* from whatever cause or motive or under whatever circumstances," the clause nevertheless does not apply to a mere *temporary absence* with the intention of returning (*h*). [So if the power is to arise in the event of a trustee "remaining out of the United Kingdom for more than twelve months," a residence by him of a week in England during a current year is sufficient to preclude the exercise of the power (*i*).

[Appointment of person to be trustee when he returns to England.]

But where a person resident abroad is appointed by a testator to be trustee "if and when he shall return to England," and

(*a*) *Re Watt's Settlement*, 9 Hare, 106; *Turner* v. *Maule*, 15 Jur. 761; *Re East*, 8 L. R. Ch. App. 735; [and see *Re Wheeler and De Rochow*, (1896) 1 Ch. 315].

[(*b*) *Re Bridgman*, 1 Dr. & Sm. 164.]

[(*c*) *Re Adams' Trust*, 12 Ch. D. 634; and see *Re Barker's Trust*, 1 Ch. D. 43; *Re Hopkins*, 19 Ch. D. (C.A.) 61.]

(*d*) *Mennard* v. *Welford*, 1 Sm. & G. 426; *S. C.* 1 Eq. Rep. 237; and see *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.

(*e*) *Withington* v. *Withington*, 16 Sim. 104; *Re Harrison's Trusts*, 22 L. J. N.S. Ch. 69; and see *Re Watt's Settlement*, 9 Hare, 106; *O'Reilly* v. *Alderson*, 8 Hare, 104.

(*f*) *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223; [and see *Re Wheeler and De Rochow*, (1896) 1 Ch. 315].

(*g*) *Re East*, 8 L. R. Ch. App. 735.

(*h*) *Re Moravian Society*, 26 Beav. 101; [and see *Re Earl of Stamford*, (1896) 1 Ch. 288, 296].

[(*i*) *Re Walker*, (1901) 1 Ch. 259.]

eight years after the testator's death he comes to England for his health, remains for six months, and then returns to his home abroad, he has fulfilled the condition, and, in the absence of evidence that he has dissented from or disclaimed the trusteeship, the trust estate vests in him (*a*).]

Two trustees retiring, and appointing a single successor.

28. If there be *two trustees* of a settlement, and both be anxious to retire from the trust at one and the same time, they would not be justified in putting the property under the control of a *single trustee* appointed in their *joint places* (*b*).

Single trustee retiring and appointing two to succeed.

29. And, *vice versâ*, [until the Conveyancing and Law of Property Act, 1881, a *single* trustee, had he wished to retire, could not have appointed] *more than a single trustee* in his place; for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet he ought not to clog the estate with unnecessary machinery. The idea of the settlor may have been, that by increasing the number of the trustees the vigilance of each, individually, would be diminished. "A great number," observed Lord Mansfield, "may not do business better than a smaller, and it would be attended with more expense" (*c*). [But now by the Trustee Act, 1893, unless a contrary intention is expressed in the instrument creating the trust, the number of trustees may, on the appointment of a new trustee, be increased, and the section applies to trusts created either before or after the commencement of the Act (*d*).

D'Almaine *v.* Anderson.

30. Independently of statute] the power may be so specially worded as to authorise the substitution of *several* trustees in the place of *one* or of *one* in the place of *several*. Thus, where a testator appointed two trustees, and directed "that if the trustees thereby appointed, or to be appointed as thereinafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee *or trustees* for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one *or more* person *or persons* to be a trustee *or trustees*, in the room of the trustee or trustees so dying, &c., and thereupon the trust estates should be vested in the new trustee *or trustees*, jointly with the surviving or continuing trustee *or trustees*, *or solely*, as occasion should require,"

[(*a*) *Re Arbib*, (1891) 1 Ch. (C.A.) 601.]

(*b*) *Hulme* v. *Hulme*, 2 M. & K. 682.

(*c*) See *Rex* v. *Lexdale*, 1 Burr. 448; *Ex parte Davis*, 2 Y. & C. C. C. 468; 3 Mont. D. & De G. 304; and see *Re Breary*, W. N. 1873, p. 48.

[(*d*) 56 & 57 Vict. c. 53, s. 10, replacing s. 31 of the Conveyancing Act of 1881.]

and the surviving trustee appointed *two* trustees in the room of the deceased trustee, the late Vice-Chancellor of England held that such a case was immediately contemplated by the proviso (*a*).

[31. So where a testator appointed four trustees and declared that "as often as his first or future trustees or any of them should die, he empowered the surviving or continuing trustees or trustee, or if there should be no such trustee, then the retiring or renouncing trustees or trustee, and if there should be no such last mentioned trustee, then the executors or administrators of the last deceased trustee, by any deed to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, &c.; and upon the appointment of every such new trustee, all the trust estates, money and premises, should be thereupon vested in such *new trustee* or trustees, either *solely* or jointly with the surviving or continuing trustee or trustees, as occasion should require"; and two of the trustees died, and one renounced, and the surviving trustee appointed a single co-trustee, the M.R. said "he was not aware of any rule making it compulsory on the donees of a power appointing new trustees to keep up the full number of trustees except in the case of a charity. If the testator wished the number to be kept up, he must expressly say so. In that case it was clear from the words of the will that the testator contemplated the possibility of a single trustee acting alone." And he held that the appointment was valid (*b*). So where one trustee disclaimed, and the other retired, the appointment of a single trustee under the power in Lord Cranworth's Act was supported (*c*).] [Reduction in number of trustees authorised.]

32. And where the Court itself is appointing new trustees, it does not at the present day, though doubts appear to have been formerly felt on the point (*d*), consider itself bound to fill up only the precise number mentioned in the instrument of trust. It has added two new trustees to the two original trustees (*e*), Court does not limit itself to original number.

(*a*) *D'Almaine* v. *Anderson*, V.C. 1st Feb. 1841, M.S.; in *Meinertzhagen* v. *Davis*, 1 Coll. 335, the special form of the power was held to authorise the appointment of three trustees in the place of two; in *Emmet* v. *Clarke*, 3 Giff. 32, three trustees were held to have been well appointed in the place of four; and in *Hillman* v. *Westwood*, 3 Eq. Rep. 142, the Court thought that two trustees could be appointed in the place of one; and see *Corrie* v. *Byrom*, V. C. Wigram, 26th April, 1845, M.S. [the facts of which case are stated in the eighth edition of this work, p. 660, note (*a*);] and *Re Breary*, W. N. 1873, p. 48.

[(*b*) *Cunningham and Bradley's Contract for Sale to Wilson*, W. N. 1877, p. 258; *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138.]

[(*c*) *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138.]

(*d*) *Devey* v. *Peace*, Taml. 78.

(*e*) *Re Boycott*, 5 W. R. 15.

appointed four where the testator originally appointed three (*a*), three where the testator originally appointed two (*b*), and two where the testator originally appointed one (*c*). In these cases the number has been increased, but if the original number was excessive, the Court may also reduce it (*d*). If, however, two were originally appointed, the Court for security will not, at least where money is concerned, substitute one only (*e*).

Trustee should be within the jurisdiction.

33. In general, the new trustees appointed under a power should be persons amenable to the *jurisdiction of the Court*, but where the personal property of a lady was settled on her marriage with a foreigner, whose domicile was in *America* at the time of the marriage, the subsequent appointment of three *Americans* to be trustees was decided to be justifiable (*f*). But though the parties who have a *power of appointment* may exercise it in this way, the *Court* in substituting trustees by its own jurisdiction has refused to appoint new trustees who are *out of the jurisdiction* (*g*). [However, in a case where all the parties interested were of age, and they were all resident either in Australia or New Zealand, the Court appointed two persons resident in Australia new trustees of a settlement (*h*), and where an infant domiciled in Australia was entitled to a small share of real estate, persons resident in Australia were appointed trustees of the share for the purposes of the Settled Land Act, 1882 (*i*), and the like course has been adopted in other cases where some of the *cestuis que trust* have been infants (*j*). But it is only in very exceptional circumstances that such an appointment will be made, and in a recent case where three trustees were appointed, two of whom were out of the jurisdiction, the Court required the two to undertake, in case the power of appointing new trustees should become exercisable by them or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the Court (*k*); and the Court

(*a*) *Plenty* v. *West*, 16 Beav. 356.

(*b*) *Birch* v. *Cropper*, 2 De G. & Sm. 255.

(*c*) *Plenty* v. *West*, 16 Beav. 356; *Re Tunstall's Will*, 4 De G. & Sm. 421; *Grant* v. *Grant*, 34 L. J. Ch. 641.

[(*d*) *Re Fowler's Trusts*, W. N. 1886, p. 183; 55 L. T. N.S. 546; and see *Re Leon*, (1892) 1 Ch. (C.A.) 348; *Re Lees*, (1896) 2 Ch. 508.]

(*e*) *Re Ellison's Trusts*, 2 Jur. N.S. 62; *Re Porter's Trust*, 2 Jur. N.S. 349; and see *Re Roberts*, 9 W. R. 758.

(*f*) *Meinertzhagen* v. *Davis*, 1 Coll. 335; [and see *Re Smith's Trusts*, 20 W. R. 695; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52; but see *Re Long's Settlement*, 17 W.R. 218; *Re Austen's Settlement*, 38 L. T. N.S. 601].

(*g*) *Re Guibert*, 16 Jur. 852.

[(*h*) *Re Drewe's Settlement Trusts*, W. N. 1876, p. 168.]

[(*i*) *Re Simpson*, (1897) 1 Ch. (C.A.) 256.]

[(*j*) *Re Liddiard*, 14 Ch. D. 310; and see the cases cited, *sup.* note (*f*).]

[(*k*) *Re Freeman's Settlement Trusts*, 37 Ch. D. 148.]

refused to authorise money arising under the Settled Land Act to be sent out to executors in America for investment (*a*).]

One of two trustees retiring, and appointment of the co-trustee.

34. Should *one* of two trustees be desirous of retiring, of course he cannot do so without the *substitution of another* in his place (*b*), and the power of appointment of new trustees would not authorise the appointment of the *continuing trustee* as *sole* administrator of the trust (*c*); for this would, in effect, amount to a relinquishment of the trust without the appointment of any successor (*d*).

Appointment of one trustee in the place of several.

35. [Independently of the power conferred by the Trustee Act, 1893 (*e*),] *a surviving trustee* cannot be advised (though it has been sometimes done), to vest the trust estate in himself, and a new trustee appointed in the place of *one* of *several deceased trustees*, but should refuse to part with the property unless the original number of trustees be restored. Still less could the *representative* of the last surviving trustee be advised to vest the property in a *single new trustee* nominated in the place of one only of the several *deceased trustees*. And where a settlement constitutes *three trustees* with a power of appointment of new trustees in the usual form, and two die, the *survivor* should refuse to retire in favour of a *single new trustee* appointed in his place, for, as the original settlement provided three trustees to execute the trust, the donee of the power should not execute the power partially, but should restore the original number (*f*). In a trust for *sale*, if this precaution were not observed, a purchaser on a sale by the new trustee might give trouble by objecting to the title (*g*). The strongest ground for supporting the sale would be, that probably many titles depend on the validity of such an execution of the power, and in recent cases the appointment has been supported (*h*). *Fieri non debuit, factum valet.* Where the power in the will was "to appoint *one or more* new trustee or trustees in the room of the *trustee or trustees* so dying," and both trustees died, and the donee of the power appointed a single trustee in the place of both, the appointment was established (*i*).

[(*a*) *Re Lloyd*, 54 L. T. N.S. 643; W. N. 1886, p. 37.]

(*b*) *Adams* v. *Paynter*, 1 Coll. 532.

(*c*) *Wilkinson* v. *Parry*, 4 Russ. 272.

(*d*) *Attorney-General* v. *Pearson*, 3 Mer. 412, *per* Lord Eldon.

[(*e*) 56 & 57 Vict. c. 53.]

(*f*) See *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; but see *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*g*) See *Earl of Lonsdale* v. *Beckett*, 4 De G. & Sm. 73; *Meinertzhagen* v. *Davis*, 1 Coll. 344.

(*h*) *Re Pool Bathurst's Estate*, 2 Sm. & G. 169; *Reid* v. *Reid*, 30 Beav. 388; and see *Re Fagg's Trust*, 19 L. J. N.S. Ch. 175.

(*i*) *Wood* v. *Ord*, M.R. 1st July, 1793, MS.

[Trustee Act, 1893.]

[36. Now, by the Trustee Act, 1893 (*a*), sect. 10, on an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.]

Rectification of bad appointment.

37. If A. and B. be trustees, with a power of appointment of new trustees limited to "the acting trustees or trustee, or the executors or administrators of the surviving trustee," and then A. dies, and B. retires and appoints C. a trustee in his *own* place, and afterwards dies and appoints an executor, who, as the donee of the power for the time being, appoints C. and D. in the place of A. and B., the two new trustees are properly appointed, and can sign receipts; for either the original appointment of C. was good, and the subsequent appointment of D. [having been made with the concurrence of C.] filled up the number, or the original appointment of C. was invalid, and then the appointment of both C. and D. by the donee of the power was effectual (*b*).

[Concurrence of retiring trustee not necessary.]

[38. Where the power of appointing new trustees is given to the surviving or continuing trustees or trustee, and a trustee retires, his concurrence is not necessary in the appointment of a new trustee in his place, but such appointment rests with the other trustees or trustee who do not retire (*c*).]

A surviving trustee appointing two trustees in the place of himself and the deceased trustee.

39. It sometimes happens where the power of appointment of new trustees is limited to the "*surviving* or *continuing* trustee," that one trustee *dies*, and then the other, wishing to retire, proposes to appoint two new trustees at the same time in the place of himself and the deceased trustee. A doubt has, however, been suggested whether the word *surviving* must not be read as applicable only to an appointment in the room of a *deceased* trustee; and, as the word *continuing* cannot include *retiring*, the safer course is for the *surviving* trustee first to appoint a person in the room of the deceased trustee, and then the person so substituted may, as the *continuing* trustee, appoint a new trustee in the place of the trustee desirous of retiring (*d*).

[(*a*) 56 & 57 Vict. c. 53, s. 10, sub-s. 2 (*c*).]

(*b*) *Miller* v. *Priddon*, 1 De G. M. & G. 335.

[(*c*) *Re Norris*, 27 Ch. D. 333; *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; *Re Coates to Parsons*, 34 Ch. D. 370; but see *Re Glenny and Hartley*, 25 Ch. D. 611.]

(*d*) See *Nicholson* v. *Wright*, 26 L. J. N.S. Ch. 312; *S. C. nom. Nicholson* v. *Smith*, 3 Jur. N.S. 313. But see *Pell* v. *De Winton*, 2 De G. & J. 17.

Case of both trustees wishing to retire.

40. And if there be *two* trustees, and a power of appointing new trustees be given to "the surviving or continuing *trustees or trustee*," it has been held that they cannot both *retire* at the same time, but that there must be two successive appointments, as in the case last mentioned (*a*); and if there be *three trustees* with the like power, and *two* die, and the surviving trustee wishes to retire, then he is not a *continuing* trustee, and therefore he cannot retire and appoint two others in the place of *himself* and a deceased trustee (*b*).

[But under the Trustee Act, 1893, the provisions of the Act relative to the appointment of new trustees by a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of those provisions (*c*); and a retiring trustee can, accordingly, under the Act, appoint new trustees in the place of himself and a deceased trustee, or in the place of himself alone if he was originally the sole trustee.]

Power to "other trustee."

41. Where four trustees were appointed originally, and the power was to the surviving or continuing or *other* trustee to appoint, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words "other trustee" appoint four new trustees in the place of himself and three others (*d*).

[Power to donees to appoint "other" persons.]

[42. Where the power was to the husband and wife or the survivor, and after the decease of such survivor, the continuing trustees or trustee, or if no continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, to appoint any "other" person or persons to be a trustee or trustees in the place of a trustee or trustees dying, or going to reside abroad, or desiring to retire, or refusing or becoming incapable to act, it was held that the terms of the power required that the trustee or trustees to be appointed should

(*a*) *Stones* v. *Rowton*, 17 Beav. 308; *S. C.* 1 Eq. Rep. 427.

(*b*) *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; [*Re Norris*, 27 Ch. D. 333. *Travis* v. *Illingworth* has been directly called in question by V. C. Bacon in *Re Glenny and Hartley*, 25 Ch. D. 611, in which case the V. C. expressed his opinion that the retiring trustees could execute the power. It is, however, to be observed that the power in that case contained special words, showing that the words "continuing trustees" were not used in their strict sense, but as including trustees who were being discharged, and on the general question the argument of the V. C. does not seem to be so well founded as that of V. C. Kindersley in *Travis* v. *Illingworth*, and has since been disapproved of, see *Re Norris*, *sup.*, and *Re Coates to Parsons*, 34 Ch. D. 370.]

[(*c*) 56 & 57 Vict. c. 53, s. 10, sub-s. 4, replacing 44 & 45 Vict. c. 41, s. 31, sub-s. 6.]

(*d*) *Lord Camoys* v. *Best*, 19 Beav. 414.

be some person or persons "other" than the person or persons making the appointment (*a*).]

Power to "acting trustees."

43. Where persons are nominated trustees in a will, and a power of appointing new trustees is given to the "acting" trustees, should all the trustees disclaim, the power of appointment is gone, and the *hiatus* in the trust can only be filled up by the Court. It has, occasionally, been suggested that the trustees, instead of disclaiming, should accept the trust to the extent of exercising the power only, and should, by virtue of it, appoint new trustees (*b*); but it is conceived that trustees who availed themselves of the office for the purpose only of introducing other parties into the trust would be rather "refusing" than "acting" trustees, and that the exercise of the power, under such circumstances, would be nugatory, and might involve the outgoing trustees in serious liabilities.

Power to the "said trustees."

44. The power of appointment is sometimes given "to the *said trustees*," and then the question arises whether a sole survivor can appoint. It is conceived that "the said trustees" means the persons or person representing the trust for the time being under the settlement, and that the survivor can therefore exercise the power.

Appointment of a *cestui que trust* or near relative of *cestui que trust* as trustee.

45. On a change of trustees it is not uncommonly proposed to appoint one of the *cestuis que trust* to that office, but such an arrangement is evidently irregular, as each *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person whose interest would not tend to bias him from the line of his duty. Should proceedings be instituted for the removal of the *cestui que trust*, and the substitution of some indifferent person as trustee, the costs might be thrown upon the parties who had improperly filled up the trust (*c*). But it is presumed that this rule affects the parties to the trust only, and that if a *cestui que trust* who has been appointed a trustee sell real estate under a power of sale, he may sign a receipt, and that the purchaser is not bound to look to the proper exercise of the discretion in such a case (*d*). *Cestuis que trust* are not absolutely *incapacitated* from being trustees, as the Court itself, under special circumstances, appoints a *cestui que trust* a trustee (*e*). The

[(*a*) *Re Skeat's Settlement*, 42 Ch. D. 522.]

(*b*) See *Sharp* v. *Sharp*, 2 B. & Ald. 415; and *Re Hadley*, 5 De G. & Sm. 67, where power was expressly given to a declining trustee.

(*c*) See *Passingham* v. *Sherborn*, 9 Beav. 424.

(*d*) See *Reid* v. *Reid*, 30 Beav. 388; *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*e*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Forster* v. *Abraham*, 17 L. R. Eq. 351.

question is merely one of relative fitness. *A fortiori*, the circumstance of near *relationship* to the *cestui que trust* creates no absolute disqualification for the office of trustee, though Sir John Romilly, M.R., objected, where it could be avoided, to appoint relatives as trustees (*a*).

[Appointment of tenant for life or his solicitor.]

[46. The Court declines to appoint the tenant for life (*b*), or the solicitor of the tenant for life (*c*), to be a trustee for the purposes of the Settled Land Act, 1882; and has even refused to appoint two brothers trustees, and required two *independent* persons to be appointed (*d*). And it is conceived that the course of the Court would in general be the same in the exercise of its general jurisdiction (*e*), but the donee of a power of appointing new trustees is not precluded from making an appointment which the Court would refuse to make (*f*), and in a recent case an appointment by a tenant for life under a power, of her own solicitor to be trustee was, under the circumstances, upheld (*g*).]

Whether donee of power can appoint himself trustee.

47. The question has often been asked, whether the donee of the power can appoint himself a trustee, and, as no one can be judge in his own case, such an appointment has been regarded as open to objection (*h*); [and the power being fiduciary, it is not in general proper for the donee to exercise it by appointing himself either alone or jointly with others (*i*); but there is no absolute rule precluding him from doing so, and in special circumstances such an appointment may be made, and may be sanctioned by the Court (*j*).] Should, however, the execution of the trust have been committed to trustees and the survivor of them, his *executors and administrators*, and the trustees die, and the power of appointment is in the executor of the survivor, here it may be said that as by the terms of the trust the executor was declared to be a proper person to execute the trust, the executor has the settlor's warrant for the appointment of *himself* and another. It may still,

(*a*) *Wilding* v. *Bolder*, 21 Beav. 222; and see *ante*, pp. 41, 42.

[(*b*) *Re Harrop's Trusts*, 24 Ch. D. 717.]

[(*c*) *Re Kemp's Settled Estates*, 24 Ch. D. (C.A.) 485; *Re Earl of Stamford*, (1896) 1 Ch. 288; *Re Spencer's Settled Estates*, (1903) 1 Ch. 75.]

[(*d*) *Re Knowles' Settled Estates*, 27 Ch. D. 707.]

[(*e*) *Re Earl of Stamford*, (1896) 1 Ch. 288.]

[(*f*) *Re Earl of Stamford*, *sup.*; *Re Kemp's Settled Estates*, 24 Ch. D. (C.A.) 485; and see *ante*, p. 822.]

[(*g*) *Re Earl of Stamford*, *sup.*]

[(*h*) See *Tempest* v. *Lord Camoys*, 58 L. T. N.S. 221, 223.]

[(*i*) *Re Skeat's Settlement*, 42 Ch. D. 522; *Re Newen*, (1894) 2 Ch. 297; *Re Sampson*, (1904) 2 Ch. (C.A.) 331. And it has been intimated that the principle extends to the case of a donee of a power of leasing, so as to preclude him from granting a lease to a trustee for himself: *Boyce* v. *Edbrooke*, (1903) 1 Ch. 836.]

[(*j*) *Montefiore* v. *Guedalla*, (1903) 2 Ch. 723; but see *Re Sampson*, *sup.*]

however, be observed, that the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors *a priori* cannot dispense with the discretion to be applied afterwards.

Of severing a trusteeship.

48. Where estates of a different description, or held under a different title, or limited upon different trusts, have been vested in the same trustees by the settlor, and there is a single power of appointment of new trustees in the usual form, it [was at one time thought] that there was no authority for afterwards dividing the trust by the appointment of one set of new trustees to execute the trusts of the one estate, and a distinct set of new trustees to execute the trusts of the other (*a*); and it [was even held in one case] upon a petition under the Trustee Acts, that the Court had no jurisdiction to make such an order (*b*). [But where there was no opposition to the order, the Court in several subsequent cases appointed new trustees under the Trustee Acts of one of several trust funds, held under the same instrument without dealing with the other funds (*c*); and in an administration action it was held by Fry, J., that the Court had jurisdiction to appoint separate sets of trustees (*d*). Now, by the Trustee Act, 1893 (*e*), sect. 10, it is enacted, that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees (*f*); or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and this section applies to trusts created either before or after the commencement of the Act. And the appointment may be made even although in certain events the trusts of the several properties may become identical (*g*).]

(*a*) See *Cole* v. *Wade*, 16 Ves. 27; *Re Anderson*, Ll. & G. *t.* Sugd. 29.

(*b*) *Re Dennis's Trusts*, 12 W. R. 575; 3 N. R. 636.

[(*c*) *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52, and the cases there cited; *Re Paine's Trusts*, 28 Ch. D. 725; *Re Moss's Trusts*, 37 Ch. D. 513.]

[(*d*) *Re Grange*, 29 W. R. 502; 44 L. T. N.S. 469.]

[(*e*) 56 & 57 Vict. c. 53, s. 10, sub-s. 2 (*b*), replacing s. 5 of the Conveyancing Act, 1882.]

[(*f*) This section by these words incorporates s. 6 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), passed to obviate the difficulty which arose in *Savile* v. *Couper*, 36 Ch. D. 520; and in Ireland in *Re Nesbitt's Trusts*, 19 L. R. (Ir.) 509; but see *Re Moss's Trusts*, 37 Ch. D. 513.]

[(*g*) *Re Hetherington's Trusts*, 34 Ch. D. 211; and see *Re Moss's Trusts*, 37 Ch. D. 513; *Re Paine's*

Directory powers.

49. The proviso is sometimes of such a directory character as to authorise the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclusively. Thus, where six trustees were empowered, *when reduced to three*, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment (*a*). So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect (*b*). It should be observed that these were cases of *charitable* trusts, in which a greater latitude of construction is allowed than in ordinary trusts (*c*).

Tenant for life disposing of his life estate.

50. If a tenant for life has a *power* of appointing new trustees, and *sells his life interest*, the power [is not thereby destroyed, but is still exercisable with the consent of the person to whom the beneficial interest has been aliened (*d*). So if the tenant for life] has only *mortgaged* his life interest, he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power, if it be done with the consent of the mortgagee.

[It has been intimated (*e*), that the power is exercisable by the tenant for life, even without the consent of the alienee, but it is submitted that this must be subject to the implied condition that there is nothing in the appointment prejudicial to the interest of the alienee. This condition has been expressly recognised in several of the earlier cases (*f*), and is in accordance with

Trusts, 28 Ch. D. 725. The enactment appears to contemplate the existence of separate and distinct "parts" of the trust estate, so that, for example, a settled legacy charged on the settled land, and not duly invested or appropriated in exoneration of the land, would seem not to be within the provision.]

(*a*) *Attorney-General* v. *Floyer*, 2 Vern. 748; and see *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; but see *Foley* v. *Wontner*, 2 J. & W. 245.

(*b*) *Doe* v. *Roe*, 1 Anst. 86.

(*c*) See *ante*, p. 751.

[(*d*) *Alexander* v. *Mills*, 6 L. R. Ch. App. 124. See *Holdsworth* v. *Goose*, 29 Beav. 111, and cases cited Ib.; *Nelson* v. *Seaman*, 1 De G. F. & J. 368; *Lord Leigh* v. *Ashburton*, 11 Beav. 470; *Eisdell* v. *Hammersley*, 31 Beav. 255; *Walmesly* v. *Butterworth*, Coote on Mortgages, App. 3rd Ed. p. 572; *Warburton* v. *Farn*, 16 Sim. 625.]

[(*e*) *Hardaker* v. *Moorhouse*, 26 Ch. D. 417, *per* North, J.; but in the case of *Re Bedingfield*, (1893) 2 Ch. 232, before the same learned judge, a contrary opinion was expressed by him, but the actual question did not there arise.]

[(*f*) *Alexander* v. *Mills*, 6 L. R. Ch. App. 124; *Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdell* v. *Hammersley*, 31 Beav. 255; and see *Re Cooper*, 27 Ch. D. 565; *Re Bedingfield*, *sup.*; and *cf.* the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50; *Earl of Lonsdale* v. *Lowther*, (1900) 2 Ch. 687; *ante*, p. 773.]

sound principle; and it is conceived that the wiser course will be to procure the consent of the alienee to the appointment.

[Donee of power becoming lunatic.]

51. Where the donee of a power of appointing new trustees is a person of unsound mind not so found by inquisition, the Court in lunacy has power, under the provisions of the Lunacy Act, 1890 (*a*), to appoint a person to exercise the power on behalf of the lunatic, either generally or by appointing specified persons (*b*).]

Trustee cannot retire in consideration of a *premium*, or in favour of another who intends to commit a breach of trust.

52. Advantage cannot be taken of the power for the purposes of profit; and therefore if the donee of the power appoint a person a trustee in consideration of *a sum of money* paid by him for the office, the appointment cannot stand (*c*). And if a trustee refuse, when solicited, to commit a breach of trust himself, but declares his willingness to resign in favour of some other person less scrupulous, the Court, acting upon the principle of *qui facit per alium facit per se*, and considering that it is equally incumbent on the trustee in this ultimate act of office to fulfil the duty imposed on him as at any other time, may hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted (*d*). [But in order to make retiring trustees liable for a breach of trust committed by their successors it must be shown, and shown clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustees when such retirement and appointment took place. It will not suffice to prove that the former trustees rendered easy or even intended a breach of trust if it was not in fact committed. They must be proved to have been guilty, as accessories before the fact, of the impropriety actually perpetrated (*e*).] And upon principle it would seem that a bond of indemnity given to the retiring trustee would be a very doubtful security against the consequences of the act, for the bond itself, if found to be infected with fraud, could afford no just ground for action (*f*). However, it was held by the Court of Exchequer that the common law Courts have no such cognisance of breaches of trust as to treat a bond of indemnity

[(*a*) 53 Vict. c. 5, ss. 116, 128, 129.]

[(*b*) *Re Shortridge*, (1895) 1 Ch. (C.A.) 278; and see *Re A.*, (1904) 2 Ch. 328, 333, and *ante*, p. 669.

(*c*) *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*d*) *Norton* v. *Pritchard*, Reg. Lib. B. 1844, 771; *Le Hunt* v. *Webster*, 8 W. R. 434; reversed 9 W. R. 918; *Clark* v. *Hoskins*, 36 L. J. N.S. Ch. 689; reversed on appeal, 37 L. J. N.S. Ch. 561; *Palairet* v. *Carew*, 32 Beav. 567; [*Head* v. *Gould*, (1898) 2 Ch. 250, 273, 274].

[(*e*) *Head* v. *Gould*, *ubi sup.*, *per* Kekewich, J.; *Clark* v. *Hoskins*, *ubi sup.*]

(*f*) See Shep. Touch. 132, 371.

against an act amounting in equity to a breach of trust as necessarily containing anything *illegal* (*a*).

Improper appointment by donee of power.

53. If a tenant for life, with a power of appointment of new trustees, *appoint improper persons* to the trust, he will be personally liable for the costs of a suit for removing the objectionable trustees (*b*).

Result where a new trustee is ineffectually appointed.

54. If a new trustee be *ineffectually appointed*, the old trustees may exercise the powers given to them by the instrument of trust, notwithstanding the ineffectual attempt (*c*). But if a trustee retire upon the appointment of a new trustee, and from want of the proper formalities being observed the appointment is not legal, the old trustee cannot lie by for a long interval and then exercise a power of mere concurrence in the deed, without *bonâ fide* exercising his own judgment and discretion (*d*).

Lis pendens.

55. If the *administration of the trust* be in the hands of the *Court*, the donee of the power cannot exercise it without having first obtained the Court's approbation of the person proposed (*e*). However, if the old trustees do appoint without the leave of the Court, the act is not to be considered as altogether void in itself, but it puts the burthen upon them of proving, and that by the strictest evidence, that what was done was perfectly right; and also saddles them with the costs of that proof. If the act was not proper, of course the appointment will be cancelled (*f*).

How the costs are to be borne.

56. On the appointment of a new trustee under a power, the *costs*, [including those of the donee of the power (*g*),] fall on the *corpus* of the trust estate. In strictness the costs of appointing new trustees should be governed by the same principles as the payment of fines on admission to copyhold (*h*). But on the appointment of new trustees by the Court the costs are always thrown upon the estate, and the practice in Court regulates the practice out of Court (*i*). Where there is no fund readily available the costs are often paid by the tenant for life.

Enrolment in case of charity.

57. On the appointment of new trustees of a *charity*, the

(*a*) *Warwick* v. *Richardson*, 10 M. & W. 284; and see *Lord Newborough* v. *Schröder*, 7 C. B. 342; *Dugdale* v. *Lovering*, 10 L. R. C. P. 196.

(*b*) *Raikes* v. *Raikes*, 32 Beav. 403.

(*c*) *Warburton* v. *Sandys*, 14 Sim. 622; *Miller* v. *Priddon*, 1 De G. M. & G. 335.

(*d*) *Lancashire* v. *Lancashire*, 2 Ph. 657; 1 De G. & Sm. 288.

(*e*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General* v. *Clack*, 1 Beav. 467; *Peatfield* v. *Benn*, 17 Beav. 552; *Middleton* v. *Reay*, 7 Hare, 106; *Kennedy* v. *Turnley*, 6 Ir. Eq. Rep. 399; [*Re Gadd*, 23 Ch. D. 134; and see *ante*, p. 771.]

(*f*) *Attorney-General* v. *Clack*, 1 Beav. 473, *per* Lord Langdale; and see *Cafe* v. *Bent*, 3 Hare, 249.

[(*g*) *Harvey* v. *Olliver*, W. N. 1887, p. 439; 59 L. T. N.S. 249.]

(*h*) See *ante*, p. 453.

(*i*) *Palmer's Settlement*, V. C. Kindersley, 18th April, 1857; *Carter* v. *Sebright*, 26 Beav. 376; see *post*, p. 834.

conveyance of real estate which is already in mortmain need not be *enrolled* (*a*).

Power of new trustees.

58. Where new trustees are appointed under a power, it is presumed that they can exercise all the *powers* given to the *original trustees* in that character; but in penning a power of appointment of new trustees, all questions should be obviated by an express direction that the new trustees shall have the same powers as if originally appointed (*b*).

Attested copies.

59. A trustee upon transferring the trust estate to a newly appointed trustee is not allowed to charge it with the expense of an *attested copy* of the settlement where he has already an ordinary copy, or with the expense of a *duplicate* of the deed of new appointment, though he is entitled to an examined copy of it. The *extra* evidence is considered as incurred for the satisfaction of the trustee from an excess of caution, and, if required, must be paid for by himself (*c*).

Inquiries to be made by incoming trustee.

60. If newly appointed trustees *omit to inquire of a retiring trustee* whether he has notice of any charge, and then having no notice, they distribute the fund to the prejudice of the incumbrancer, they will not be liable to him on the ground that it was their duty to have made inquiry of the retiring trustee, in which case they would have known of the incumbrance (*d*). [But new trustees are bound to look into the documents relating to the trust to ascertain of what incumbrances their predecessors have had notice (*e*).]

Matrimonial Causes Act, 1859.

61. Under sect. 5 of 22 & 23 Vict. c. 61, the Court has jurisdiction, where a final decree of nullity of marriage or dissolution of marriage has been made, to extinguish or vary the power of appointing new trustees of the settlements made by the parties to the marriage (*f*).

Thirdly. Of the discharge of the trustee and the appointment of new trustees by the authority of the Court.

[(A) Under the general jurisdiction of the Court.]

Suit to be discharged from the trust.

1. The trustee may, in every proper case, although the contrary

(*a*) *Ashton* v. *Jones*, 28 Beav. 460; and see Shelf. Mortm. 130.

[(*b*) In appointments under the statutory powers this is expressly provided for; Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145), sect. 27; Trustee Act, 1893 (56 & 57 Vict. c. 53), sect. 10.]

(*c*) *Warter* v. *Anderson*, 11 Hare, 301; *S. C.* 1 Eq. Rep. 266.

(*d*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80.

[(*e*) *Hallows* v. *Lloyd*, 39 Ch. D. 686, 691.]

[(*f*) *Oppenheim* v. *Oppenheim*, 9 P. D. 60; *Maudslay* v. *Maudslay*, 2 P. D. 256; Seton on Judgments, 6th ed. pp. 967, 968; *Allcard* v. *Walker*, (1896) 2 Ch. 369.]

appears to have been at one time supposed (*a*), get himself discharged from the office on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements, or the donee of the power either cannot or will not exercise it, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task.

Where no new trustee can be found.

2. Where *no new trustee can be found* willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. "It is quite a mistake," observed Lord St Leonards, "to suppose that a trustee who is *entitled to be discharged* from his trust is bound to show to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court and not discharge him. The Court will, however, take care that the trustee shall not suffer thereby in the meantime" (*b*). This was said in a case where the trustee, from the conduct of the *cestui que trust*, could claim to be discharged; but if a trustee wish to retire from mere *caprice*, it is not clear that the Court can or will discharge him, unless another trustee can be found in substitution (*c*). It is certain that the Court cannot divest him of the *estate* before some one can be found to take it, and even as to the *office* it is not unreasonable that if a man once engages to undertake it, he shall not retire from it without any reason, and so leave the estate without a trustee. But a trustee may, in a proper case, relieve himself from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the Court (*d*); [and in such an action the Court, in a proper case, will exercise its jurisdiction to discharge a trustee without appointing a new trustee in his place (*e*).]

How application to be discharged from the trust should be made.

3. Formerly the application to the Court to be discharged from the trust was in general made by *bill*, in order to give the Court an opportunity of examining into the merits of the case (*f*),

(*a*) *Hamilton* v. *Fry*, 2 Moll. 458.

(*b*) *Courtenay* v. *Courtenay*, 3 Jon. & Lat. 533; and see *Forshaw* v. *Higginson*, 20 Beav. 487; [*Re Chetwynd's Settlement*, (1902) 1 Ch. 692, where it was said that in the passage quoted above, Lord St Leonards was referring to the case of a sole trustee being desirous of retiring, or to a case in which it was for any reason undesirable that the continuing trustees should act alone].

(*c*) *Ardill* v. *Savage*, 1 Ir. Eq. Rep. 79.

(*d*) See *Forshaw* v. *Higginson*, 20 Beav. 485; *Gardiner* v. *Downes*, 22 Beav. 397. [As to the practice of the Court under its statutory jurisdiction, see *post*, p. 835 *et seq.*]

[(*e*) *Re Chetwynd's Settlement*, (1902) 1 Ch. 692.]

(*f*) See *Ex parte Anderson*, 5 Ves. 243; *Re Fitzgerald*, Ll. & G. *t.* Sudg. 22; *Re Anderson*, Ib. 29.

but if a suit were already pending, the trustee might then solicit his dismissal by *petition* or *motion* (*a*). It was formerly not the custom of the Court to look through the proceedings, but a reference was ordered to the Master (*b*). Under the present practice the Court, except in cases of special difficulty, usually appoints a trustee without a reference to chambers, and without a suit, under the statutory provisions.

Part of the trust estate lost.

4. If part of the original trust estate is *supposed to be lost*, or is *not forthcoming*, the Court will not appoint new trustees of the *residue*, so as to make them *partial trustees* only, but will appoint them *trustees generally;* and, if required, will at the same time, for the protection of the trustees, direct an inquiry whether any part of the trust fund has been lost, and what steps should be taken for its recovery (*c*).

Costs.

5. The *costs* where the trustee retires from *caprice* or *without sufficient reason* must be borne by himself (*d*); but where he retires from necessity, or on good and sufficient ground, they will be thrown upon the trust estate (*e*). Where the trust was originally a simple one, but has become embarrassing from its complications, the trustee may commence an action to be relieved, and will be allowed his costs, for although he might have paid the trust fund into Court under the Trustee Relief Act (*f*), this would not have saved him from being sued, except as to the particular sum paid into Court (*g*).

Application by representative of deceased trustee.

6. A distinction was taken by Lord Langdale between the case where the same person who accepted the trust comes to be relieved from it, in whom it would be caprice to relinquish the trust without any sufficient reason, and the case where on that person's death, the trust devolves on his *representative* by operation of law, and the *representative* applies to the Court (*h*). And where the *executor* of a trustee declined to act as trustee, and a bill was filed against him to have new trustees appointed, and that the executor might pay the costs, the Court said the executor had a perfect right to decline acting in the trusts, and allowed him his costs (*i*).

(*a*) —— v. *Osborne*, 6 Ves. 455; —— v. *Robarts*, 1 J. & W. 251.

(*b*) —— v. *Osborne*, 6 Ves. 455.

(*c*) *Bennett* v. *Burgis*, 5 Hare, 295.

(*d*) *Howard* v. *Rhodes*, 1 Keen, 581; *Porter* v. *Watts*, 16 Jur. 757; *Hamilton* v. *Fry*, 2 Moll. 458.

(*e*) *Greenwood* v. *Wakeford*, 1 Beav. 581; *Forshaw* v. *Higginson*, 20 Beav. 486; *Courtenay* v. *Courtenay*, 3 Jon. & Lat. 529; *Gardiner* v. *Downes*, 22 Beav. 395; see *ante*, p. 831.

[(*f*) Now replaced by s. 42 of the Trustee Act, 1893, see *ante*, p. 424 *et seq.*]

(*g*) *Barker* v. *Peile*, 2 Dr. & Sm. 340.

(*h*) *Greenwood* v. *Wakeford*, 1 Beav. 582; and see *Aldridge* v. *Westbrooke*, 4 Beav. 212.

(*i*) *Legg* v. *Mackrell*, 1 Giff. 165; 2 De G. F. & J. 551; [and see *Re Ridley*, (1904) 2 Ch. 774.]

Complication of the trust by the acts of the tenant for life.

7. Where the settlement contained a power of appointment of new trustees, and the tenant for life having incumbered his life estate with annuities and other charges, the original trustees were desirous of relieving themselves from the difficulties of their situation by retiring from the trust, and the tenant for life, who was the donee of the power, could not find any person to undertake the trust, the costs of the suit which the trustees had instituted for their discharge were thrown exclusively upon the fund of the *tenant for life* (*a*).

Executor cannot be discharged.

8. An *executor* is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged even by the Court, from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee.

[(B) Of the appointment of new trustees under the statutory jurisdiction of the Court.

First, by the High Court of Justice.

[Scope and object of Trustee Acts, 1850, 1852, and 1893.]

1. The statutory jurisdiction of the Court as to the appointment of new trustees and the vesting of trust property has in modern times been mainly derived from the Trustee Acts, 1850 (*b*), and 1852 (*c*), which have now been replaced by Part III. of the Trustee Act, 1893 (*d*). The Act of 1850 was intituled "An Act to consolidate and amend the Laws relating to the transfer of real and personal property vested in mortgagees and trustees." The object of these enactments, as shown by the wording of them, is to facilitate the performance of trusts, and not to declare or enforce them, or to confer upon the Court any jurisdiction to decide on disputed questions of title (*e*).

[Definition of "trust" and "trustee."]

2. By the definition clause of the Act of 1893 (*f*), "the expression 'trust' does not include the duties incident to an estate

(*a*) *Coventry* v. *Coventry*, 1 Keen, 758.

[(*b*) 13 & 14 Vict. c. 60.]

[(*c*) 15 & 16 Vict. c. 55.]

[(*d*) 56 & 57 Vict. c. 53. For the Act printed *in extenso*, see App. No. 1; and for the Rules of Court applicable, and cases thereunder, see App. No. 2. As to the appointment of new trustees under the Settled Land Acts, and the Judicial Trustees Act, 1896, and Public Trustee Act, 1906, see *ante*, Chapters XXII. and XXIII.]

[(*e*) *Re Draper's Settlement*, 9 W. R. 805. Where on the purchase of land by a company, the land was conveyed to their secretary as absolute owner, North, J., doubted whether he had jurisdiction under the Acts to appoint a new trustee in his place, until the trusteeship had been established in an action; *Re Martin's Trusts*, W. N. (1886) p. 183.]

[(*f*) 56 & 57 Vict. c. 53, s. 50. This definition is substantially identical with the definition in sec. 2 of the Act of 1850.]

conveyed by way of mortgage; but with this exception, the expressions 'trust' and 'trustee' include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person."

The exception of the duties incident to an estate conveyed by way of mortgage is to be read as confined to the continuance of the security, during which no relation of trustee and *cestui que trust* is constituted, and does not extend to a case where there is an express trust, as, for example, a provision that the mortgagor shall hold in trust for the mortgagee (*a*). And although a mortgagee, on being paid off, becomes a trustee for the mortgagor, he cannot be treated as such in the absence of clear evidence of payment binding on him, and, accordingly, where one of joint mortgagees was out of the jurisdiction, and the mortgage money was paid to the joint account of the joint mortgagees, the Court refused to make a vesting order (*b*).

[Implied and constructive trusts.]

Previously to the provisions of the Conveyancing and Law of Property Act, 1881 (*c*), whereby the personal representative of a vendor is empowered to convey, where at his death an enforceable contract is subsisting (*d*), difficulties often arose by reason of the death of a vendor of real estate intestate before conveyance, and it was held that in such a case the infant heir of the vendor was not a constructive trustee for the purchaser (at least in cases where the trust could possibly be disputed), until the trust had been declared by the judgment of the Court (*e*). A vendor after contract was held to be a trustee of shares in a joint stock bank for the purchaser (*f*); and cases of constructive trusteeship have also been

[(*a*) *London and County Bank* v. *Goddard*, (1897) 1 Ch. 642.]

[(*b*) *Re Osborn's Mortgage*, 12 L. R. Eq. 392; see *Re Walker's Mortgage Trusts*, 3 Ch. D. 209.]

[(*c*) 44 & 45 Vict. c. 41, s. 4.]

[(*d*) And see as regards vendors dying after 31st December, 1897, the Land Transfer Act, 1897, (60 & 61 Vict. c. 65), s. 1, *ante*, p. 248.]

[(*e*) *Re Carpenter*, 1 Kay, 418; *Re Colling*, 32 Ch. D. (C.A.) 333; *Re Burt*, 9 Hare, 289; *Re Dickenson*, 17 L. T. 231; *Cust* v. *Middleton*, 7 Jur. N.S. 151; *Re Weeding's Estate*, 4 Jur. N.S. 707; *Re Faulder*, W. N. 1866, p. 83; *Jackson* v. *Milfield*, 5 Hare, 538; *Re Milfield*, 2 Ph. 254; *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582. *Re Wise*, 5 De G. & Sm. 415, is distinguishable; and see *Re Propert's Purchase*, 22 L. J. N.S. Ch. 948. Where a vendor died before acceptance of the title, having devised the estate to an infant, and the executors prayed that the infant might be declared a trustee within the Act, and that the property on payment of the purchase-money might be conveyed to the purchaser, who had accepted the title, and the prayer was supported by the infant's counsel, the Court made the order; *Re Lowry's Will*, 15 L. R. Eq. 78.]

[(*f*) *Re Angelo*, 5 De G. & Sm. 278: for form of order where vendor died before completion, leaving infant heir, see *Re Beaufort's Will*, W.N. (1898) 148, referring to *Re Pagani*, (1892) 1 Ch. (C.A.) 236.]

held to arise where a vendor refuses to convey after tender of a deed settled by the judge, or to receive the purchase-money (*a*), or the owner of copyholds covenants to surrender, and declares that he will stand seised upon trust for the covenantee in the meantime (*b*). And the following persons have been held to be constructive trustees within the Act:—The infant devisee of a testator, who had signed an agreement to convey certain easements in compromise of an action, no title being in question (*c*); an infant who was the sole beneficial owner of stock standing in his name, subject to a provision or direction for his maintenance, which was vested in some other person (*d*); an executor holding a legacy bequeathed to persons successively (*e*); the husband of a *feme covert*, a trustee of stock, as the Bank acted on his directions (*f*); an heir, taking by descent, but who was bound under the doctrine of election to hold upon the trusts of a will (*g*); an *heir* taking the trust estate by the *disclaimer* of the trustees (*h*), or by the death of the trustee in the testator's lifetime (*i*); one of three assignees of a bankrupt who had resigned his office and gone abroad (*j*); an heir of a mortgagee who had taken possession (*k*); a mortgagee who was a trustee of the mortgage money (*l*); a mortgagee, nominee of third persons to whom the mortgage money belonged, no declaration of trust having been made by him (*m*); and a defendant

[(*a*) *Warrender* v. *Foster*, Seton on Judgments, 6th edit. p. 2288. By the order the vendor was declared a trustee, and on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor.]

[(*b*) *Re Collingwood's Trusts*, 6 W.R. 536; and see *Steele* v. *Waller*, 28 Beav. 466. And even where there is no such declaration, yet if the contract be not *in fieri*, but has been carried out and completed, the covenantor is a trustee within the Act; *Re Cuming*, 5 L. R. Ch. App. 72; *Re Bradley's Settled Estate*, 54 L. T. N.S. 43; 34 W. R. 140; and see *Re Colling*, 32 Ch. D. (C.A.) 333; *Re Ruthven's Trusts*, (1906) 1 I. R. 236 (where the Court in Scotland had decreed conveyance).]

[(*c*) *Re Taylor*, W.N. 1866, p. 5.]

[(*d*) *Gardner* v. *Cowles*, 3 Ch. D. 304; Set. on Judgments, p. 1244; and see *Re Findlay*, 32 Ch. D. 221, 641.]

[(*e*) *Re Davis's Trusts*, 12 L. R. Eq. 214.]

[(*f*) *Re Wood*, 7 Jur. N.S. 323. See now the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 7.]

[(*g*) *Dewar* v. *Maitland*, 2 L. R. Eq. 834.]

[(*h*) *Wilks* v. *Groom*, 6 De G. M. & G. 205.]

[(*i*) *Re Gill*, Set. on Judgments, 6th edit. pp. 1255, 1256.]

[(*j*) *Re Joyce's Estate*, 2 L. R. Eq. 576; 12 Jur. N.S. 1015. An order was made vesting the legal estate in the two acting assignees.]

[(*k*) *Re Skitter's Mortgage*, 4 W. R. 791.]

[(*l*) *Re O'Gorman's Trusts*, 25 L. R. Ir. 93. Where one of three joint mortgagees, who were trustees, refused to concur in a transfer of the mortgage which was executed by the other mortgagees, a new trustee was appointed in his place, and on a petition for a vesting order, it was held that the recusant trustee was a trustee within the meaning of the Act for the transferee of the mortgage; *Re Walker's Mortgage Trusts*, 3 Ch. D. 209.]

[(*m*) *Re Barber's Mortgage Trusts*, W. N. 1888, p. 11; 58 L. T. N.S. 303.]

against whom an absolute decree for foreclosure upon an equitable mortgage had been made (*a*).

In view of the provisions of sect. 30 of the Conveyancing and Law of Property Act, 1881, and of sect. 1 of the Land Transfer Act, 1897, already referred to (*b*), many of these cases will now be unlikely to occur except in the comparatively rare event of there being no legal personal representative of a deceased trustee.

[Power of the Court to appoint new trustees.]

3. By sect. 25 (*c*) of the Trustee Act, 1893, it is provided that (1) "The High Court may (*d*), whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt. (2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated. (3) Nothing in this section shall give power to appoint an executor or administrator."

[Expediency of appointing trustee.]

4. The first requirement of sect. 25 is that the proposed appointment should be shown to be "expedient." Cases of expediency have been held by the Court to arise where the trustee appointed by a will is an infant (*e*), or is by age and infirmity incapable

[(*a*) *Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578.]

[(*b*) See *ante*, p. 248.]

[(*c*) This section replaces ss. 32 and 36 of the Act of 1850, ss. 8 and 9 of the Act of 1852, and s. 147 of the Bankruptcy Act, 1883, all of which, by s. 51 and schedule of this Act, are repealed.]

[(*d*) Where the power of appointing new trustees is vested in a lunatic the High Court has jurisdiction to appoint a new trustee, not (as in lunacy, see *post*, p. 861) under the special power given to the lunatic, but under the general statutory power; *Re Sparrow*, L. R. 5 Ch. 662. The Court has jurisdiction under the section, either upon summons or petition, to appoint a new trustee in substitution for a trustee who has been convicted of felony, but it depends on the circumstances of the case whether or not the Court will exercise the jurisdiction: *Re Dawson's Trusts*, W. N. (1899) 134; 48 W. R. 73.]

[(*e*) *Re Porter's Trust*, 2 Jur. N.S. 349; *Re Gartside's Estate*, 1 W. R. 196. But the order should be without prejudice to an application by the infant on his coming of age to be restored to the trust; *Re Shelmerdine*, 33 L. J. N.S. Ch. 474; *Re Brunt*, W. N. 1883, p. 220; *Re Tallatire*, W. N. 1885, p. 191.]

of acting as a trustee (*a*), or has become bankrupt, never surrendered, and absconded (*b*), or where there is great difficulty in obtaining administration to the deceased trustee, or last surviving trustee (*c*), or where a dissolution of a society under the Industrial and Provident Societies Act, 1893 (*d*), has taken place before the society has handed over any of its property to the person nominated by the instrument of dissolution, under sects. 58 and 61 of the Act, to realise the assets (*e*), or generally where there is no personal representative of a surviving trustee (*f*). And where two trustees were desirous of retiring, and it was doubtful whether the power in the settlement of appointing new trustees applied to the case, it was deemed expedient to appoint new trustees (*g*).

[Case for the assistance of the Court.]

5. In considering whether the assistance of the Court is required, the existence of a power to appoint new trustees is of course very material. In general, where there is a power of appointment of new trustees, which the donee is willing to exercise (*h*), the Court will not appoint new trustees (*i*), though it is suggested that the power will be improperly exercised (*j*). But in one case, where the parties having the power of appointing new trustees were resident in India (*k*), and in another, where the power of appointment was vested in husband and wife jointly, and the wife had obtained a judicial separation, and the husband was resident abroad, the Court made an order (*l*).

[Where no existing trustee.]

6. The statutory power to appoint a trustee is available, "although there is no existing trustee," a provision which was inserted in

[(*a*) *Re Lemann's Trusts*, 22 Ch. D. 633; *Re Phelps' Settlement Trusts*, 31 Ch. D. (C.A.) 351; and see *Re Barber*, 39 Ch. D. (C.A.) 187; *Re Weston's Trusts*, W. N. (1898) 151.]

[(*b*) *Re Renshaw's Trusts*, 4 L. R. Ch. App. 783.]

[(*c*) *Davis* v. *Chanter*, 4 Jur. N.S. 272; *Re Matthews*, 26 Beav. 463.]

[(*d*) 56 & 57 Vict. c. 39, ss. 58, 61.]

[(*e*) *Re Ruddington Land*, (1909) 1 Ch. 701.]

[(*f*) *Re Davis' Trusts*, 12 L. R. Eq. 214.]

[(*g*) *Re Woodgate's Settlement*, 5 W.R. 448; *Re Armstrong's Settlement*, Ib.]

[(*h*) If this is not so, the petition should so state; *Re Sutton*, W. N. 1885, p. 122.]

[(*i*) *Re Higginbottom's Trusts*, (1892) 3 Ch. 132; *Re Gadd*, 23 Ch. D. 134; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571. As to appointment of the public trustee, see *ante*, pp. 701, 702.]

[(*j*) *Re Hodson's Settlement*, 9 Hare, 118. Where the sole trustee of a will, who had acted and was in no way personally disqualified from continuing to act in the trusts, was desirous of being discharged from the trusts of a particular fund forming a portion of the trust property, and had expressed his intention of lodging such fund in Court unless new trustees were appointed in respect of it, whom he declined to appoint himself, it was held that there was not a case of expediency for the appointment of additional trustees; *Re Nesbitt's Trusts*, 19 L. R. Ir. 509.]

[(*k*) *Re Humphry's Estate*, 1 Jur. N.S. 921.]

[(*l*) *Re Somerset*, W. N. 1887, p. 122. As to the case where the power of appointing new trustees is vested in a lunatic, see *post*, p. 861.]

sect. 9 of the Act of 1852 in order to remove a doubt which had been entertained under the Act of 1850 (*a*); and where the three trustees appointed by a testator died in his lifetime, the Court appointed new trustees (*b*). But as the power is only to appoint a "new" trustee or trustees, the Court would appear to have no jurisdiction under the statute (*c*) to make an appointment where no trustees have been appointed by the testator, unless the circumstances are such that the executor or heir may be deemed a constructive trustee (*d*).

[Convict or bankrupt trustee.]

7. The section expressly empowers the Court to make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony or is a bankrupt, but does not, as regards a bankrupt trustee, introduce the words "whether voluntarily resigning or not," which were contained in section 147 of the Bankruptcy Act, 1883 (*e*). It is apprehended, however, that the words of the section are sufficient to confer jurisdiction on the Court to remove a bankrupt trustee against his will (*f*).

[Removal of trustee.]

In other cases, not so specially provided for, it is held that the Court cannot under the statute remove a trustee who is willing to act (*g*). Thus, where one of the two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the Court refused to appoint a new trustee in his room (*h*), and where it was alleged that a trustee was of unsound mind, but the trustee denied the allegation, and was unwilling to be removed, the Court refused to make an order (*i*).

[(*a*) See *Re Tyler's Trust*, 5 De G. & Sm. 56; *Re Hazeldine*, 16 Jur. 853; *Re Frost's Settlement*, 15 Jur. 644.]

[(*b*) *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251.]

[(*c*) But the Court has authority to do it by its inherent jurisdiction independently of the Act; *Dodkin* v. *Brunt*, 6 L. R. Eq. 580.]

[(*d*) *Re Davis' Trusts*, 12 L. R. Eq. 214; *Re Moore*, 21 Ch. D. 778, and see *Re Gillett's Trusts*, 25 W. R. 23.]

[(*e*) Repealed, see *ante*, p. 838, note (*c*).]

[(*f*) See *Coombes* v. *Brookes*, 12 L. R. Eq. 61; *Re Adams' Trusts*, 12 Ch. D. 634. A bankrupt trustee who had obtained his discharge was removed on the application of his co-trustee, who was also a beneficiary, although the application was opposed by beneficiaries entitled to larger shares than the petitioner; *Re Foster's Trusts*, 55 L. T. N.S. 479.]

[(*g*) *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; *Re Garty's Settlement*, 3 N. R. 636; *Re Combs*, 51 L. T. N.S. 45.]

[(*h*) *Re Mais*, 19 Jur. 608; see *Re Lincoln Primitive Methodists*, 1 Jur. N.S. 1011. But where one of the trustees had gone to Australia, and it was not known where he was, the Court appointed a new trustee in his place; *Re Harrison's Trusts*, 22 L. J. N.S. Ch. 69. And where an assignee in bankruptcy had resigned his office and gone abroad, and the creditors had accepted his resignation, the Court made a vesting order; *Re Joyce's Estate*, 2 L. R. Eq. 576; and in another case, where a trustee had gone abroad to reside permanently, the Court appointed a trustee in his place; *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.]

[(*i*) *Re Combs*, 51 L. T. N.S. 45.]

If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by action, as it was not the intention of the Act to deprive retiring trustees of their right to have their accounts taken in the presence of their *cestuis que trust*, or of their *lien* upon the trust estate for any balance due to them (*a*).

[Re-appointment of trustees already appointed.]

8. Where trustees have been already appointed under a power, the Court has in some cases appointed them again for the purpose of making a vesting order (*b*), but in *Re Vicat* (*c*), a case in lunacy, L.JJ. Cotton and Lindley considered that it was not proper to reappoint trustees of the validity of whose appointment under the power there was no doubt, and declined to make such an order, and in the subsequent case in Chancery of *Re Dewhirst's Trusts* (*d*), the Court of Appeal followed *Re Vicat*, and held that the earlier authorities must be treated as overruled (*e*).

[Persons eligible to be appointed by the Court.]

9. The Court will not in general appoint persons trustees who are resident *out of the jurisdiction* (*f*); but has done so in several cases, where the special circumstances rendered that course advisable (*g*). It has been the general rule of the Court not to appoint one of the *cestuis que trust* a trustee, if it can be avoided (*h*), but

[(*a*) *Re Blanchard*, 7 Jur. N.S. 505. Even a *solicitor*, though an officer of the Court, was held not to be removable by petition against his will, on grounds of misconduct in his character, not of solicitor, but of trustee; *Re Blanchard*, 3 De G. F. & J. 131.]

[(*b*) *Re Mundel's Trust*, 2 L. T. N.S. 653; *Re Pearson*, 5 Ch. D. (C.A.) 982; *Re Chell*, 49 L. T. N.S. 196; *Re Carson's Settlement Trusts*, W. N. 1867, p. 32; *Re Clay's Settlement*, W. N. 1873, p. 129; *Re Dalgleish's Settlement*, 4 Ch. D. (C.A.) 143, reversing *S. C.* 1 Ch. D. 46; *Re M'Carthy's Trusts*, 1 L. R. Ir. 16.]

[(*c*) 33 Ch. D. 103.]

[(*d*) 33 Ch. D. 416; and see *Re Gardiner's Trusts*, 33 Ch. D. 590; *Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Kenny's Trusts*, (1906) 1 I. R. 531.]

[(*e*) And see *Re Cane's Trusts*, (1895) 1 I. R. 172. In *Re Stocken*, W. N. (1893), p. 203, one of the newly appointed trustees retired, and a new trustee was appointed in his place, and the vesting order made consequential thereon.]

[(*f*) *Re Guibert*, 16 Jur. 852; *Re Curtis's Trust*, 5 Ir. R. Eq. 429.]

[(*g*) *Re Liddiard*, 14 Ch. D. 310; *Re Austen's Settlement*, 38 L. T. N.S. 601; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52; *Re Hill's Trusts*, W. N. 1874, p. 228; *Re Freeman's Settlement*, 37 Ch. D. 148. In one order the Court inadvertently appointed an *alien* a trustee, and afterwards refused to substitute a natural born subject without the consent of the Crown, which was not given. The order was then reheard by the same judge *pro formâ* and discharged, and a natural born subject appointed in the place of the alien; *Re Giraud*, 32 Beav. 385. See now the Naturalization Act, 1870 (33 Vict. c. 14), s. 2. Where the *cestuis que trust* were living abroad, and English trustees could not be found, the Court appointed aliens; *Re Hill's Trusts*, W. N. 1874, p. 228. As to the appointment of persons resident out of the jurisdiction to be trustees for the purposes of the Settled Land Acts, see *ante*, p. 656. The Court can appoint new trustees where a trust is an *office* without any estate; *Re Boyce*, 4 De G. J. & Sm. 205; 10 Jur. N.S. 138; and see Seton on Judgments, 6th ed. p. 1247.]

[(*h*) *Ex parte Clutton*, 17 Jur. 988; *Re Clissold's Settlement*, 10 L. T. N.S.

the husband of a *cestui que trust* was appointed jointly with another, on the husband's undertaking that if he became sole trustee he would immediately take steps for the appointment of a co-trustee (*a*). It is apprehended that the Court, at all events in cases where the powers of the Settled Land Acts are likely to be exercised, would be unwilling to appoint the solicitor of the tenant for life (*b*).

[Number of trustees to be appointed.]

10. The Court, in appointing new trustees under this section, does not limit itself necessarily to the number named in the original instrument of trust. Thus it has appointed two instead of one (*c*), and has added two new trustees to the two original trustees (*d*); but it never appoints a *single* trustee where there were originally more trustees than one (*e*). The Court has appointed two trustees where there were originally three (*f*), and three where there were originally four (*g*), and, where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court appointed the two continuing trustees to be the sole trustees (*h*). This practice of the Court was, however, arrested by the case of *In re Colyer* (*i*), in which

642; *Ex parte Conybeare's Settlement*, 1 W. R. 458; and see *Re Giraud*, 32 Beav. 385. As to the appointment of a near relative of a *cestui que trust*, see *ante*, p. 827, and as to the removal of these restrictions under the Rules of Court in reference to the appointment of judicial trustees, see *ante*, p. 700.]

[(*a*) *Re Hattatt's Trusts*, 21 L. T. N.S. 781; 18 W. R. 416; *Re Burgess's Trusts*, W. N. 1877, p. 87; *Re Lightbody's Trusts*, 52 L. T. N.S. 40; but this undertaking was not required in *Re Jesson*, (In Lunacy, 7th August, 1878, M.S.), where three new trustees were appointed, one of whom was the husband of the tenant for life.]

[(*b*) See *Re Earl of Stamford*, (1896) 1 Ch. 288, 299; *Re Spencer's Settled Estates*, (1903) 1 Ch. 75. For a case in which one of the firm of solicitors who acted for the petitioners was appointed trustee, see *Re Brentnall's Trusts*, W. N. 1872, p. 77.]

[(*c*) *Re Tunstall's Will*, 4 De G. & Sm. 421.]

[(*d*) *Re Baycott*, 5 W. R. 15.]

[(*e*) *Re Ellison's Trust*, 2 Jur. N.S. 62; *Re Porter's Trust*, 2 Jur. N.S. 349; *Re Tunstall*, 15 Jur. 645; *Re Dickinson's Trust*, 1 Jur. N.S. 724. But where there was only one trustee originally and the trust was coming to an end, the Court appointed a single trustee; *Re Reynault*, 16 Jur. 233.]

[(*f*) *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N.S. 994; *Re Marriot's Settlement*, 18 L. T. N.S. 749.]

[(*g*) *Emmet* v. *Clarke*, 7 Jur. N.S. 404; and where a fund was bequeathed to a single trustee upon trust for a person for life, with remainder to two others, and the remaindermen petitioned for the appointment of an additional trustee, the Court made the order, but threw the costs upon the remaindermen; *Re Brackenbury's Trusts*, 10 L. R. Eq. 45; *Re Gregson's Trusts*, 34 Ch. D. 209.]

[(*h*) *Re Stokes' Trusts*, 13 L. R. Eq. 333; and this decision was subsequently followed in *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Gibbin's Trusts*, W. N. 1880, p. 99; *Re Shipperdson's Trusts*, 49 L. J. N.S. Ch. 619; *Re Northorp*, 29 W. R. 134; and see *Re Mace's Trusts*, W. N. 1887, p. 232; *Re Fowler's Trusts*, 55 L. T. N.S. 546.]

[(*i*) 50 L. J. N.S. Ch. 479. In *Re Aston*, 23 Ch. D. (C.A.) 217, the M.R.,

the L. J. Cotton, on a lunacy petition, declined to follow it, and required the whole number of trustees to be filled up. But recently, in view of the wide terms of the Trustee Act, 1893, and the Lunacy Act, 1890, orders have been made both in the Chancery Division and in Lunacy, vesting trust property in three continuing trustees, where four were originally appointed (*a*); and in two, where there were originally three (*b*). And certain statutory exceptions to the general practice of the Court have been introduced by the Public Trustee Act, 1906 (*c*).

Where the whole of the fund is immediately divisible, the Court has not been in the habit of requiring the number of trustees to be filled up by the appointment of a new trustee (*d*).

[Separate sets of trustees.]

11. Where there are two distinct trust estates under the same will, but only one set of trustees, the Court, with the consent of the representative of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate (*e*); and generally the Court has assumed the like power of appointing separate trustees of separate shares (*f*).

[Exception as to appointment of executor or administrator.]

12. The concluding sub-sect. of sect. 25, providing that nothing contained in the section shall give power to appoint an executor or administrator, is a new enactment. It must be read in connection with the definition, and so read, the effect of it appears to be that the Court cannot appoint a trustee to perform duties

with the concurrence of the other members of the Court, while adhering to his decision in *Re Harford's Trusts*, declined to follow it, on the ground of L. J. Cotton's objection, and to secure uniformity of practice in the Chancery Division and in Lunacy, and Lindley and Bowen, L.JJ., concurred: and see *Re Lamb's Trusts*, 28 Ch. D. 77; *Re Gardiner's Trusts*, 33 Ch. D. 590; *Re Chetwynd's Settlement*, (1902) 1 Ch. 692, where Farwell, J., said: "Either, therefore, from want of jurisdiction or from refusal to exercise it, the Court did not in fact discharge trustees under the Trustee Act, 1850, without appointing new trustees in their place; and the same practice must obtain under the Trustee Act, 1893."]

[(*a*) *Re Leon*, (1892) 1 Ch. 348, in lunacy; *Re Lees*, (1896) 2 Ch. 508, Chitty, J.; and see *Dugmore* v. *Suffield*, W. N. (1896) p. 50; *Re Price*, W. N. (1894) p. 169. *Quære* whether, having regard to the provisions of the Act, two continuing trustees are not in ordinary cases a sufficient number.]

[(*b*) *Re Fitzherbert's Settlement Trusts*, W. N. (1898) p. 58.]

[(*c*) See *ante*, Chap. XXIII. p. 701.]

[(*d*) See *Re Martyn*, 26 Ch. D. (C.A.) 745; *Re Lambs' Trusts*, 28 Ch. D. 77; and in one case where an action was pending to execute the trusts, the Court dispensed with a new trustee on the continuing trustees undertaking to bring the trust funds immediately into Court in the action; *Davies* v. *Hodgson*, 42 Ch. D. 225. In the case of a *charity*, the Court appointed ten new trustees and vested the estate in the whole body, and directed that when reduced to three the trustees should apply at Chambers for the appointment of new trustees; *Re Bergholt*, 2 Eq. Rep. 90.]

[(*e*) *Re Dennis*, 12 W. R. 575.]

[(*f*) *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52; *Re Paine's Trusts*, 28 Ch. D. 725; *Re Moss's Trusts*, 37 Ch. D. 513.]

which belong not to the office of a trustee, but only to that of an executor, but that when the estate is cleared by payment of debts, and the executor assumes the character of trustee, a new trustee may, in a fit case, be appointed in his place (*a*).

[Vesting orders as to land.]

13. The general provisions of the Trustee Act, 1893 (*b*), in reference to vesting orders as to land (*c*), are contained in sect. 26 (*d*), which enacts that "In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed (*e*) a new trustee; and

(ii.) Where a trustee entitled to or possessed of any land (*f*), or entitled to a contingent right therein, either solely or jointly (*g*) with any other person—

(a) is an infant (*h*), or

(b) is out of the jurisdiction of the High Court (*i*), or

(c) cannot be found (*j*); and

[(*a*) See *Eaton* v. *Daines*, W. N. (1894) p. 32, and *ante*, p. 835. Under the former Acts it had been held by Kay, J., in *Re Moore*, 21 Ch. D. 778, that the Court had jurisdiction to appoint a trustee to perform executorial duties, but this decision was doubted by Cotton, L.J., in *Re Willey*, W. N. 1890, p. 1.]

[(*b*) 56 & 57 Vict c. 53.]

[(*c*) The late Vice-Chancellor Parker was not disposed to make a vesting order in cases where a conveyance could be had; *Langhorn* v. *Langhorn*, 21 L. J. N.S. Ch. 860. But it is clear that the Court has power to make, and according to the present practice, it frequently does make, vesting orders even where there is no incapacity in the person seised or possessed of the legal estate to convey to the new trustee; *Re Manning's Trusts*, Kay, App. xxviii.]

[(*d*) Replacing ss. 7-15 of the Act of 1850, and s. 2 of the Act of 1852.]

[(*e*) The new trustee may be appointed in a suit and an order made subsequently, see *Re Hughes' Settlement*, 2 H. & M. 695.]

[(*f*) By s. 50 the expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land.]

[(*g*) The word "jointly" is not limited to a legal joint tenancy, but is used in a wide sense, and applies to the case of lands descending to the co-heiress and the surviving heir, or (if the case fall within s. 30 of the Conveyancing and Law of Property Act, 1881), the personal representative of a deceased co-heiress of the deceased trustee; *Re Greenwood's Trusts*, 27 Ch. D. 359; *Re Templer's Trusts*, 4 N.R. 494; but see *M'Murray* v. *Spicer*, 5 L. R. Eq. 527.]

[(*h*) As to an infant of unsound mind, see *post*, p. 846.]

[(*i*) A temporary absence, as where the captain of a merchantman was abroad on a voyage, is not within the Act; *Hutchinson* v. *Stephens*, 5 Sim. 499 (a case under the old Act, 11 G. 4. & 1 W. 4. c. 60). A trustee may be treated as out of the jurisdiction, although he appears by counsel; *Stillwell* v. *Ashley*, Set. on Judgt., 6th ed. p. 1247. The enactment applies, where the trustee out of the jurisdiction is of unsound mind; *Re Gardner's Trusts*, 10 Ch. D. 29.]

[(*j*) Where a company had become automatically dissolved before it had conveyed its property to a purchaser, the Court made an order vesting the property in him for all the estate of the company therein at the date of the dissolution: *Re General Accident Assurance Corporation*, (1904) 1 Ch. 147; and similar orders were made where, under similar circumstances, an assignment of leaseholds to purchasers had not been made; *Re No.* 12 *Cable Road, Hoylake, Cheshire*, (1904) W.N. 8; and where a transfer of

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v.) Where there is no heir or personal representative (*a*) to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused (*b*) or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

mortgage had been overlooked; *Re No. 9 Bomore Road*, (1906) 1 Ch. 359. In *Re Taylor's Agreement Trusts*, (1904) 2 Ch. 737, Buckley, J., being of opinion that, as the Crown was trustee, sect. 35 did not apply, declined, in a similar case, to make the order, but in the result, the Board of Trade, on the suggestion of counsel to the Treasury, directed the Comptroller to register the purchaser as proprietor.]

[(*a*) It is apprehended that these words must be read as equivalent to "where there is no heir, or where there is no personal representative."]

[(*b*) A *married woman* is capable of refusing; *Rowley* v. *Adams*, 14 Beav. 130. A refusal is not wilful if the title of the person requiring the conveyance is disputed, and the trustee entertains a *bonâ fide* doubt as to it; *Re Mills' Trusts*, 40 Ch. D. (C.A.) 14, 19, where Cotton, L.J., observed that the corresponding enactment in s. 2 of the Act of 1852 was only intended to apply in clear cases, as, for instance, where a conveyance to a new trustee as to whose title there is no doubt, is asked for. *Quære*, whether the refusal must be by the person who is trustee at the date of the order; see *Re Mills' Trusts, ubi sup.* Where a mortgagor covenanted to surrender copyholds to the mortgagee, and refused to surrender for twenty-eight days, the Court made a vesting order, and service on the mortgagor, who could not be found, was dispensed with; *Re Crowe's Mortgage*, 13 L. R. Eq. 26; and see *Re Mills' Trusts*, 37 Ch. D. 312, at p. 316. As to the instrument to be tendered in the case of copyholds, see *Rowley* v. *Adams*, 14 Beav. 132; Seton, 6th ed. pp. 1236, 1269, and as to the form of order in case of refusal to convey, see Seton, 6th ed. pp. 1234, 1236, 1247.]

Provided that—

(a) Where the order is consequential on the appointment of a new trustee, the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person."

[Jurisdiction of Court.]

14. Under the corresponding provisions of the former Acts it was held that the Court had jurisdiction to divest the whole estate from the continuing and incapacitated trustees, and to vest it in the new body of trustees, including the continuing trustees, as joint tenants (*a*), and if the lands were leaseholds for a term of years, to make a vesting order, without the concurrence of the landlord, unless there was a provision against assignment (*b*), and to vest the estate though it had escheated to the Crown, provided the Crown consented (*c*). But the Court did not assume jurisdiction to give directions as to the mode in which the trust should be executed by the trustees (*d*). It would seem that the High Court, when appointing a new trustee in place of a sole lunatic trustee, has no jurisdiction to make a vesting order (*e*).

[Infant trustee of unsound mind.]

15. By section 143 of the Lunacy Act, 1890 (*f*), it is expressly enacted that the provisions of that Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant, and it seems therefore, that where an infant trustee is of unsound mind, the case does not fall under the lunacy jurisdiction, but under that of the High Court (*g*.)

[Orders as to the contingent rights of unborn persons.]

16. By sect. 27 of the Trustee Act, 1893, "where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust,

[(*a*) *Re Fisher's Will*, 1 W. R. 505; *Smith* v. *Smith*, 3 Drew. 72, overruling *Re Watt's Settlement*, 9 Hare, 106, and *Re Plyer's Trust*, Ib. 220.]

[(*b*) *Re Matthew's Settlement*, 2 W. R. 85, &c.; *Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Dalgleish's Settlement*, 4 Ch. D. (C.A.) 143, reversing *S. C.* 1 Ch. D. 46; *Re Rathbone*, 2 Ch. D. (C.A.) 483. But see *Re Farrant's Trust*, 20 L.J. Ch. 532.]

[(*c*) *Re Martinez' Trust*, W. N. 1870, p. 70; 22 L. T. N.S. 403.]

[(*d*) *Re Tayler*, 2 De G. F. & J. 125.]

[(*e*) *Re M.*, (1899) 1 Ch. 79.]

[(*f*) 53 & 54 Vict. c. 5.]

[(*g*) See *Re Arrowsmith's Trusts*, 4 Jur. N.S. 1123. In s. 2 of the Trustee Act, 1850, the definition of person of unsound mind expressly excluded an infant. But the expression "infant" *primâ facie* includes an infant who is of unsound mind, and the form of vesting order adopted by ss. 134-136 of the Lunacy Act, 1890, is not adapted to the case of an infant.]

the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land."

[Mortgagee sections.]

17. Sections 28 and 29 (*a*) of the Act contain provisions applicable to the case of mortgagees of land, and enabling the Court to make a vesting order in place of a conveyance by an infant mortgagee, or in place of a conveyance by the heir, devisee, or personal representative of a deceased mortgagee.

[Vesting order consequential on judgment for sale or mortgage of land.]

18. By sect. 30 (*b*) of the Trustee Act, 1893, as amended by sect. 1 of the Trustee Act, 1894 (*c*), it is provided that where any Court gives a judgment, or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein (*d*), and is a party to the action or proceeding in which the judgment or order is given or made (*e*), or is otherwise bound by the judgment or order (*f*), shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of the Act of 1893 (*g*); and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof, for such estate as the Court thinks fit, in the purchaser or mortgagee, or in any other person (*h*).

[Vesting order consequential on judgment for specific performance, &c.]

19. By sect. 31 (*i*) of the same Act, where a judgment is given

[(*a*) For these sections, see App. No. 1.]

[(*b*) Replacing s. 29 of the Act of 1850, and s. 1 of the Act of 1852.]

[(*c*) 57 Vict. c. 10.]

[(*d*) In the Act of 1893 the word "therein" was followed by the words "as heir or under the will of a deceased person for payment of whose debts the judgment was given or order made," but by the Act of 1894 these words are repealed.]

[(*e*) In an administration suit, if the legal estate has descended to the heir of the testator who is not a party, the Court has no jurisdiction to make a vesting order; *Gunson* v. *Simpson*, 5 L. R. Eq. 332; and see *Gough* v. *Bage*, W. N. 1871, p. 327; 25 L. T. N.S. 738.]

[(*f*) The section applies to the case where the person to convey is not under disability; *Re Lee; Kenyon* v. *Lee*, Set. on Judgments, 6th ed. p. 1272; *Beckett* v. *Sutton*, 19 Ch. D. 646.]

[(*g*) A devisee of real estate charged with debts who had become a lunatic, and had subsequently by his committee, with the sanction of the Master in Lunacy, commenced an action for the administration of his testator's estate, was held to be bound by an order for sale of the real estate made in the action, and to be a trustee within the Act; *Re Stamper*, 46 L. T. N.S. 372.]

[(*h*) Where copyholds, devised to an infant for life with remainder to his first son in tail, were decreed to be sold for payment of debts, and the infant's guardian had been ordered to surrender to the purchaser in the place of the infant, the purchaser was entitled to an order releasing the contingent rights of the infant's unborn issue: *Wood* v. *Beetlestone*, 1 K. & J. 213.]

[(*i*) Replacing s. 30 of the Trustee Act, 1850, and s. 7 of the Partition Act, 1868.]

for the specific performance of a contract concerning any land (*a*), or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of the Act, or may declare that the interests of unborn persons (*b*) who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of the Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees (*c*).

Under the powers conferred by the enactments for which this section has been substituted it was held in a partition suit that instead of giving an infant entitled to a share a day to show cause, the Court might declare him to be a trustee of such parts of the property as were allotted to other parties (*d*), and in a foreclosure suit by an equitable mortgagee, that the Court, in making an absolute decree for foreclosure and directing a conveyance, could

[(*a*) For order declaring donee of a power of jointuring a trustee for plaintiff and appointing a person to execute a jointure deed, see *Ex parte Mornington*, 4 De G. M. & G. 537; Seton on Judgments, 6th ed. p. 1265. In suits for the specific performance of a contract for a lease, the Court has on several occasions made orders under the former Acts appointing a person to convey, or vesting the interests of unborn persons; see *Hodgson* v. *Bower*, *Howell* v. *Palmer*, Set. on Judgments, 6th ed. pp. 1264, 2275, 2288; *Hall* v. *Hale*, 51 L. T. N.S. 226; Seton, 6th ed. p. 1264; but in *Grace* v. *Baynton*, 25 W. R. 506, Sir G. Jessel, M. R., held that the Court had no power under those Acts to appoint a person to convey in the place of a party refusing to execute the lease; but see now sect. 14 of the Judicature Act, 1884, *post*, note (*c*).]

[(*b*) The expression "unborn persons" has been construed liberally, and held to include the "heirs of a living person"; *Basnett* v. *Moxon*, 20 L. R. Eq. 182.]

[(*c*) By the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14, "Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it." And see sect. 33 of the Trustee Act, 1893, *post*, p. 850.]

[(*d*) *Bowra* v. *Wright*, 4 De G. & Sm. 265; *Brooke* v. *Brown*, Seton, 6th ed. p. 1266.]

add a declaration that the mortgagor was a trustee for the mortgagee, and make a vesting order (*a*).

[Effect of vesting order.]

20. As regards the effect of a vesting order as to land, several separate provisions contained in the Acts of 1850 and 1852 (*b*) are now comprised in section 32 of the Act of 1893, which provides that a vesting order under any of the foregoing provisions shall, in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance (*c*) or release to the effect intended by the order.

[(*a*) *Lechmere* v. *Clamp*, (No. 2), 30 Beav. 218; *S. C.* (No. 3), 31 Beav. 578; Seton, 6th ed. pp. 1271, 1272. In the case of an equitable mortgage where the mortgagor had died having devised his estate to trustees upon trust for sale, and, the trustees having disclaimed, the legal estate descended to the heir of the mortgagor, who was an infant and was made a defendant to a foreclosure action, the Court, in making the usual foreclosure decree, inserted a declaration that in case the plaintiffs were not redeemed, the infant would be a trustee for them within the Act, and that his mother, who was executrix of the mortgagor, should convey on his behalf; *Foster* v. *Parker*, 8 Ch. D. 147; Seton, 6th ed. pp. 1269, 1270, 1272. In such a case the mother would now take the fee under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), see *ante*, p. 248. Where the mortgagor who had created an equitable mortgage by deposit died intestate, and the estate descended to the infant heir subject to the mortgage, the judgment directed the infant to convey when he attained twenty-one, and gave him a day to show cause; *Mellor* v. *Porter*, 25 Ch. D. 158; Seton, 6th ed. pp. 980, 981, 983, 1273, where Kay, J., said that the enactment "applies to all cases where there is a judgment against an infant for an immediate conveyance, but this is not the form of a judgment for foreclosure in the case of an equitable mortgagee."]

[(*b*) Sects. 8-15 and 19 of the Trustee Act, 1850, and s. 1 of the Trustee Act, 1852.]

[(*c*) By s. 50, the expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land.]

Where there is an adult tenant for life, with remainder to an infant tenant in tail, with remainders over, a vesting order of the infant's estate, with the consent of the tenant for life as protector, will bar the entail, and all remainders over (*a*).

The vesting order being a *conveyance*, should be so worded as to make it clear by the description what property passes (*b*). The estate vests from the date of the order (*c*). Vesting orders forming links in title ought to be framed with scrupulous care (*d*).

Where circumstances require a severance of the property, the Court will, if necessary, make separate vesting orders instead of one general order (*e*); but in general, in cases of severance, the convenient course is to appoint a person to convey under sect. 33 (*f*).

In settling the form of order, the Court has had regard to its effect prospectively. Thus where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the Court, instead of vesting the property in the executor and executrix, when the *feme covert* in order to part with it would have to acknowledge the deed (*g*), vested it in such person or persons as the executor and executrix should appoint, and in default thereof, in the executor and executrix (*h*).

[Power to appoint person to convey.]

21. Sect. 33 (*i*) of the Trustee Act, 1893, provides that "in all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity

[(*a*) *Powell* v. *Matthews*, 1 Jur. N.S. 973; *Re Montagu*, (1896) 1 Ch. 549; see Seton, 6th ed. p. 1249, and see form of order, Ib. p. 1270. The reference to the mode of conveyance under the Fines and Recoveries Act is unnecessary, and the order should simply vest the land for such estate as the infant could, if of full age, convey; see *Re Montagu*, *sup.*, and form of order in that case.]

[(*b*) *Re Ord's Trust*, 3 W. R. 386; see Seton, 6th ed. p. 1248.]

[(*c*) *Woodfall* v. *Arbuthnot*, 3 L. R. P. & D. 108.]

[(*d*) An order has been made to vest the legal estate in the devisees of a mortgagor, subject to a charge created by his will; *Re Ellerthorpe*, 18 Jur. 669. Under the former Acts, and s. 45 of the Copyhold Act, 1887, an order was made vesting in the executors of a deceased mortgagee the legal estate in copyholds outstanding in his infant heir; *Re Franklyn's Mortgages*, W. N. 1888, p. 217; and an order vesting the property in a person absolutely entitled has been made; *Re Godfrey's Trusts*, 23 Ch. D. 205.]

[(*e*) *Brader* v. *Kerby*, W. N. 1872, p. 174.]

[(*f*) See Seton, 6th ed. pp. 1249, 1254.]

[(*g*) See *Re Harkness*, (1896) 2 Ch. 358; but see now the Married Women's Property Act, 1907, sect. 1, *ante*, p. 37.]

[(*h*) *Re Powell*, 4 K. & J. 338.]

[(*i*) Reproducing s. 20 of the Trustee Act, 1850; and see section 14 of the Judicature Act, 1884 (47 & 48 Vict, c. 61), *ante*, p. 848, note (*c*).]

with the order shall have the same effect as an order under the appropriate provision."

The question whether a vesting order should be made, or a person appointed to convey, must be determined by considerations of expense and convenience. On a sale in lots where the parties under disability are numerous, the Court will appoint a person to convey (*a*).

[Effect of vesting order as to copy holds.]

22. By sect. 34 (*b*) of the Trustee Act, 1893, it is provided that where an order vesting copyhold land in any person, is made under the Act with the consent of the lord or lady of the manor, the land shall vest accordingly (*c*) without surrender or admittance; and that where an order is made under the Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land, and the lord and lady of the manor, and every other person, shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the person in whose place an appointment is made were free from disability, and had executed and done those assurances and things (*d*).

The Court has power without the consent of the lord to vest in the person nominated by the Court all such estate as was vested in the person in respect of whom the inconvenience to be remedied arises. Such an order does not affect the interests

[(*a*) See *Hancox* v. *Spittle*, 3 Sm. & G. 478; but in *Shepherd* v. *Churchill*, 25 Beav. 21, a vesting order was made, as being less expensive. For forms of order see Seton on Judgments, 6th ed. pp. 1236, 1261, 1263, 1264, 1266, 1268, 1269, 1270. The conveyance should contain a recital showing that it is made in obedience to the order of the Court, and should be executed by the person appointed to convey in his own name; though the late Vice-Chancellor of England, in a case arising upon the 1 W. 4. c. 60, seems to have considered that the execution by the person appointed to convey, of a deed purporting to be the conveyance of the trustee who refused, would, with a mere reference in the attestation clause to the order appointing the person to convey, be sufficient; *Ex Parte Foley*, 8 Sim. 395. For form of order appointing a person to convey where the Court orders a sale of land, and a party to the proceedings refuses to execute the conveyance, see *Beale* v. *Bragg*, (1902) 1 I. R. 99. As to whether a person appointed to convey for a tenant for life can pass an estate in remainder, see *Wood* v. *Beetlestone*, 1 K. & J. 213; Seton, 6th ed. p. 1254.]

[(*b*) Replacing s. 28 of the Trustee Act, 1850.]

[(*c*) Where a bare trustee of copyholds had died intestate and without an heir, the Court made an order vesting the copyholds in the beneficial owner; *Re Godfrey's Trusts*, 23 Ch. D. 205.]

[(*d*) For form of order appointing a person to do all necessary acts to vest copyholds in a new trustee, see *Re Hey's Will*, 9 Hare, 221. As to the application of the section to the public trustee, under the Public Trustee Act, 1906, see *ante*, Chap. XXIII. p. 704.]

of the lord, and therefore the petition need not be served upon him. On the order being made, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done. In lieu of making a vesting order, the Court, without the consent of the lord, may appoint a person to convey the copyholds, and then the person so appointed must surrender, and the surrenderee must be admitted. But to prevent circuity, this section *allows* the lord to consent to a vesting order, and then the estate will vest without the necessity of any surrender or admission (*a*).

[Vesting orders as to stock and choses in action.]

23. As regards stock and choses in action, the power to make vesting orders is contained in sect. 35 of the Trustee Act, 1893, which comprises provisions contained in several sections of the earlier Acts. Sub-sect. 1 of sect. 35 (*b*) provides as follows:—

"In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found (*c*), or

(d) neglects or refuses to transfer stock (*d*) or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto, for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

[(*a*) *Paterson* v. *Paterson*, 2 L. R. Eq. 31; *S. C.* 35 Beav. 506; *Re Flitcroft*, 1 Jur. N.S. 418; *Re Hurst*, Seton, 6th ed. pp. 1236, 1251; *Re Hey's Will*, 9 Hare, 221, overruling *Cooper* v. *Jones*, 2 Jur. N.S. 59; *Re Howard*, 3 W. R. 605. Where the lord consents, it may be by act *in pais*, without appearance in Court; *Ayles* v. *Cox*, 17 Beav. 585. Where on the death of a trustee the customary heir was out of the jurisdiction, and the Court appointed a new trustee, the lord claimed two fines, one for the admission of the customary heir and another for the admission of the new trustee, but it was ruled that he could claim one fine only, viz., on the admission of the new trustee; *Bristow* v. *Booth*, 5 L. R. C. P. 80; and as to fines payable, see *Reg.* v. *Garland*, 5 L. R. Q. B. 269; *Garland* v. *Mead*, 6 L. R. Q. B. 441; *Hall* v. *Bromley*, 35 Ch. D. (C.A.) 642. As to admission subsequently on the vesting order, see Scriven on Copyholds, 7th ed. p. 143.]

[(*b*) Replacing ss. 22-25 and 35 of the Act of 1850, and ss. 3-5 of the Act of 1852.]

[(*c*) See *Re General Accident Assurance Corporation*, (1904) 1 Ch. 147; *ante*, p. 844, note (*j*).]

[(*d*) See also s. 14 of the Judicature Act, 1884, *ante*, p. 848, note (*c*), and *Re Cathcart*, 41 W. R. 277.]

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead:

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(a) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint" (*a*).

[Definitions of "stock" and "transfer."]

By sect. 50 of the same Act, the expression "stock" includes fully paid up shares, and, so far as relates to vesting orders made by the Court under the Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instruments of transfer either alone or accompanied by other formalities, and any share or interest therein. The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee.

The first sentence of the above definition of "stock" is taken from the Trust Investment Act, 1889, and the rest of the clause, as to vesting orders, from the Trustee Act, 1850. Under that Act it was held that "stock" included shares in joint stock companies (*b*), and also in accordance with the previously

[(*a*) Where a new trustee had been appointed by deed in the place of a trustee out of the jurisdiction, the Court vested the right to transfer the stock in the continuing trustee and the new trustee; *Re Blaine's Trusts*, W. N. 1886, p. 203.]

[(*b*) *Re Angelo*, 5 De G. & Sm. 278.]

well-established practice, shares not fully paid up (*a*), and it is apprehended that this holds good under the Act of 1893, so far as vesting orders are concerned.

[Infant trustee.] 24. The powers of sect. 35, sub-sect. 1, are applicable to the case of stock to which an infant is beneficially entitled, standing in the name of the infant and another (*b*); and where executors have by inadvertence invested money in stock in the name of an infant, the Court has treated the infant as a trustee of the stock, and made a vesting order accordingly (*c*).

[Lunatic trustee.] 25. It would seem that the High Court, when appointing a new trustee of stock in the place of a sole lunatic trustee, has no jurisdiction to make a vesting order (*d*).

[Neglect or refusal to transfer.] 26. A tenant for life is not a person "absolutely entitled," competent to give a direction under clause (d) of section 35, except for the purpose of an application limited to the income, nor is one of two trustees (*e*), but persons who have been duly appointed new trustees are absolutely entitled (*f*).

The corresponding provisions in the former Acts were held to be applicable where the executor of a surviving trustee had not proved, and declined to say whether he intended doing so, and declined to transfer (*g*).

Until the expiration of the period of twenty-eight days the jurisdiction of the Court does not arise, and a petition presented

[(*a*) *Re New Zealand Trust and Loan Company*, (1893) 1 Ch. (C.A.) 403.]

[(*b*) *Re Harwood*, 20 Ch. D. 536; *Re Barnett*, 61 L. T. N.S. 676; *Re Dehaynin*, (1910) 1 Ch. (C.A.) 223.]

[(*c*) *Rives* v. *Rives*, 14 L. T. N.S. 351; W. N. 1866, p. 144; *Gardner* v. *Cowles*, 3 Ch. D. 304; and see form of order, Seton on Judgments, 6th ed. p. 1244; and see *Sanders* v. *Homer*, 25 Beav. 467; Seton, 6th ed. p. 1243. Where stock was standing in the names of three trustees and an infant, and two of the trustees were dead and the third was out of the jurisdiction, the Court appointed a guardian, and allowed maintenance, and vested the right to receive the dividends in the guardian during the infant's minority; *Re Morgan*, Seton, 6th ed. p. 1219.]

[(*d*) *Re M.*, (1899) 1 Ch. 79.]

[(*e*) *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338; more fully reported 16 Jur. 723; and see form of order, Seton, 6th ed. p. 1245.]

[(*f*) *Ex parte Russell*, 1 Sim. N.S. 404; *Re Baxter's Will*, 2 Sm. & G. App. v.; *Re Ellis's Settlement*, 24 Beav. 426.]

[(*g*) *Re Ellis's Settlement*, 24 Beav. 426; and see *Re Price's Settlement*, W.N. 1883, p. 202; *Re Trubee*, (1892) 3 Ch. 55, where executors duly constituted in Scotland declined to prove the will in England; and see form of order, Seton on Judgments, 6th ed. p. 1240; and *Re Crum Ewing's Trusts*, 29 L. R. Ir. 449; and see, under 1 W. 4. c. 60, *Cockell* v. *Pugh*, 6 Beav. 293; *Re Lunn's Charity*, 15 Sim. 464. And the Court seems to have made a similar order where the next of kin *who was entitled to take out administration* had refused to make the transfer; *Re Stroud's Trusts*, W. N. 1874, p. 180. See, however, *Re Cane's Trusts*, (1895) 1 I. R. 172, intimating that, even if an executor who had not proved and refused to prove could be said to be a trustee within the Act of 1850, he could not be held to be a trustee within the enactment of 1893.]

and served previously is premature (*a*). Where the refusal to transfer is wholly unjustifiable the recusant trustee may be ordered to pay costs (*b*).

[Where stock in sole name of deceased trustee.]

27. It will be observed that the Act contains no express provision (such as was contained in sect. 25 of the Act of 1850) for the making of a vesting order as to stock standing in the sole name of a deceased trustee; but in such a case the personal representative is a trustee within the Act (*c*).

[Where there is no representative of deceased trustee.]

28. Nor under this section is any special provision made, as is done in the case of land by sect. 26, clause v. (*d*), for the case where there is no personal representative of a sole or last surviving trustee, and in such a case it would seem that the Court has no jurisdiction to make a vesting order (*e*) otherwise than consequentially on an appointment of new trustees, and that the proper course, therefore, is to apply to the Court for such an appointment and a vesting order (*f*).

[Appointment of person to transfer stock.]

29. By sub-sect. 2 of sect. 35, "in all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer" (*g*).

[Form and effect of vesting order as to stock or chose in action.]

30. The remaining sub-sections of sect. 35 (*h*) relate mainly to the form and effect of the vesting order, and are as follows:—

"(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

"(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any

[(*a*) *Re Knox's Trusts*, (1895) 1 Ch. 538, *per* Kekewich, J.]

[(*b*) *S. C.* (1895) 1 Ch. 538; (1895) 2 Ch. (C.A.) 483.]

[(*c*) See *Re Ellis's Settlement*, 24 Beav. 426; and for form of order see *Re Bradshaw*, Seton on Judgments, 6th ed. p. 1217.]

[(*d*) See *ante*, pp. 845, *et seq.*]

[(*e*) See *Re Cane's Trusts*, (1895) 1 I. R. 172.]

[(*f*) *Re Herbert's Will*, 8 W. R. 272; *Re Crowe's Trusts*, 14 Ch. D. 304, 610.]

[(*g*) Replacing s. 20 of the Trustee Act, 1850. By reference to proviso (b), see *ante*, p. 853, it will be seen that the Court under this provision can only direct a person to transfer in the place of the person creating the difficulty, and therefore where the stock was standing in the names of two persons, one of whom was out of the jurisdiction, it was necessary to order the person within the jurisdiction to join in the transfer; *Wade* v. *Hopkinson*; *Hodgson* v. *Hodgson*, Seton on Judgments, 6th ed. p. 1254.]

[(*h*) Replacing s. 26 of the Trustee Act, 1850, s. 6 of the Trustee Act, 1852, s. 31 of the Trustee Act, 1850, and s. 10 of the Merchant Shipping Act Amendment Act, 1855 (18 & 19 Vict. c. 91).]

other company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order.

"(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

"(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock."

As respects all government stocks, and, in general, all stocks and shares which are fully paid up, the proper form of order is that the right to call for a transfer of, and to transfer the stock or shares, and to receive the dividends thereon, should vest in the new trustees and that they should transfer the stock or shares into their own names (*a*). This form, which meets the book-keeping requirements of the Bank of England, will not be departed from except in special cases, but the Court has power to adopt another form, and an order vesting the right to call for a transfer and to transfer to "any purchaser or purchasers" has been made under peculiar circumstances (*b*).

The Bank of England, it seems, objects to an order authorising an unlimited severance of the dividends from the capital, and where one of four trustees was out of the jurisdiction, and an order had been made vesting the right to receive the dividends in the three trustees, on the objection of the Bank the order was limited to the dividends to accrue during the lives of the three trustees (*c*); and where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the Bank would not apportion the past dividend between the trust estate and the beneficial estate, the Court, in appointing new trustees, vested the right to receive the whole dividend in the new trustees, upon their undertaking that

[(*a*) *Re Gregson*, (1893) 3 Ch. (C.A.) 233; *Re Joliffe*, W. N. (1893) p. 84; *Re Price*, W. N. (1894) p. 169; *Re Glanville's Trusts*, W. N. 1877, p. 248; 1878, p. 21. See form, Set. on Judgt., 6th ed. p. 1253.]

[(*b*) See *Re New Zealand Trust and Loan Co.*, (1893) 1 Ch. (C.A.) 403, where there was a liability on the shares for unpaid calls; and *Re Peacock*, 14 Ch. D. 212; 50 L. J. Ch. 280 (*q.v.* for form of order), where part of the trust funds had been invested in unauthorised securities, and it was desired to sell them and reinvest, and the order contained an undertaking by the trustees to hold the proceeds on the trusts of the settlement. The objection to such a form of order is that it imposes on the Bank or Company the necessity of making an investigation into extraneous facts, *ex. gr.* the identity of the purchaser or purchasers.]

[(*c*) *Re Peyton's Settlement*, 2 De G. & J. 290; 25 Beav. 317; and see *Re Hartnall*, 5 De G. & S. 111.]

they would invest in the name of the old trustee so much as belonged to him beneficially (*a*).

[National Debt Stockholders Relief Act, 1892.]

31. By the National Debt Stockholders Relief Act, 1892 (*b*), where by virtue of any provision in an Act of Parliament, the right to stock for the time being transferable in the books of the Bank of England (*c*) is vested in any person, he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock, and to receive and give a valid receipt for any accrued or accruing dividends on the stock; and where by virtue of any such provision the right to transfer stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to receive, and give a valid receipt for any accrued or accruing dividends on the stock.

It is also provided (*d*), that in the following cases, namely—(a) Where an infant is the sole survivor in an account; and (b), where an infant holds stock jointly with a person under legal disability; and (c), where stock has by mistake been brought in or transferred into the sole name of an infant, the Bank may, at the request in writing of the parent, guardian, or next friend of the infant, receive the dividends and apply them to the purchase of like stock, and the stock so purchased shall be added to the original investment (*e*).

[Persons entitled to apply for orders.]

32. Sect. 36 (*f*) of the Act of 1893 is as follows:—

"(1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

"(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage."

In sales by the Court the purchaser, as beneficially interested in the property sold (*g*), or the plaintiffs in the suit, as beneficially

[(*a*) *Re Stewart*, 2 De G. F. & J. 1; see *Hodges* v. *Wheeler*, Set. on Judgt. 6th ed. p. 1254.]

[(*b*) 55 & 56 Vict. c. 39, s. 4.]

[(*c*) See sect. 8.]

[(*d*) Sect. 3.]

[(*e*) In the case of *Re Alice Kemp*, W. N. 1888, p. 138; 59 L. T. N.S. 209; 36 W. R. 729, the Bank refused to act on an order directing the accumulation of dividends of consols standing in the sole name of an infant.]

[(*f*) Reproducing s. 37 of the Trustee Act, 1850.]

[(*g*) *Ayles* v. *Cox*, 17 Beav. 584; *Rowley* v. *Adams*, 14 Beav. 130.]

interested in the proceeds, are respectively entitled to apply to the Court (*a*); and of course the purchaser or several purchasers and the plaintiffs can join in making the application (*b*).

A person contingently entitled to a beneficial interest is within the meaning of the Act (*c*), but not so the committee of a lunatic *cestui que trust* (*d*).

The fact that a *cestui que trust* is entitled to apply under the Act for an appointment of new trustees does not preclude him from instituting a suit for the same purpose (*e*), but the Court may hold him answerable for any additional costs occasioned by his taking that course (*f*).

[Powers of new trustee appointed by Court.]

33. Sect. 37 (*g*) of the Trustee Act, 1893, provides that "every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust."

[Power to charge costs on trust estate.]

34. By sect. 38, "the High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just."

In general the costs of applications for the appointment of new trustees, being for the benefit of the whole estate, come out of the *corpus* of the trust fund (*h*). Where new trustees of two funds were appointed upon the same petition, the costs were borne by

[(*a*) *Re Wragg*, 1 De G. J. & S. 356.]

[(*b*) *Rowley* v. *Adams*, 14 Beav. 130, 135; as to the mode of application, see Rules of Court in App. No. 2.]

[(*c*) *Re Sheppard's Trusts*, 4 De G. F. & J. 423; and, *semble*, so is a new trustee duly appointed; *Ex parte Russell*, 1 Sim. N.S. 404.]

[(*d*) *Re Bourke*, 2 De G. J. &. S. 426, where the petition was directed to be amended by making the lunatic a co-petitioner.]

[(*e*) *Legg* v. *Mackrell*, 1 Giff. 165; 4 L. T. N.S. 568.]

[(*f*) *Thomas* v. *Walker*, 18 Beav. 521. Upon an originating summons for administration and the appointment of new trustees, all persons interested being parties, the Court, in the exercise of its general jurisdiction, made an appointment; *Re Allen*, 56 L. J. Ch. 779; 56 L. T. N.S. 611, and see *post*, Appendix No. 2.]

[(*g*) Replacing s. 33 of the Trustee Act, 1850, and s. 33 of the Conveyancing and law of Property Act, 1881. The former section provided that the new trustee should have the same rights and powers as he "would have had if appointed by decree in a suit duly instituted."]

[(*h*) *Re Fellows's Settlement*, 2 Jur. N.S. 62; *Re Fulham*, 15 Jur. 69; *Ex parte Davies*, 16 Jur. 882; *Re Parby*, 29 L. T. N.S. 72; *Carter* v. *Sebright*, 26 Beav. 374.]

the two funds rateably according to their respective values (*a*); and where a petition was presented for vesting the legal estate of lots sold by the Court in the purchasers, it was held that the petition might properly be presented by the purchasers, and that the costs of the purchaser of each lot were payable out of the purchase-money of such lot (*b*).

On appointing new trustees of real estate, the Court has directed the amount of the costs to be raised by mortgage (*c*).

[Trustees of charities.]

35. Section 39 (*d*) provides that the powers conferred by the Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power, or by the High Court under its general or statutory jurisdiction (*e*).

[Orders made upon certain allegations to be conclusive evidence.]

36. By sect. 40 (*f*), "where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a

[(*a*) *Re Grant's Trusts*, 2 J. & H. 764.]

[(*b*) *Ayles* v. *Cox*, 17 Beav. 584.]

[(*c*) *Re Crabtree*, V. C. Wood, 11 Jan. 1866, Set. on Judgt., 5th ed. p. 1076; and see *Ex parte Davies*, 16 Jur. 882, where the Court, though after some hesitation, declared that certain costs incurred under the Act should, with interest at 4 per cent., form a charge on the inheritance.]

[(*d*) Replacing s. 45 of the Trustee Act, 1850.]

[(*e*) See orders under the former Act, *Re Norton Folgate*, *Re Basingstoke School*, Seton on Judgments, 6th ed. pp. 1303, 1304. Under 16 & 17 Vict. c. 137, s. 28, where the value of the property exceeds 30*l.* per annum, any person authorised by the Charity Commissioners under s. 17 may apply to the judge at chambers for any order which may be made by such a judge, notwithstanding any lunacy; *Re Davenport's Charity*, 4 De G. M. & G. 839. By order LV., rule 13, applications under this enactment are to be by summons.]

[(*f*) Replacing s. 44 of the Trustee Act, 1850, and s. 140 of the Lunacy Act, 1890.]

reconveyance or the payment of costs occasioned by any such order if improperly obtained."

[Application of vesting order to land out of England.]

37. By sect. 41 (*a*), the powers of the High Court in England to make vesting orders under the Act are extended to all land and personal estate in His Majesty's dominions, except Scotland. The High Court in England may therefore make a vesting order as to lands or personal estate in Ireland (*b*).

[Ireland.]

By sect. 2 of the Trustee Act, 1894 (*c*), the powers conferred by this section on the High Court in England are conferred also on the High Court in Ireland.

Secondly. Where the jurisdiction is exercised in lunacy.

[Jurisdiction in lunacy.]

1. By sect. 116 (*d*) of the Lunacy Act, 1890 (*e*), the powers of that Act relating to management and administration extend not only to lunatics so found by inquisition and to every person lawfully detained as a lunatic (*f*), but also to "every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved, to the satisfaction of the judge in lunacy, that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs" (*g*). Where, therefore, any such person, not being an infant (*h*), or resident out of the jurisdiction (*i*), is a trustee, the jurisdiction of the Court in

[(*a*) Replacing s. 54 of the Trustee Act, 1850.]

[(*b*) *Re Hewitt's Estate*, 6 W. R. 537; *Re Taitt's Trusts*, W. N. 1870, p. 257; *Re Lamotte*, 4 Ch. D. (C.A.) 325: *Re Hodgson*, 11 Ch. D. (C.A.) 888; *Re Steele*, W. N. 1885, p. 218; 53 L. T. N.S. 716. So as to lands in Canada, *Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. N.S. 336; and notwithstanding that the title arises under a will which has not been proved in this country; *Re Best's Settlement*, (unreported, C.A., overruling *Kay*, J., 1888). As the Lunacy Act, 1890, (53 Vict. c. 5) does not extend to Ireland (see s. 2), the judge in lunacy cannot, by force of that Act, make a vesting order as to property in Ireland, where such property is vested in an English lunatic; but the judges of the Court of Appeal, who have jurisdiction in lunacy, being also additional judges of the Chancery Division for the purposes of applications connected with lunacy (see *post*, p. 861), can under the two jurisdictions appoint new trustees and make a vesting order; *Re Lamotte*, *ubi sup.*; *Re Hodgson*, *ubi sup.*; *Re Bowyer Smyth*, 55 L. T. N.S. 37.]

[(*c*) 57 Vict. c. 10.]

[(*d*) See App. No. 3, where the sections of the Lunacy Acts, 1890 and 1891, relating to trustees will be found *in extenso*.]

[(*e*) 53 Vict. c. 5.]

[(*f*) The expression "lawfully detained as a lunatic," means "lawfully detained" under the provisions of the Acts of Parliament of this country, as *ex. gr.*, under the Idiots Act, 1886 (49 & 50 Vict. c. 25): *Re Whalley*, (1906) 1 Ch. (C.A.) 565, explaining and distinguishing *Re Watkins*, (1896) 2 Ch. 336.]

[(*g*) The corresponding definition in the Trustee Act, 1850, only extended to infirmity of mind and not of body; *Re Barber*, 39 Ch. D. 187; and see *Re Martin*, 34 Ch. D. 618; overruling *Re Phelps' Settlement Trusts*, 31 Ch. D. 351.]

[(*h*) See *ante*, p. 846.]

[(*i*) *Re Gardner's Trusts*, 10 Ch. D. 29, where the existing trustee being of unsound mind, and out of the jurisdiction, new trustees were appointed in Chancery, and a vesting

Lunacy, as defined by the Lunacy Acts of 1890 and 1891, arises. Where the incapacity arises from physical and not from mental infirmity, the matter is within the jurisdiction of the Chancery Division (*a*).

[Jurisdiction by whom exercisable.]

2. By virtue of sect. 108 of the Lunacy Act, 1890, sect. 51 of the Judicature Act, 1873 (*b*), and the request of the Lord Chancellor made pursuant to that section, the judges of the Court of Appeal are enabled to act as additional judges of the Chancery Division, not only in all applications under the Trustee Act, 1893, but in all applications in lunacy which require also the exercise of the jurisdiction of the Chancery Division (*c*); but in lunacy matters this jurisdiction can only be exercised in aid of the jurisdiction in lunacy (*d*).

[Appointment of new trustees by Court in lunacy.]

3. Under sect. 128 of the Lunacy Act, 1890, "where a power is vested in a lunatic in the character of trustee (*e*) or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power (*f*), and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs," and under this section and sect. 129, the judge in lunacy can empower the committee of a lunatic to exercise in the name, and on behalf of the lunatic, a power of

order made; but see *Re Barker's Trusts*, (1904) W.N. 13, where the Court, under the special circumstances, declined to exercise the jurisdiction in Chancery, but gave liberty to amend the petition by entitling it in Lunacy.]

[(*a*) *Re Barber*, 39 Ch. D. 187; *Re Weston's Trusts*, W.N. (1898) 151. The jurisdiction conferred by the section does not extend to the exercise, on behalf of a person of unsound mind not so found by inquisition, in respect of land of which he is only tenant for life, of the power of sale given by s. 7 of the Lands Clauses Consolidation Act, 1845: *Re S. S. B.*, (1906) 1 Ch. (C.A.) 712, following *Re Baggs*, (1894) 2 Ch. 415, (see *ante*, p. 669,) and discussing *Re Salt*, (1896) 1 Ch. 117.]

[(*b*) 36 & 37 Vict. c. 66.]

[(*c*) *Re Platt*, 36 Ch. D. 410; *Re Blake*, W.N. (1895) 51; 72 L. T. N.S. 280; Seton, 6th ed. p. 1259.]

[(*d*) *Re Barber*, 39 Ch. D. 187.]

[(*e*) These words were held to be wide enough to include a power of appointment among children contained in the lunatic's marriage settlement, and exercisable by her jointly with her husband: *Re A.*, (1904) 2 Ch. (C.A.) 328. (*Per* Vaughan Williams and Romer, L.JJ., *diss.* Cozens Hardy, L.J.)]

[(*f*) The consent (under the Settled Land Act, 1882, s. 56) of a tenant for life, a lunatic not so found, to the exercise of a power of sale contained in a settlement is neither "necessary in the character of trustee" nor "as a check upon the undue exercise of the power," and therefore the power cannot be exercised by his quasi-committee appointed under sec. 116; *Re De Moleyns & Harris's Contract*, (1908) 1 Ch. 110.]

appointing new trustees vested in the lunatic, and any person appointed is to have all the same rights and powers as he would have had if the order had been made by the High Court. And in such a case, the judge in lunacy, where it seems to him to be for the lunatic's benefit and also expedient, may make any order respecting the property subject to the trust which might have been made on the appointment of a new trustee or trustees under the Trustee Act. Under these sections the Court in lunacy made an order authorising the sister of a lunatic to exercise a power of appointing new trustees on behalf of the lunatic by appointing certain persons named in the order, and directing that "upon the appointment" of the new trustees, "they be and are hereby appointed to call for a transfer of and to transfer into their joint names" a sum of consols, and a deed reciting the order and appointing the trustee was duly executed. The Bank of England objected to the order as casting upon them the duty of ascertaining whether the deed of appointment was genuine. The Court held that it had power thus to authorise the exercise of a power to appoint new trustees, and combine with it an order for a future transfer of stock, but intimated that in future the Bank ought in such a case to be supplied with something in the nature of a certificate by the master in lunacy identifying the deed on which the bank have to act (*a*).

By sect. 141 of the Lunacy Act, 1890, it is provided that "in every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees."

[Vesting orders in lunacy as to land.]

4. By sect. 135 of the Lunacy Act, 1890, when a lunatic is solely or jointly seised or possessed of any land, or solely or jointly entitled to a contingent right in any land, upon any trust, or by way of mortgage, the judge in lunacy is empowered to make an order vesting the land in such person or persons for such estate, and in such manner, as he directs, or by order to release the land from the contingent right and dispose of the same to such person or persons as he directs (*b*). Any such order is to have "the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right" (*c*).

[(*a*) *Re Shortridge*, (1895) 1 Ch. (C.A.) 278.]

[(*b*) Sub-ss. 1, 2, see Appendix No. 3.]

[(*c*) Sub-s. 3. Orders in lunacy for vesting or appointing a person to convey or transfer any property are

Where one of three trustees became lunatic, and a new trustee had been appointed in his place, it was held that a petition for a vesting order must be entitled in Chancery as well as in Lunacy, as otherwise the vesting order would sever the joint tenancy (*a*).

Where the person of unsound mind is tenant in tail, it is not necessary in the vesting order to refer to the Fines and Recoveries Act, or to the manner in which the trustee could have conveyed if sane (*b*). The order should simply direct the property to vest for all the estate which the person of unsound mind could convey if sane (*c*). Where a person who had agreed to grant a lease with a covenant for quiet enjoyment became lunatic before the lease was granted, it was held that under a vesting order of the interest of the lunatic, the lessee would not obtain the benefit of the covenant for quiet enjoyment (*d*). As to copyhold land, the section contains provisions similar to those contained in sect. 34 of the Trustee Act, 1893 (*e*).

[Vesting orders in lunacy as to stock or choses in action.]

5. By sect. 136 of the Lunacy Act, 1890, where a lunatic is solely entitled, or where any persons are jointly entitled with a lunatic, to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy is empowered to make an order vesting the right to transfer or call for a transfer of the stock, or to sue for the chose in action in any person or persons, and either in the persons jointly entitled with the lunatic, or in them jointly with any other person or persons (*f*), and a similar power is conferred as to stock standing in the name of a deceased person, whose personal representative is lunatic, and as to a chose in action vested in a lunatic as the personal representative of a deceased person (*g*).

to be drawn in the form employed for similar orders in the Chancery Division, and schedules, and any other devices, may be employed for shortening orders; *Practice Note*, (1908) W.N. (C.A.) 75.]

[(*a*) *Re Pearson*, 5 Ch. D. 982; *Re Chell*, 49 L. T. N.S. 196. The Court has power under the section, on payment of purchase-money of leaseholds, belonging to a lunatic, which he contracted to sell before he was found lunatic, to make a vesting order: *Re Pagani*, (1892) 1 Ch. (C.A.) 236; Seton, 6th ed. p. 1258.]

[(*b*) *Re Montagu*, (1896) 1 Ch. 549; see Seton, 6th ed. pp. 1249, 1270.]

[(*c*) *Mason* v. *Mason*, 7 Ch. D. (C.A.) 707.]

[(*d*) *Cowper* v. *Harmer*, 57 L. J. N.S. Ch. 461; 57 L. T. N.S. 714.]

[(*e*) See *ante*, p. 832.]

[(*f*) Sub-ss. 1, 2, see App. No. 3. In *Re Nash*, 16 Ch. D. 503, where consols were standing in the names of three trustees, one of whom was a lunatic, L. J. Cotton refused to make an order vesting the right to transfer until a new trustee had been appointed in the place of the lunatic. But where there was no object to be attained by such appointment it was dispensed with; *Re Watson*, 19 Ch. D. 384; and see *Re Ray*, 47 L. T. N.S. 500.]

[(*g*) Sub-s. 3. In *Re Wacher*, 22 Ch. D. 535, one of three executors of the surviving executor of a testator being of unsound mind, an

The Court in lunacy will not administer a trust, and therefore, where a sole surviving trustee of stock had become of unsound mind, the Court declined to make an order vesting the right to transfer the stock in the persons beneficially entitled to it, as that would in effect be an administration of the trust, but on a petition intituled in the Chancery Division as well as in Lunacy, the Court appointed the beneficiaries new trustees of the settlement, and vested the right in them in that capacity (*a*); and similarly, the Court declined to make a vesting order in a person absolutely entitled, but appointed a new trustee, and left the owner to take further steps to put an end to the trust (*b*).

Where a mortgage debt and stock were vested in two trustees of a settlement, one of whom was lunatic and the other resident out of the jurisdiction, and new trustees of the settlement had been appointed, the Court made an order vesting the mortgage debt and the right to call for a transfer of the stock, first in the trustee resident out of the jurisdiction, and then, it appearing that he was out of the jurisdiction, in the new trustees (*c*).

Where a legacy bequeathed to a lunatic not so found is paid into Court under the Trustee Act, 1893, sect. 42, an application by the next friend for allowance for maintenance out of income and capital, so far as income is insufficient, ought to be made in Lunacy, where there are facilities for requiring the person appointed as receiver to furnish periodical accounts (*d*).

[Trustee a criminal lunatic.] As the Lunacy Act, 1890, gives no jurisdiction to make a vesting order in the case of a trustee who is a criminal lunatic, the old jurisdiction in such a case under sect. 5 of the Trustee Act, 1850, is preserved (under sect. 342 of the Act of 1890), and the Court in Lunacy will exercise that jurisdiction by making a vesting order under the Act of 1850 (*e*).

[Evidence.] Where the application in lunacy is to vest or procure the

order was made vesting the right to transfer stock belonging to the estate of the original testator and still standing in his name.]

[(*a*) *Re Currie*, 10 Ch. D. 93.]

[(*b*) *Re Holland*, 16 Ch. D. 672; Seton, 6th ed. p. 1260.]

[(*c*) *Re Batho*, 39 Ch. D. 189.]

[(*d*) *Re Barker's Trusts*, (1904) W.N. 13, but see *Re Carr's Trusts*, (1904) 1 Ch. (C.A.) 792, where, on a similar application, an order was made, upon the undertaking of the trustees to transfer stock into Court and to deposit in Court the deeds relating to property in mortgage, that the interest on the stock and on the mortgage should during the life of the *non compos*, or until further order, be paid to her sister, she undertaking to apply the same for the maintenance, comfort, and benefit of the *non compos*. See *ante*, pp. 431 *et seq.*]

[(*e*) *Re R.*, (1906) 1 Ch. 730 (*q.v.* as to the effect of a saving clause in an Act of Parliament preserving jurisdiction under a repealed Act).]

conveyance or transfer of outstanding property in or to trustees, it is not necessary, unless in any particular case the Court otherwise directs, to deduce the beneficial title to the property, or to serve beneficiaries (*a*).

[Powers of Masters in Lunacy.]

6. By sub-sect. 1 of sect. 27 of the Lunacy Act, 1891 (*b*), the jurisdiction of the judge in lunacy "as regards administration and management" may be exercised by the Masters; these powers are not confined to those contained in the group of sections (116-130) so headed in the Lunacy Act, 1890 (*c*), but extend to any matters of administration and management provided for in the Act of 1890 (*d*); they are, however, strictly limited to what can properly be described as administration or management of the lunatic's estate. Therefore a master in lunacy has no jurisdiction to make a vesting order as to trust property vested in two trustees, one of whom has become lunatic (*e*). On the other hand, it has been held that when a master in lunacy, under s. 128 of the Lunacy Act, 1890, appoints a person to exercise a power of appointing new trustees which is vested in a lunatic, he may also, under s. 129, make an order vesting the trust property in the new trustees when appointed (*f*).

[Appointment of person to convey land or transfer stock.]

7. In all cases where a vesting order can be made, the judge in lunacy is empowered, if it is more convenient, to appoint a person to convey the land, or release the contingent right (*g*), or to make or join in making a transfer of stock (*h*).

[Costs.]

8. Sect. 142 of the Lunacy Act, 1890, confers on the judge in lunacy power as to costs similar to that conferred on the High Court by sect. 38 of the Trustee Act, 1893 (*i*).

If the lunatic, against whom an order is sought, be a trustee, the trust estate or the *cestui que trust* must bear the costs of the proceedings under the Act. If he be a mortgagee, and it appears upon the face of the mortgage deed that the lunatic mortgagee is a trustee for a third party, the costs will fall on the mortgagor (*j*); but if the mortgagor had no notice of the fact that the lunatic was a trustee, the costs may, it seems, in some cases be borne by the lunatic's estate (*k*); but it does not

[(*a*) *Practice Note*, (1908) W. N. (C.A.) 75.]
[(*b*) See Appendix No. 3.]
[(*c*) See Appendix No. 3.]
[(*d*) *Re Browne*, (1894) 3 Ch. 412.]
[(*e*) *Re Langdale*, (1901) 1 Ch. 3.]
[(*f*) *Re Fuller*, (1900) 2 Ch. 551.]
[(*g*) Lunacy Act, 1890, s. 135, sub-s. 4.]
[(*h*) Lunacy Act, 1890, s. 136, sub-s. 4.]
[(*i*) See *ante*, p. 858.]
[(*j*) *Re Lewes*, 1 Mac. & G. 23.]
[(*k*) *Re Townsend*, 1 Mac. & G. 686; *Re Jones*, 2 Ch. D. 70. It would seem that where the lunatic is beneficially interested in the mortgage money, the costs of the petition, which should be presented by the

appear from the cases that any general rule on the subject has been established.]

committee and need not be served on the mortgagor, are (exclusive of the costs of the mortgagor if served), by force of authority rather than upon principle, to be borne by the lunatic's estate; *Re Wheeler*, 1 De G. M. & G. 436; *Re Stuart*, 4 De G. & J. 319, and cases cited Ib.; *Re Phillips*, 4 L. R. Ch. App. 629; but that in all other cases the costs must be paid by the mortgagor; see *Ex parte Clay*, Shelf. Lun. p. 510, 2nd edit., where the mortgage money had *not* been paid; and see *Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 De G. F. & J. 554, where the mortgage money *had* been paid; and see also *Re Viall*, 8 De G. M. & G. 439; *Re Rowley's Lunacy*, 1 N. R. 251; *Re Townsend*, 2 Ph. 348, and cases there cited. Where a mortgagee became of unsound mind, but was not so found by inquisition, and an order was made on the petition of the mortgagor authorising him to pay the mortgage debt into the Bank of England, and vesting the estate in the petitioner, it was held that the Court had no jurisdiction to make the mortgagee or his estate bear the costs where the application was made by the mortgagor; and no costs were allowed on either side; *Re Sparks*, 6 Ch. D. 361.]

PART III

THE CESTUI QUE TRUST

CHAPTER XXVII

IN WHAT THE ESTATE OF THE CESTUI QUE TRUST PRIMARILY CONSISTS

HAVING concluded the subject of the *estate* and *office* of the trustee, it follows next that we investigate the nature and properties of the *Estate* of the *cestui que trust;* and in the present chapter we shall inquire in what the estate of the *cestui que trust* primarily consists, *First,* In the *simple* trust; and *Secondly,* In the *special* trust.

SECTION I

OF THE CESTUI QUE TRUST'S ESTATE IN THE SIMPLE TRUST

In the *simple* trust the equitable ownership is compounded of the Pernancy of the profits and the Disposition of the estate—the *jus habendi* and *jus disponendi* (*a*).

First. The equitable owner is entitled to the pernancy of the profits.

Cestui que trust entitled to possession of lands.

1. In a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate (*b*); and if the *cestui que trust* be ejected from the possession by the trustee, the *cestui que trust* may compel the trustee to account not only for the rents actually received, but for the whole rents legally demandable from the tenants (*c*).

(*a*) *Smith* v. *Wheeler*, 1 Mod. 17, *per* Pemberton, J.

(*b*) *Brown* v. *How*, Barn. 354; *Attorney-General* v. *Lord Gore*, Id. 150, *per* Lord Hardwicke.

(*c*) *Kaye* v. *Powel*, 1 Ves. jun. 408.

Rule applicable only to simple trust.

2. The rule which gives the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions (*a*).

Blake *v.* Bunbury.

Thus a testator devised all his real estate to trustees in fee upon trust to convey the same for a term of 500 years (the trusts of which were to raise certain *annuities* and *sums in gross*), and subject thereto to the use of A. for life, with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into *immediate possession;* but Lord Thurlow said: "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. The Court, perhaps, has let a tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole, and if I was to do it now, perhaps I should only have to resume the estate" (*b*). The accounts were afterwards taken, and the plaintiff was let into possession on giving *security* to the amount of 10,000*l.* to abide the order of the Court as to the annuities and other incumbrances (*c*).

Tidd *v.* Lister.

In another case (*d*), a testator devised and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an annuity of sixty guineas each, and subject thereto upon trust for his daughter for life, with remainders over; and the

(*a*) *Jenkins* v. *Milford*, 1 J. & W. 629; *Baylies* v. *Baylies*, 1 Coll. 537; and see *Denton* v. *Denton*, 7 Beav. 388; *Pugh* v. *Vaughan*, 12 Beav. 517; *Hoskins* v. *Campbell*, W.N. 1869, p. 59; *Etchells* v. *Williamson*, W. N. 1869, p. 61.

(*b*) *Blake* v. *Bunbury*, 1 Ves. jun. 194. See the case more fully stated, Ib. 514; 4 B. C. C. 21.

(*c*) *S.C.* 1 Ves. jun. 514; 4 B. C. C. 28.

(*d*) *Tidd* v. *Lister*, 5 Mad. 429.

personal estate having sufficed to discharge the funeral expenses, debts, and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be let into possession upon securing the amount of the premiums of the policies; but Sir J. Leach said that if a testator, who gave in the first instance a beneficial interest for life only, thought fit to place the direction of the property in other hands, which was an obvious means of securing the provident management of that property for the advantage of those who were to take in succession, a Court of Equity ought not to disappoint that intention by delivering over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who were to take in remainder. There might be cases in which it was plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees; there might be cases in which it was plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There might be very special cases in which the Court would deliver the possession of the property to the *cestui que trust* for life, *although the testator's intention appeared to be that it should remain with the trustees;* as, where the personal occupation of the trust property was beneficial to the *cestui que trust;* in which case the Court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. And his Honour, considering that there was no such ground of exception in the case before him, refused the application (*a*).

Cestui que trust for her separate use.

3. In one case a *feme covert* was entitled to her *separate use* for her life, and it was not thought incompatible with the nature of such an estate that she should be put into possession, though the claim was opposed by the trustees (*b*). A tenant for life cannot claim possession as a *right*, but only at the discretion and by the sufferance of the Court (*c*); and therefore, where trustees were directed as managers of the estate to pay insurances

[(*a*) And see *Re Bentley*, 54 L. J. N.S. Ch. 782; 33 W. R. 610.]

(*b*) *Horner* v. *Wheelwright*, 2 Jur. N.S. 367; and see *Hoskins* v. *Campbell*, W.N. 1869, p. 59; *Taylor* v. *Taylor*, 20 L. R. Eq. 297; [*Re Bentley*, 54 L. J. N.S. Ch. 782].

[(*c*) See *Re Bagot's Settlement*, (1894) 1 Ch. 177; *Re Hunt*, W. N. (1900) 65, where the application was by the assignee of the life interest.]

and repairs and other necessary outlays, and apply the net annual income to the separate use of a person for life, it was held that such tenant for life was not a person "entitled to possession or receipt of the rents and profits" for life within the meaning of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and could not therefore grant leases under the Act (*a*). Such a power would in fact *pro tanto* neutralise the powers of management vested in the trustees (*b*).

[Discretionary power of Court enlarged since Settled Land Acts.]

[4. The extensive powers conferred by the Settled Land Acts on tenants for life afford an additional ground for the exercise in a fit case of the discretion of the Court in favour of letting an equitable tenant for life into possession (*c*); and accordingly, although large powers of management are conferred on the trustees by the testator, and although the interest of the tenant for life is determinable on alienation (*d*), or the tenant for life is a married woman restrained from anticipation (*e*), or the property is leasehold, so that the trustees are personally liable under the covenants, or the life interest is subject to a mortgage (*f*), or to an antecedent term of years vested in trustees upon trust to pay off incumbrances which remain undischarged (*g*), the discretion may be exercised, but the Court will insert in the order all such directions and undertakings as are necessary for the protection and indemnity of all persons interested in the estate (*h*). In considering the matter, the Court will have regard to all the circumstances of the case, and will not make an order if for reasons which it can judicially notice, there is a probability that within a very short time it would be right to restore possession to the trustees (*i*).

[Accumulation directed for payment of mortgages.]

5. Where a testator directed an accumulation of rents for the

(*a*) *Taylor* v. *Taylor*, 20 L. R. Eq. 297. [But see observations of L. J. James in *Taylor* v. *Taylor*, 3 Ch. D. (C.A.) 147.]

[(*b*) See *Vine* v. *Raleigh*, 24 Ch. D. 238, where it was held that if an estate is vested in trustees, and there is not for the time being any person beneficially entitled to the rents and profits, the trustees are the persons who may, under the 23rd section of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), apply to the Court to exercise the powers conferred by the Act; and a distinction was drawn between the language of that section and that of the 46th section, under which the person entitled to the possession or to the receipt of the rents and profits of the settled estates for an estate for life, &c., *either in his own right or in right of his wife* (words pointing to a *beneficial* ownership), is authorised to grant leases for twenty-one years; and see *Re Bentley*, 54 L. J. N.S. Ch. 782; 33 W. R. 610.]

[(*c*) *Re Bagot's Settlement*, (1894) 1 Ch. 177; *Re Wythes*, (1893) 2 Ch. 369; *Re Newen*, (1894) 2 Ch. 297.]

[(*d*) *Re Wythes*, *ubi sup.*]

[(*e*) *Re Bagot's Settlement*, *ubi sup.*]

[(*f*) *Re Newen*, *ubi sup.*]

[(*g*) *Re Richardson*, (1900) 2 Ch. 778; *Re Money Kyrle's Settlement*, (1900) 2 Ch. 839.]

[(*h*) For form of order see *Re Money Kyrle's Settlement*, *ubi sup.*, Seton, 6th ed. p. 1758; and see *Re Paddon*, (1909) W. N. 162.]

[(*i*) *Re Bagot's Settlement*, *ubi sup.*, at p. 182, *per* Chitty, J.]

purpose of paying off mortgages, and that the tenant for life under the will should not receive any part of the rents until the mortgages were paid off, and the mortgagees sold the estates comprised in their mortgages, but the proceeds being insufficient to pay them in full, the balance was paid out of the accumulations, it was held that the tenant for life was entitled to be let into possession of the estates remaining unsold, and to receive the surplus accumulations (*a*).]

Cestui que trust cannot recover the possession at law.

6. Until the Judicature Act, 1873, to be noticed presently, the *cestui que trust's* right to the possession was recognised, we must remember, in a court of *equity* only; for in a court of *law* the *cestui que trust* was merely tenant at will (*b*), and this tenancy was determinable at any time on *demand of possession* by the trustee, though not before such demand (*c*). In the day of Lord Mansfield it was maintained that a *cestui que trust*, a plaintiff in ejectment, could not be non-suited by a term outstanding in his trustee (*d*); and that a trustee, a plaintiff in ejectment, could not recover against his own *cestui que trust* (*e*). It was even decided that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge), notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied (*f*). Such at least were the doctrines in cases of *clear* trusts: for where the equity was at all *doubtful*, the rights of the parties were even then referred to the proper tribunal (*g*). "Lord Mansfield," as Lord Redesdale observed, "had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same Courts" (*h*). From the time of Lord Mansfield, and until the Act of 1873 it was established:—*First*, that a *cestui que trust* could not recover in ejectment (*i*), unless a

[(*a*) *Norton* v. *Johnstone*, 30 Ch. D. 649; following *Tewart* v. *Lawson*, 18 L. R. Eq. 490; and see *Blake* v. *O'Reilly*, (1895) 1 I. R. 479.]

(*b*) *Garrard* v. *Tuck*, 8 C. B. 231; *Melling* v. *Leak*, 1 Jur. N.S. 759; *Parker* v. *Carter*, 4 Hare, 400; *Perry* v. *Shipway*, 1 Giff. 1; and see *Geary* v. *Bearcroft*, O. Bridgm. 486-490; Bac. Us. 5; *Doe* v. *Jones*, 40 B. & Cr. 718; *Doe* v. *M'Kaeg*, 10 B. & Cr. 721; *post*, Chap. XXXI. s. 1.

(*c*) *Doe* v. *Phillips*, 10 Q. B. 130.

(*d*) *Lade* v. *Holford*, B. N. P. 110. The doctrine is said to have originated with Mr Justice Grundy.

(*e*) *Armstrong* v. *Peirse*, 3 Burr. 1901.

(*f*) *Bristow* v. *Pegge*, 1 T. R. 758, note (*a*); overruled by *Doe* v. *Staple*, 2 T. R. 684.

(*g*) *Doe* v. *Pott*, Doug. 695, *per* Lord Mansfield; *Goodright* v. *Wells*, Id. 747, *per eundem*.

(*h*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 66.

(*i*) *Doe* v. *Staple*, 2 T. R. 684; see *Barnes* v. *Crowe*, 4 B. C. C. 10 & 11; *Doe* v. *Sybourn*, 7 T. R. 3; *Goodtitle* v. *Jones*, 7 T. R. 45, and following pages; *Doe* v. *Wroot*, 5 East, 138.

surrender to him of the legal estate could be reasonably presumed (*a*) (which, of course, could not be where the circumstance of the outstanding legal estate appeared on the declaration or special case (*b*)), and the *cestui que trust* had no alternative but to bring his action in the name of the trustee, who was to be indemnified against the costs (*c*): *Secondly*, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust* (*d*); and the *cestui que trust* had no defence to the action at law, but must have had recourse to an injunction in equity (*e*), and the clause in the Common Law Procedure Act, 1854, which authorised an equitable defence at law, did not apply to ejectment (*f*). However, a lessee under a *feme covert* entitled to her separate use might protect himself by equitable plea against trespass by the husband, in whom the legal estate was vested (*g*).

Supreme Court of Judicature Act, 1873, s. 24.

7. Now, generally, by 36 & 37 Vict. c. 66, sect. 24, equitable defences are to be recognised in all the Courts, so that for the time to come the full merits, both at law and in equity, will be administered in the same action.

Leases by a *cestui que trust.*

8. As a tenant is not allowed to dispute his landlord's title, if a *cestui que trust*, having only an equitable estate, grant a lease, then, as between lessor and lessee, the lessor may distrain and exercise the other rights of a landlord in the same way as if at the date of the demise he had been the legal owner (*h*). The title of the lessor might be such, that on his death the person claiming under him could not prove the devolution of the estate without showing upon the pleadings that at the date of the lease the lessor's interest was equitable, and in such a case it is presumed the estoppel would not apply, and the remedy would be in equity (*i*). But if there were no difficulty upon the pleadings, the persons claiming under the lessor, as, for instance, his trustee in bankruptcy, had always the same benefit of the rule as the lessor had (*j*).

(*a*) *Doe* v. *Sybourn*, 7 T. R. 2; see *Doe* v. *Staple*, 2 T. R. 696; *Goodtitle* v. *Jones*, 7 T. R. 45, and following pages; *Roe* v. *Reade*, 8 T. R. 122.

(*b*) *Goodtitle* v. *Jones*, 7 T. R. 43; see *Doe* v. *Staple*, 2 T. R. 696; *Roe* v. *Reade*, 8 T. R. 122.

(*c*) *Annesley* v. *Simeon*, 4 Mad. 390; and see *Reade* v. *Sparkes*, 1 Moll. 11; *Jenkins* v. *Milford*, 1 J. & W. 635; *Ex parte Little*, 3 Moll. 67.

(*d*) See *Roe* v. *Reade*, 8 T. R. 122, 123.

(*e*) *Shine* v. *Gough*, 1 B. & B. 445.

(*f*) *Neave* v. *Avery*, 16 C. B. 328; and see *Smith* v. *Hayes*, 1 I. R. C. L. 333; *Clarke* v. *Reilly*, 2 I. R. C. L. 422.

(*g*) *Allen* v. *Walker*, 5 L. R. Ex. 187.

(*h*) *Alchorne* v. *Gomme*, 2 Bing. 54; *Blake* v. *Foster*, 8 T. R. 487; *Parker* v. *Manning*, 7 T. R. 537.

(*i*) See *Noke* v. *Awder*, Co. Eliz. 373, 436. See 2 Lord Raymond, 1553.

(*j*) *Parker* v. *Manning*, 7 T. R. 537.

Notice to quit.

9. If the trustees put the *cestui que trust* in possession, and the *cestui que trust* grants a lease and afterwards serves a notice on the lessee to quit, the *cestui que trust* is the agent of the trustees for the purposes of the notice, and an ejectment by the trustees can be sustained as if the notice had been given by themselves (*a*).

Injunction between tenants in common.

10. If there be *two cestuis que trust* tenants in common, and one of them be put into possession, and cuts timber, and becomes insolvent, the other *cestui que trust* can obtain an injunction (*b*).

Possession of the title-deeds.

11. The *title-deeds* of an estate form no part of the usufructuary enjoyment; and therefore if a person vests an estate in trustees upon particular trusts, one of which is to receive the rents and pay them over to the settlor for life, and the deeds are *delivered into their possession, they* have a right to the custody of them for the benefit of all parties interested (*c*), and should the *settlor* obtain them from the trustees, and thereby be entitled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently, or under such gross negligence as amounted to constructive fraud, would be held personally responsible for the consequences (*d*). However, a tenant for life, if the estate be *legal*, is entitled to the custody of the deeds (*e*), and may bring an action of detinue (*f*), or, unless he has shown that he cannot be safely trusted with the deeds (*g*), may take proceedings in equity for the recovery of them (*h*); and as equity follows law, the Court, in the absence of special trusts requiring the possession of the deeds by the trustees, will not take the deeds from the tenant for life who has got possession of them (*i*); and where the tenant for life in equity is *not the settlor*, and therefore cannot by suppressing the settlement make a title to the fee simple, the Court has ordered the deeds to be delivered to the tenant for life in equity (*j*), subject of course to the remainderman's right

(*a*) *Jones* v. *Phipps*, 3 L. R. Q. B. 567.

(*b*) *Smallman* v. *Onions*, 3 B. C. C. 621.

(*c*) See *Garner* v. *Hannyngton*, 22 Beav. 630; *Stanford* v. *Roberts*, 6 L. R. Ch. App. 307.

(*d*) See *Evans* v. *Bicknell*, 6 Ves. 174.

(*e*) In *Foster* v. *Crabb*, 12 C. B. 136, the Court seems to have approved the rule laid down in early times, that whoever first gets possession of the deeds, whether tenant for life or in remainder, keeps them. But see *Garner* v. *Hannyngton*, 22 Beav. 627; *Webb* v. *Webb*, 1 Eden, 8; *Duncombe* v. *Mayor*, 8 Ves. 320; [*Leathes* v. *Leathes*, 5 Ch. D. 221; *Re Beddoe*, (1893) 1 Ch. (C.A.) 547, 557;] and Sugd. Vend. and P., 14th edit. p. 445, note (1).

(*f*) *Allwood* v. *Heywood*, 1 N. R. 289.

(*g*) See *Jenner* v. *Morris*, 1 L. R. Ch. App. 603.

(*h*) *Garner* v. *Hannyngton*, 22 Beav. 627.

(*i*) *Taylor* v. *Sparrow*, 4 Giff. 703; 9 Jur. N.S. 1226; and see *Denton* v. *Denton*, 7 Beav. 388.

(*j*) *Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Taylor* v. *Sparrow*, 9 Jur. N.S. 1227; [*Leathes* v. *Leathes*, 5 Ch. D.

to production and inspection to a reasonable extent (*a*), [and has required him to undertake not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions (*b*). And in general where the equitable tenant for life is let into possession by the Court, custody of the title-deeds will be committed to him in a proper case (*c*); but mortgagees of the life estate are entitled to insist on the retention of the deeds by the trustees (*d*).] Where the legal estate, whether of freeholds, copyholds, or leaseholds, is vested in a trustee or executor in trust, not for certain persons entitled in succession, but for *cestuis que trust* entitled absolutely in possession, the *cestuis que trust*, or if they are infants, their guardians, may institute proceedings to have the deeds delivered up to them. But as to *leaseholds* [under the general law, and as to real estate under the Land Transfer Act, 1897 (*e*)], an *executor* may hold the deeds until all debts have been paid and the estate cleared (*f*).

[The trustee in bankruptcy of the husband of a legal tenant for life (not entitled to the property as separate estate) has not an absolute right to the custody of the title-deeds during the coverture; but where the circumstances require it, they will be ordered to be brought into Court for safe custody (*g*).]

Cestuis que trust entitled to inspect documents.

12. *Cestuis que trust* have a right at all seasonable times to *inspect* the documents relating to the trust (*h*), and at their own expense to be furnished with *copies* of them, and the rule extends to *cases* submitted and *opinions of counsel* taken by the trustees for their guidance in the discharge of their duty, for as

221, disapproving dictum in *Warren* v. *Rudall*, 1 J. & H. 1].

(*a*) *Davis* v. *Dysart*, 20 Beav. 405; *Pennell* v. *Dysart*, 25 Beav. 542.

[(*b*) *Re Burnaby's Settled Estates*, 42 Ch. D. 621; *Re Wythes*, (1893) 2 Ch. 369; *Re Money Kyrle's Settlement*, (1900) 2 Ch. 839, 845, as corrected, *Re Paddon*, (1909) W. N. 162.]

[(*c*) *Re Wythes*, (1893) 2 Ch. 369.]

[(*d*) *Re Newen*, (1894) 2 Ch. 297.]

[(*e*) 60 & 61 Vict. c. 65; in case of testators dying on or after 1st January, 1898. As to the exception of copyholds from "real estate," see *ante*, p. 248.]

(*f*) *Smith* v. *Pavier*, V. C. Wood, 18th July, 1852. In this case J. Smith devised freeholds and leaseholds for long terms to Wade and Pavier and their heirs to the use of Joel Smith for life, with remainder to Wade and Pavier to preserve contingent remainders, with remainder to the children of Joel Smith (who were infants at the filing of the bill) and the heirs of their bodies, with remainders over, including limitations to Wade and Pavier, who were also executors, to preserve contingent remainders. Wade and Pavier took possession of the title-deeds on the testator's death, and held them during the life of Joel Smith. On his death the infant children by their next friend, with two other persons as co-plaintiffs (being their guardians appointed by the Court), filed their bill against Pavier, the surviving executor, for delivery of the deeds, and there being no allegation of unpaid debts, the delivery of the deeds to the two guardians was ordered.

[(*g*) *Ex parte Rogers*, 26 Ch. D. (C.A.) 31.]

[(*h*) *Re Cowin*, 31 Ch. D. 179.]

the expense falls upon the trust estate, it stands to reason that the *cestuis que trust* may see the opinions and cases for which they pay. But the right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court (*a*).

Custody of deeds may be committed to *one* of the trustees.

13. As the deeds and documents relating to the trust cannot be held by *all* the trustees (unless they be deposited with bankers with a direction not to part with them except on the authority of the whole number), co-trustees have been held to be justified in committing the custody of the deeds to one of themselves; and where the deeds are a security for money, the possession by the one is no implied authority from the co-trustee to him who holds them to receive the principal money secured (*b*).

Privileges of *cestui que trust.*

14. Upon the principle that the *cestui que trust* is *in foro conscientiæ* entitled to the pernancy of the profits, he has been invested by the express language of some statutes, and by the equitable construction of others, with the various privileges conferred by the legislature upon the legal tenants of real estate.

Qualification of *cestui que trust* to be a juror.

15. By the Juries Act, 1825 (6 Geo. 4. c. 50), sect. 1, every man between the ages of 21 and 60, residing in any county in England, who shall have in his own name or *in trust for him* within the same county 10*l.* by the year, above reprises, in real estate, &c., &c., is qualified to serve as a *juror* (*c*).

Right of *cestui que trust* to vote at election for members of Parliament.

16. By the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), sect. 74, "no trustee of lands or tenements shall in any case have a right to vote in any such election (*i.e.* for a Member of Parliament), for or by reason of any trust estate therein, but the *cestui que trust* in actual possession, or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust" (*d*).

[Protector of the settlement.]

[17. The person entitled to the beneficial enjoyment of the rents and profits of settled property, under a settlement made *since* the Fines and Recoveries Act, 1833, is the protector of the settlement under sect. 22 of the Act, as *owner* of the prior estate, and not the trustees in whom the legal estate is vested;

[(*a*) *Wynne* v. *Humberston*, 27 Beav. 421.]

(*b*) *Cottam* v. *Eastern Counties Railway Company*, 1 J. & H. 243; *Goldney* v. *Bower*, cited Ib. 247. [Upon the general question as to the proper mode of custody of title-deeds by trustees, see *ante*, p. 328.]

(*c*) And see Co. Litt. 272 a, 272 b.

(*d*) See *Wallis* v. *Birks*, 5 L. R. C. P. 222; and see *ante*, p. 262.

and in a settlement made *before* the Act, if the estates are equitable the beneficial owner is also protector (*a*).]

Income and corpus distinguished.

18. The question frequently arises, both in construing Acts of Parliament which speak of a limited amount of *income*, and also in determining the relative rights of *tenants for life and remaindermen*, what is *income* and what is *corpus*, and it has been held that a tenant for life of a manor is entitled to the fines payable on all customary grants (*b*), or on admissions (*c*), and where leaseholds are annually renewable, the tenant for life of the reversion is entitled to the annual fines for renewal (*d*); [and where leaseholds for lives are perpetually renewable on the dropping of the lives, the tenant for life of the reversion is entitled to the heriots and fines for renewal, as they are of the nature of casual profits accruing during his tenancy for life (*e*); and so where money is paid as the consideration for his accepting the surrender of a lease (*f*); but not where the lease was granted by an equitable tenant for life under the Settled Land Acts (*g*).] So a tenant for life is entitled to underwood and thinnings of plantations in ordinary course (*h*), [or under a local usage which must have been in the contemplation of the testator (*i*)], and to rents and royalties payable under the lease of an open mine (*j*), [or a lease of unopened mines under a contract entered into by the testator (*k*)], or of a brickfield, whether the lease was granted by the testator or by the trustee of his will under a power in the will (*l*), and to the produce of gravel, loam, peat, or bog-earth got annually according to the usual custom (*m*). But a tenant for life is not entitled to trees in woodlands not cut periodically according to custom, though cut for the sake of improving the growth of the rest (*n*).

[Mines and timber.]

[19. Under the Settled Land Act, 1882, a tenant for life, whether impeachable for waste or not, can now grant mining leases of mines either opened or unopened, and is entitled if

[(*a*) *Re Dudson's Contract*, 8 Ch. D. (C.A.) 628; *Re Ainslie*, 51 L. T. N.S. 780; and see *ante*, p. 457.]

(*b*) *Earl Cowley* v. *Wellesley*, 35 Beav. 640; [*Re Medows*, (1898) 1 Ch. 300].

(*c*) *Earl Cowley* v. *Wellesley*, 35 Beav. 641.

(*d*) *Milles* v. *Milles*, 6 Ves. 761.

[(*e*) *Brigstocke* v. *Brigstocke*, 8 Ch. D. (C.A.) 357.]

[(*f*) *Re Hunloke's Settled Estates*, (1902) 1 Ch. 941.]

[(*g*) *Re Rodes*, (1909) 1 Ch. 815.]

(*h*) *Earl Cowley* v. *Wellesley*, 35 Beav. 635.

[(*i*) *Dashwood* v. *Magniac*, (1891) 3 Ch. (C.A.) 306.]

(*j*) *Earl Cowley* v. *Wellesley*, 35 Beav. 639.

[(*k*) *Re Kemeys-Tynte*, (1892) 2 Ch. 211.]

(*l*) *Earl Cowley* v. *Wellesley*, 35 Beav. 638.

(*m*) *S. C.*, 35 Beav. 639.

(*n*) *S. C.*, 35 Beav. 635; and see *ante*, p. 211.

impeachable for waste, to one fourth part of the rents, and if not impeachable for waste, to three fourth parts of the rents (*a*). And as a tenant for life, although impeachable for waste, has a right to continue the working of open mines, he will be entitled, if a lease is granted of such mines under the powers of the Act, to three-fourths of the rents (*b*). Under the same Act a tenant for life, impeachable for waste, may, on obtaining the consent of the trustees of the settlement, or an order of the Court, cut and sell timber, ripe and fit for cutting, and is entitled to one fourth part of the net proceeds, but the remaining three-fourths are to go as capital (*c*).

[Loss on business held in trust for persons successively.]

20. Where a business was held in trust for successive tenants for life, and remaindermen, and was carried on by a receiver and manager at a loss during the life of the first tenant for life, it was held that the loss must be made good out of the profits earned during the life of the next tenant for life, and not out of the corpus (*d*); but the adjustment of the relative rights of tenant for life and remainderman in such a case necessarily depends on the construction of the particular will (*e*).

[Shares.]

21. Under an ordinary bequest of shares, the tenant for life is entitled to the fruit of the shares in the shape of dividends duly declared during his life; but when a bonus dividend is declared [Bonus.] by a company out of accumulated profits, it is a question of fact, involving a consideration of the constitution of the company, and often very difficult to determine,] whether such bonus is to be regarded as capital or income, and where in such a case it appeared that the company had not paid or intended to pay any sum as dividend, but intended to appropriate the undivided profits as an increase of their capital, it was held that the tenant for life was not entitled to the bonus, but that it must be treated as capital (*f*). The mere fact that the profit is carried to a

[(*a*) Sects. 6, 11. Such leases may be granted, even though the remaindermen be to some extent prejudiced, if the provisions of s. 53 are complied with: *Re Aldam's Settled Estate*, (1902) 2 Ch. (C.A.) 46. And a building lease with a reservation of minerals may be granted under the Act by the tenant for life: *Re Gladstone*, (1900) 2 Ch. (C.A.) 101.]

[(*b*) *Re Chaytor*, (1900) 2 Ch. 804. As to the circumstances under which a mine contiguous to another is to be deemed a separate unopened mine, see *Re Maynard's Settled Estate*, (1899) 2 Ch. 347.]

[(*c*) Sect. 35.]

[(*d*) *Upton* v. *Brown*, 26 Ch. D. 588; but see *Gow* v. *Forster*, 26 Ch. D. 672, the decision in which seems to have turned on the wording of the will, and not on any general principle; and see *Re Millichamp*, 52 L. T. N.S. 758.]

[(*e*) See *Gow* v. *Forster*, 26 Ch. D. 672, 677; *Re Millichamp*, 52 L.T. N.S. 758.]

[(*f*) *Bouch* v. *Sproule*, 12 App. Cas. 385, and cases there cited; and see *Re Bramley*, 55 L. T. N.S. 145; *Re Alsbury*, 45 Ch. D. 237; *Re Northage*, 60 L. J. N.S. Ch. 488; 64 L. T. N.S.

reserve fund is not sufficient to show that it has been appropriated as capital (*a*); [but where a reserve fund, representing undistributed profits, was, after the liquidation of the company, returned to the shareholders as surplus capital, it was held to be corpus as between tenant for life and remainderman (*b*).

[New shares.] 22. Where new shares are allotted and paid for out of income, it must be remembered that any diminution in value of the old shares, consequent upon the issue of the new shares, is part of the consideration, and where new shares are allotted in lieu of dividend, the tenant for life is *primâ facie* entitled as income to so much only of the value of the new shares as represents the dividend declared (*c*).]

Succession duty. 23. The tenant for life of an estate must bear the expense of *accounts* necessary to be taken for the discharge of the *succession duty* payable by the tenant for life as successor (*d*), and must discharge the *rates* and *taxes* payable during his life (*e*).

Fencing. 24. The expenses of *fencing* newly acquired enclosures will fall upon the corpus (*f*).

Cestui que trust's possession of chattels. 25. Hitherto we have spoken of the *cestui que trust's* right to the pernancy of the profits in respect of *lands*. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy of the tenant for life, though left in the possession of the bankrupt by permission of the legal owner, for they are left with him *according to the title* (*g*); [and possession by the *cestui que trust* in accordance with the trust instrument is in law the possession of the

625, where a declaration of bonus dividend, and issue of new shares to the amount thereof, being regarded as separate transactions, the tenant for life was held entitled to the dividend. The true rule to be inferred from *Bouch* v. *Sproule* and other cases is that the tenant for life of shares in a company is entitled to all payments out of profits made by the company, unless they have been validly capitalised: *Re Piercy*, (1907) 1 Ch. 289.]

[(*a*) *Re Alsbury*, 45 Ch. D. 237, 247; commenting on *Bouch* v. *Sproule*, *ubi sup.*]

[(*b*) *Re Armitage*, (1893) 3 Ch. (C.A.) 337; and see *Re Taylor's Trusts*, (1905) 1 Ch. 734 (where a tenant for life was held not to be entitled to any part of the proceeds of sale of bonds on which a deficient amount of cumulative interest had been paid.)]

[(*c*) *Re Malam*, (1894) 3 Ch. 578.]

(*d*) *Earl Cowley* v. *Wellesley*, 35 Beav. 642.

(*e*) *Fountaine* v. *Pellet*, 1 Ves. jun. 337, see 342.

(*f*) *Earl Cowley* v. *Wellesley*, 35 Beav. 641.

(*g*) See *ante*, p. 272.

trustee, who can maintain an action against a wrongdoer for the conversion of the chattels (*a*).]

Household goods.

26. In a bequest to a person of the use of *household goods*, it seems the legatee may use them in his own or any other person's house, and either alone or promiscuously with other goods, or, it is said, may let them out to hire (*b*); but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire except together with the house itself (*c*). Of course the use of the chattels by the tenant for life does not enable him to *pawn* them beyond the extent of his own interest (*d*).

[Heirlooms.]

[27. By the Settled Land Act, 1882, sect. 37, a tenant for life may sell personal chattels settled as heirlooms, and the money arising by the sale is to be capital money under the Act, and to be dealt with accordingly, or it may be invested in the purchase of other chattels to be settled and held on the same trusts. But no sale or purchase of chattels under the section is to be made without an order of the Court (*e*).]

Stock in the funds.

28. Where the trust fund consists of *stock*, the *cestui que trust* is usually put into possession of the dividends by a *power of attorney* from the trustee to the *cestui que trust's bankers*, with a written authority from the trustee to the bankers to credit the *cestui que trust* with the dividends as and when received, by which arrangement the trustee is spared the trouble of repeated personal attendances at the Bank of England, and the entries in the books of the private bankers are sufficient evidence of the receipt. In cases where the *cestui que trust* is *tenant for life*, this course seems free from objection; but where his interest is one which may *determine in his lifetime*, some risk is incurred of the power of attorney and authority being acted upon by the bankers after the determination of the *cestui que trust's* estate; and it is conceived that the trustee would be liable to the other *cestuis que trust* for any misappropriation thus taking place. The trustee must be careful to see that the power of attorney extends only to the receipts of the *dividends*, and not to the *sale of the stock* itself; otherwise, if the bankers sell out the stock and the proceeds are misapplied, the trustee will be answerable (*f*).

[(*a*) *Barker* v. *Furlong*, (1891) 2 Ch. 172, citing *White* v. *Morris*, 11 C. B. 1015.]

(*b*) *Marshall* v. *Blew*, 2 Atk. 217.

(*c*) *Cadogan* v. *Kennet*, Cowp. 432; [and see *Re Brown's Will*, 27 Ch. D. 179].

(*d*) *Hoare* v. *Parker*, 2 T. R. 376.

[(*e*) As to this section, see *ante*, p. 690.]

(*f*) See *Sadler* v. *Lee*, 6 Beav. 324.

Secondly. Of the *jus disponendi.*

Cestui que trust's right of disposition of the legal estate.

1. The *cestui que trust* may call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs (*a*). If the trustee refuses to comply, and the *cestui que trust* institutes proceedings to compel him, the trustee will be visited with the costs (*b*), unless there was some reasonable ground for his refusal (*c*), or he acted *bona fide* under the advice of counsel (*d*); and the trustee has been made to pay costs, though the *cestui que trust*, instead of filing a *bill*, might have enforced a conveyance by the summary process of a *petition* (*e*). But a trustee has a right to be satisfied by the fullest evidence that the party requiring the conveyance is the exclusive *cestui que trust* (*f*); and a *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable: an equitable tenant in *tail*, for instance, cannot call for a conveyance of the legal *fee-simple* (*g*). And Lord Eldon was of opinion that a *cestui que trust* could not require the trustee to divest himself from time to time of *different parcels* of the trust estate; for the trustee had a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper" (*h*). And a trustee, like a mortgagee, cannot be called upon to convey the estate by any other words or description than that by which the conveyance was made to himself (*i*). And a trustee cannot be compelled to execute a conveyance containing inaccurate recitals; but where all the *cestuis que trust* are parties, he cannot insist

(*a*) *Payne* v. *Barker*, Sir G. Bridgm. Rep. 24. [A devisee of land since the Land Transfer Act, 1897, cannot call for a conveyance from the personal representative, but must be content with his assent: *Re Pix*, W. N. (1901) 165.]

(*b*) *Jones* v. *Lewis*, 1 Cox, 199; *Willis* v. *Hiscox*, 4 M. & Cr. 197; *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438; *Penfold* v. *Bouch*, 4 Hare, 271; *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *Palairet* v. *Carew*, 32 Beav. 565; and see *Campbell* v. *Home*, 1 Y. & C. C. C. 664.

(*c*) *Goodson* v. *Ellisson*, 3 Russ. 583; *Poole* v. *Pass*, 1 Beav. 600.

(*d*) *Angier* v. *Stannard*, 3 M. & K. 556; and see *Devey* v. *Thornton*, 9 Hare, 232; *Field* v. *Donoughmore*, 1 Dru. & War. 234; [*Stott* v. *Milne*, 25 Ch. D. (C.A.) 710; *Re Beddoe*, (1893) 1 Ch. (C.A.) 547].

(*e*) *Watts* v. *Turner*, 1 R. & M. 634.

(*f*) *Holford* v. *Phipps*, 3 Beav. 434; and see *Etchells* v. *Williamson*, W. N. 1869, p. 61.

(*g*) *Saunders* v. *Neville*, 2 Vern. 428. But though this point may have been mooted in the case and ruled as reported, yet the principal question in the cause was a different one, viz. whether under the circumstances the plaintiff was entitled to call for a conveyance of the legal estate even to him, and "the heirs of his body." See note by Raithby, correcting the text from the Reg. Book.

(*h*) *Goodson* v. *Ellisson*, 3 Russ. 594. But if the *cestuis que trust* of a fund, as tenant for life and remainderman, assign part of the fund, it is conceived that the trustee cannot refuse to transfer that part to the assignee. The owner of an aliquot share has a separate claim in respect of it: *Smith* v. *Snow*, 3 Mad. 10.

(*i*) *Goodson* v. *Ellisson*, *ubi sup.*

on the insertion of recitals against the wishes of his *cestuis que trust* (*a*); and a trustee in whom any property is vested which is liable to *succession duty*, must see that the duty is satisfied, or he becomes personally liable (*b*). Succession duty.

[2. Where property is disposed of by the beneficial owner under the provisions of the Settled Land Act, 1882, as by the 20th section he is empowered to convey the property for the estate or interest the subject of the settlement, and can therefore pass the legal estate (*c*), if comprised in the settlement, without the concurrence of the trustees, it is conceived that the trustees would not be compelled to join in the assurance.] [Under the Settled Land Act.]

3. A trustee for the *separate use* of a married woman with *restraint of anticipation*, holds upon a special trust during the coverture; but if the husband die, the trust for the separate use is suspended, and the *feme* has an absolute power of disposition, though on a future coverture the separate use and non-anticipation clause, if not prevented by previous disposition, would revive. The trustee, therefore, after the death of the husband, holds upon a simple trust for the *feme*, and is bound at her direction to convey the legal estate to her (*d*). Trustee for separate use.

4. It not infrequently happens that when property is held upon trust for a tenant for life, with a power of appointment among his children, and in default of appointment for the children, the trustee is called upon to make a conveyance by the joint direction of the parent and such of the children as are the appointees, and the trustee has a shrewd suspicion that *undue influence* has been used, or that there is an *underhand bargain* in derogation of the rights of the other children, who take nothing by the appointment. In these cases, if the nature of the transaction be such as to show on the face of it that there is good ground for suspicion, the trustee will, on refusing to convey, be protected by the Court, and be entitled to his costs (*e*). But, although it may be the duty of the trustee to make inquiry as to the *bonâ fides* of the transaction, yet, if he cannot prove any *mala fides*, the mere *possibility* of fraud or undue influence will Fraudulent appointments.

(*a*) *Hartley* v. *Burton*, 3 L. R. Ch. App. 365.

(*b*) 16 & 17 Vict. c. 51, s. 44; [and see the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), ss. 6, 12.]

[(*c*) As to the effect of a conveyance by a tenant for life who has incumbered his life estate, see *Re Sebright's Settled Estates*, 33 Ch. D. (C.A.) 429; and *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 342; 41 Ch. D. (C.A.) 375, 376.]

(*d*) *Buttanshaw* v. *Martin*, Johns. 89.

(*e*) *Hannah* v. *Hodgson*, 30 Beav. 19; *King* v. *King*, 1 De G. & J. 663. [As to the right of the donee of a power to release the power and so bring about a result which might well arouse suspicion, see *ante*, pp. 762, 763.]

not be sufficient, and if a trustee decline to convey without any better reason, he will have to bear the costs of a suit for compelling him, though he will still be entitled to his charges and expenses properly incurred, not being costs in the cause (*a*).

Inquiry into a collateral trust.

5. Trustees who are bound to make a conveyance of their trust estate, cannot justify their refusal to convey by alleging a duty to *inquire into another trust* recited in their trust deed, but which is wholly distinct from the trust in question (*b*).

Delivery of possession to remainderman.

6. Where the legal estate is vested in trustees for A. for life, with remainder to B., and on the death of A. application for a conveyance is made by B., the trustees sometimes object that they cannot convey until they have recovered all the *arrears of rent* that accrued in the lifetime of A. (*c*). In such a case the trustees are, at all events, bound to use due diligence, and must not from their *laches* postpone the rights of the remainderman. But the better course would be to give the trustees an *indemnity* on delivery of possession, or an *undertaking* to receive the arrears, and account for them to the tenant for life's estate.

Trustee's conveyance.

7. The 4th section of the Real Property Act, 1845 (8 & 9 Vict. c. 106), enacts that the word "*grant*" shall not imply any covenant in law except so far as the same may, by force of any Act of Parliament, imply a covenant; and therefore, whatever may have been the case formerly, a conveying trustee cannot now draw any liability upon himself by the use of the word grant *alone*. But, as to lands in *Yorkshire*, it must be remembered that the Yorkshire Registry Acts (*d*) gave the force of covenants for title to the combined words "*grant, bargain, and sell.*" And by the Lands Clauses Consolidation Act, 1845, the word "*grant*" in conveyances by *companies* within the provisions of the Act is made to carry with it the ordinary covenants for title (*e*).

[By the Conveyancing and Law of Property Act, 1881, the use of the word "grant" is rendered unnecessary for the conveyance of hereditaments, corporeal or incorporeal, whether in instruments before or after the commencement of the Act (*f*).]

(*a*) *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *Campbell* v. *Home*, 1 Y. & C. C. C. 664.

(*b*) *Palairet* v. *Carew*, 32 Beav. 564.

(*c*) See Bacon's Abridg. "Distress." This claim was made by the trustees in *Hogg* v. *Jones*, reported upon another point, 32 Beav. 45, and M.R. ordered delivery of possession to the remainderman, on his undertaking in effect to use due diligence in receiving the arrears and handing them over.

(*d*) 6 Anne, c. 35, ss. 30, 34; 8 G. 2. c. 6, s. 35. [Repealed as from the 1st January, 1885, by 47 & 48 Vict. c. 54.]

(*e*) 8 & 9 Vict. c. 18, s. 132.

[(*f*) 44 & 45 Vict. c. 41, s. 49.]

A series of equitable interests.

8. In general, in the simple trust, there are *no intermediate steps* of the *equitable interest*, so that if A. be trustee for B., who is trustee for C., A. holds in trust for C., and must convey the estate as C. directs (*a*). But if any special confidence or discretionary power be reposed in B., which requires him to have the legal estate, he may then call upon the original trustee to execute a transfer to himself (*b*). And if a fund be vested in trustees in trust for a *feme covert* for life for her separate use, with remainder upon such trusts as she may by will appoint, and she by will gives legacies, and disposes of the residue and appoints executors, the original trustees are bound to transfer the fund to the executors to be administered by them (*c*), [or to an administrator *cum testamento annexo*, even though the testatrix was a married woman who died before the coming into operation of the Married Women's Property Act, 1882 (*d*); and where the original trustees, instead of transferring the fund to the executors, paid it into Court under the Trustee Relief Act (*e*), they were made to pay the costs of the petition for getting the fund out of Court (*f*). If, however, the donee of a *special* power of appointment appoints the fund to trustees in trust for the objects of the power, the trustees so nominated are not necessarily entitled to call for a transfer of the fund (*g*), but the question must depend on the intention of the instrument creating the power, and if an intention is there shown that the trustees of that instrument shall administer, that intention must prevail; but the fact that provision is made for a sale by those trustees is not conclusive evidence of such an intention, as such provisions may be intended to be in aid of, and not to interfere with, the appointment by the donee of the power, and if so, then the trustees under the appointment are *primâ*

(*a*) *Head* v. *Lord Teynham*, 1 Cox, 57; and see —— v. *Walford*, 4 Russ. 372. [As to the effect of notice to B. in such a case, see *post*, p. 913.]

(*b*) *Wetherell* v. *Wilson*, 1 Keen, 86; *Cooper* v. *Thornton*, 3 B. C. C. 96, 186; *Woods* v. *Woods*, 1 M. & Cr. 409; *Angier* v. *Stannard*, 3 M. & K. 571; *Onslow* v. *Wallis*, 16 Sim. 483; 1 Mac. & G. 506; —— v. *Walford*, 4 Russ. 372; *Poole* v. *Pass*, 1 Beav. 600.

(*c*) *Re Philbrick's Trust*, 13 W. R. 570; and see *Hayes* v. *Oatley*, 14 L. R. Eq. 1.

[(*d*) *Re Peacock's Settlement*, (1902) 1 Ch. 552.]

[(*e*) Now replaced by s. 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), see *ante*, pp. 424 *et seq.*]

[(*f*) *Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. (C.A.) 281; but see as to this case, *Turner* v. *Hancock*, 20 Ch. D. (C.A.) 303.]

[(*g*) *Busk* v. *Aldam*, 19 L. R. Eq. 16; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 17; but see *Scotney* v. *Lomer*, 29 Ch. D. 535, where North, J., was of the opposite opinion. *Scotney* v. *Lomer* was affirmed on appeal, 31 Ch. D. (C.A.) 380, but on different grounds from those upon which North, J., based his judgment, and the Court of Appeal do not seem to have questioned the authority of *Busk* v. *Aldam*; and that case has since been followed by North, J., in *Re Tyssen*, (1894) 1 Ch. 56.]

facie the proper persons to administer (*a*). Thus where trustees of a settlement, having a general power of sale, were directed to hold upon trust "to pay and transfer" to the appointees under a special power, and the donee of the special power by his will appointed to trustees for sale and conversion upon complicated trusts, the trustees of the will were held to be the proper persons to sell the property, and call for a conveyance from the trustees of the settlement (*b*)].

Trustees for appointees.

9. Where trustees hold a fund *upon such trusts* as a person by an instrument to be executed in a particular manner may *appoint*, they must of course be careful in transferring it to the appointees to see that all the formalities attending the power have been duly observed, for if the execution of it be not regular, the trustees (except in those cases where Courts of Equity aid a defective execution) will be personally liable for the fund to the parties claiming in default of the execution of the power (*c*).

Costs.

10. The *costs* incurred by the trustee in relation to the conveyance must be paid by the *cestui que trust*, or, which is the same thing, must be discharged out of the trust estate.

SECTION II

OF THE CESTUI QUE TRUST'S ESTATE IN THE SPECIAL TRUST

Cestui que trust's estate in special trust.

1. This may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them (*d*).

Special trust may be converted into a simple trust.

2. If there be only one *cestui que trust*, or there be several *cestuis que trust*, and all of *one mind* (in each case *sui juris*), the specific execution may be stayed, and the *special* trust will then acquire the character of a *simple* trust; for whatever

[(*a*) *Re Paget*, (1898) 1 Ch. 290; referring to *Kenworthy* v. *Bate*, 6 Ves. 793, and *Cowx* v. *Foster*, 1 J. & H. 30; and see *Stephens* v. *Green*, (1895) 2 Ch. (C.A.) 148, *post*, p. 913.]

[(*b*) *Re Adams' Trustees and Frost's Contract*, (1907) 1 Ch. 695.]

(*c*) *Hopkins* v. *Myall*, 2 R. & M. 86; *Cocker* v. *Quayle*, 1 R. & M. 535; *Reid* v. *Thompson*, 2 Ir. Ch. Rep. 26.

(*d*) See *Deeth* v. *Hale*, 2 Moll. 317.

modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors. Thus, if a fund be given to trustees upon trust to accumulate until A. attains *twenty-four*, and then to transfer the gross amount to him, A., on attaining *twenty-one*, may, as the person exclusively interested, call for the immediate payment (*a*); [and a like principle is applicable where the legatees exclusively interested are charitable institutions (*b*).] So if real estate be devised with a direction that the devisees are not to have the enjoyment until they attain the age of *twenty-five years*, unless there be a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property until the age mentioned, but that some other person is to have the enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will the direction as to non-enjoyment, and give the property at once to the devisees as the absolute owners (*c*). So if a legacy be bequeathed to trustees upon trust to purchase an *annuity*, the intended annuitant, if *sui juris*, [or the legal personal representative of the annuitant, if deceased, (*d*),] may claim the legacy without going through the form of investment (*e*); and if a fund be vested in trustees in trust for the *personal* support, clothing, and maintenance of A., an adult, A. is exclusively entitled to the benefit of the fund, and if he become bankrupt, it passes to his trustee in bankruptcy (*f*), [and directions by a testator as to mode of enjoyment by a legatee exclusively interested will not

(*a*) *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115; Cr. & Ph. 240; and see *Curtis* v. *Lukin*, 5 Beav. 147; *Rocke* v. *Rocke*, 9 Beav. 66; *Magrath* v. *Morehead*, 12 L. R. Eq. 491.

[(*b*) *Harbin* v. *Masterman*, (1894) 2 Ch. (C.A.) 184; *S. C.* in H. L. *nom. Wharton* v. *Masterman*, (1895) A. C. 186.]

(*c*) *Gosling* v. *Gosling*, Johns. 265.

[(*d*) *Re Robbins*, (1907) 2 Ch. (C.A.) 8; *S. C.* (1906) 2 Ch. 648 (where the annuitant died before probate); *Re Brunning*, (1909) 1 Ch. 276 (where a payment had been made by the trustees to the annuitant).]

(*e*) *Dawson* v. *Hearn*, 1 R. & M. 606, and cases there cited; *Re Browne's Will*, 27 Beav. 324; [*Re Friend*, (1898) W. N. 26; and see *Re Couturier*, (1907) 1 Ch. 470].

(*f*) *Younghusband* v. *Gisborne*, 1 Coll. 400; [and see *Re Ashby*, (1892) 1 Q. B. 872, and *ante*, p. 111.]

preclude his right to payment of his legacy (*a*), and even an express contract by the *cestuis que trust* with the settlor and the trustees not to put an end to the special trust, will not prevent their subsequently determining the trust, if there is no other person interested in or entitled to insist on the enforcement of the contract (*b*).]

Land to be sold and proceeds paid to A. A. is equitable owner of the land.

3. To illustrate this subject further, where a conveyance had been made to trustees upon trust to sell, and with the proceeds to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee, and the daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements, the question was, whether the entail had been effectually barred; and Sir W. Grant said: "In the lands to be sold they (the daughters) had no interest, legal or equitable, *expressly* limited to them; but the equitable interest in those lands must have resided somewhere; the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a Court of Equity inquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land, to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out; so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct; *if there are also other purposes for which it is sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provide for them he may keep the estate unsold.* The daughters by electing to keep this estate have acquired the fee, and it was discharged of every trust to which it had been subject" (*c*).

Special trust proceeds till countermanded by the *cestui que trust*.

4. But *until* the *cestui que trust* or the joint *cestuis que trust* countermand the specific execution, the special trust will proceed; as if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A.

[(*a*) *Re Johnston*, (1894) 3 Ch. 204; *Re Skinner's Trusts*, 1 Jo. & H. 102.]

[(*b*) *Re Hale and Clarke*, 55 L. J. N.S. Ch. 550; 34 W. R. 624; 55 L. T. N.S. 151.]

(*c*) *Pearson* v. *Lane*, 17 Ves. 101.

until he discharge the character impressed upon it by electing to take it as land (*a*).

Accounts.

5. As an incident to the beneficial enjoyment by the *cestui que trust* of his interest, he has a right to call upon the trustee for accurate *information* as to the state of the trust (*b*). Thus, in a trust for sale and payment of debts, the party entitled subject to the trust may say to the trustee, What estates have you sold? What is the amount of the moneys raised? What debts have been paid? &c. (*c*). It is therefore the bounden duty of the trustee to keep clear and distinct *accounts* of the property he administers, and he exposes himself to great risks by the omission (*d*). It is the *first duty*, observed Sir T. Plumer, of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect they all stand in the same situation), to be *constantly ready with his accounts* (*e*).

Sanction of co-trustee's accounts.

6. Not only is a trustee bound to render accurate accounts, but if he stand by and sanction the rendering of *improper accounts* by a defaulting trustee, he becomes liable himself for the misrepresentation (*f*).

Legatee.

7. A *legatee*, [though his interest be contingent or reversionary,] as being a quasi *cestui que trust*, is entitled to have a satisfactory explanation of the state of the testator's *assets* and an inspection of the *accounts* (*g*), but not to require a copy of the accounts at

(*a*) See *Walter* v. *Maunde*, 19 Ves. 429.

(*b*) *Springett* v. *Dashwood*, 2 Giff. 521; *Walker* v. *Symonds*, 3 Sw. 58, *per* Lord Eldon; *Newton* v. *Askew*, 11 Beav. 152; *Gray* v. *Haig*, 20 Beav. 219; *Burrows* v. *Walls*, 5 De G. M. & G. 253; [*Re Dartnall*, (1895) 1 Ch. (C.A.) 474].

(*c*) *Clarke* v. *Ormonde*, Jac. 120, *per* Lord Eldon.

(*d*) *Freeman* v. *Fairlie*, 3 Mer. 43, *per* Lord Eldon.

(*e*) *Pearse* v. *Green*, 1 J. & W. 140; and see *Hardwicke* v. *Vernon*, 14 Ves. 510; *White* v. *Lincoln*, 8 Ves. 363; *Turner* v. *Corney*, 5 Beav. 515; *Anon.* 4 Mad. 273; *Jeffreys* v. *Marshall*, 23 L. T. N.S. 548; 19 W. R. 94; *Underwood* v. *Trower*, W. N. 1867, p. 83; [In an action for money had and received the agent is, since the Judicature Acts, chargeable with interest from the date of refusal by him to pay; *Harsant* v. *Blaine*, 56 L. J. Q. B. 511.] As to the costs of suits arising out of a refusal to render accounts, see *Springett* v. *Dashwood*, 2 Giff. 521, and the cases there cited; *Kemp* v. *Burn*, 4 Giff. 348; *Wroe* v. *Seed*, 4 Giff. 425; *Payne* v. *Evans*, 18 L. R. Eq. 356; *Heugh* v. *Scard*, 33 L. T. N.S. 659; 24 W. R. 51; *Jeffreys* v. *Marshall*, *ubi sup.*; [*Re Skinner*, (1904) 1 Ch. 289]. In taking accounts against the trustee after a long lapse of time, the Court will show every indulgence it can to the trustee for enabling him to clear his accounts; *Banks* v. *Cartwright*, 15 W. R. 417. [And trustees (though one of them be a solicitor), on being requested by a person who claims to be interested as a *cestui que trust* to furnish accounts, are entitled to demand that they shall be guaranteed against the expense; *Re Bosworth*, 58 L. J. Ch. 432. As to audit of accounts under the Public Trustee Act, 1906 (6 Edw. VII. c. 55) see *ante*, Chap. XXIII., p. 705.]

(*f*) *Horton* v. *Brocklehurst* (No. 2), 29 Beav. 504; [and see *Brazier* v. *Camp*, 63 L. J. Q. B. 237; Seton, 6th ed. pp. 1130, 1131].

(*g*) *Ottley* v. *Gilby*, 8 Beav. 602; [*Re Tillott*, (1892) 1 Ch. 86; *Re Dartnall*, (1895) 1 Ch. (C.A.) 474].

the expense of the estate (*a*). [Where the fund is invested in consols, the legatee is entitled to an authority from the trustee to the Bank of England enabling the legatee to ascertain for himself whether there is any charging order or notice in lieu of distringas affecting the fund (*b*).

[Notice of terms of condition.]

Where a legacy is given upon a condition, an executor, who takes a beneficial interest on the breach of the condition, owes no duty to the legatee to give him notice of the terms of the condition (*c*).]

(*a*) *Ottley* v. *Gilby*, 8 Beav. 602.

[(*b*) *Re Tillott*, (1892) 1 Ch. 86.]

[(*c*) *Re Lewis*, (1904) 2 Ch. (C.A.) 656, considering dictum of Lord Hardwicke in *Chauncy* v. *Graydon*, 2 Atk. 616, 619; and see *Re Mackay*, (1906) 1 Ch. 25.]

CHAPTER XXVIII

PROPERTIES OF THE CESTUI QUE TRUST'S ESTATE

We shall next enter upon the properties of the *cestui que trust's* estate as affected by the *acts of the cestui que trust*, or by *operation of law.*

SECTION I

OF ASSIGNMENT

Under this head we shall treat: *First.* Of the *assignable quality* of an equitable interest; *Secondly.* Of the rule that the assignee of an equity is *bound by all the equities* affecting it; *Thirdly.* Of *Notice* to the trustee; and, *Fourthly.* Of the rule *Qui prior est tempore potior est jure.*

First. Of the *assignable quality* of an equitable interest.

General rule.

1. It may be laid down as a general rule that an equitable interest may be assigned, though it be a mere possibility (*a*), and that either with or without the intervention of the trustee (*b*). And the assignee of the *cestui que trust* may call upon the trustee to clothe the equitable interest with the legal estate, and on his refusal may by suit compel a conveyance without making the assignor a party (*c*). But a mere right to sue a trustee for an alleged breach of trust, and which right is not annexed to any transfer of the trust estate, or any part thereof, is not assignable, or at least will not pass by a deed for 5s. consideration so as to enable the nominal purchaser to sue in respect of it (*d*).

(*a*) *Courthope* v. *Heyman*, Cart. 25; *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 29; *Goring* v. *Bickerstaff*, 1 Ch. Ca. 8; *Cornbury* v. *Middleton*, Ib. 211, *per* Judges Wyld and Rainsford; *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir T. Clarke; 21 Vin. Ab. 516, pl. 1; *Smith* v. *Grant*, W. N. 1874, pp. 78, 120.

(*b*) *Philips* v. *Brydges*, 3 Ves. 127, *per* Lord Alvanley.

(*c*) *Goodson* v. *Ellisson*, 3 Russ. 583; *Jones* v. *Farrell*, 1 De G. & J. 208; [and see *Bence* v. *Shearman*, (1898) 2 Ch. (C.A.) 582].

(*d*) *Hill* v. *Boyle*, 4 L. R. Eq. 260; [but see *Re Park Gate Wagon Co.*, 17 Ch. D. (C.A.) 234].

Restraint of alienation.

2. A restriction *against alienation* (except in the case of a married woman) will have no more effect in equitable than in legal interests, but will be rejected as contravening the policy of the law (*a*); but in a limitation to the separate use of a *feme covert*, in order to give full effect to the estate itself, a clause against anticipation *during the coverture* is allowed (*b*).

Equitable interest in land.

3. As to *lands*, the transfer of an equitable interest might before the Statute of Frauds have been made by parol, but by the 9th section of that Act all grants and assignments of any trust or confidence are required to be in *writing signed by the party granting or assigning the same*, or else are utterly void. A writing, therefore, is all that is necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates.

8 & 9 Vict. c. 106.

4. By the Real Property Act, 1845 (*c*), it is enacted that an assignment of a chattel interest in lands not being copyhold shall be void *at law* unless made by *deed*, but it is conceived that this enactment affects *legal* interests only, and that the legislature cannot have intended to require a more solemn instrument for the assignment of an equitable chattel interest than for the conveyance of the equitable fee.

Equitable entail.

5. The power of an equitable *tenant in tail* to dispose of the equitable fee-simple has been differently viewed at different periods. At common law all inheritable estates were in fee-simple, and it was the statute *de donis* (*d*) that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, and in default of issue to B., would have been construed a fee-simple conditional, and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred. After much fluctuation (*e*), it was finally established by Lord Hardwicke, that as entails with expectant remainders had gained a footing

(*a*) *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 R. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 429; *Rochford* v. *Hackman*, 9 Hare, 480; [*Re Fitzgerald*, (1903) 1 Ch. 933, 940; (1904) 1 Ch. (C.A.) 573, 593.]

(*b*) See *post*, Chap. XXVIII., s. 6.

(*c*) 8 & 9 Vict. c. 106, s. 3.

(*d*) 13 Ed. 1. st. 1, c. 1.

(*e*) See an account of the fluctuation in 3rd. ed. 601-604.

in trusts by analogy to the statute *de donis*, a Court of Equity was bound to follow the analogy throughout, and therefore that a tenant in tail of a trust could not bar his issue, or the remainderman, except by an assurance analogous to one which would have been a bar had the entail been of the legal estate.

Summary of the law before the Fines and Recoveries Act.

6. The doctrines of equity, as finally settled upon this principle, were as follows:—

a. For a good *equitable recovery* there must have been an *equitable tenant to the præcipe*, that is the beneficial owner (*a*) of the first equitable freehold must necessarily have concurred (*b*).

β. An equitable recovery was a bar to *equitable* only, and not to *legal* remainders (*c*).

γ. An equitable recovery was not vitiated by the circumstance that the *equitable tenant to the præcipe* had also the *legal freehold* (*d*).

δ. An *equitable remainder* was well barred, though it was vested in a person who *had also the legal fee* (*e*).

Fines and Recoveries Act.

7. At the present day, by the operation of the Fines and Recoveries Act, 1833 (*f*), the *equitable* tenant in tail may dispose of (*g*) the equitable fee by the same modes of assurance and with the same formalities as if he were tenant in tail of the *legal* estate.

Enrolment of disentailing deed of copyholds.

8. A deed to bar the entail of an equitable interest in *copyholds* must, though not so *expressly* enacted, be entered on the Court Rolls *within six calendar months* from the date thereof (*h*).

Estates *pur autre vie.*

9. An estate *pur autre vie* was not even at law within the statute *de donis;* but a *quasi* entail (an estate of the most anomalous character) was introduced into legal estates, and was thence imported into trusts. The present doctrine of the Court appears to be this:—

a. If *quasi* tenant in tail in equity, with remainder over, be in *possession*, he may at any time, by a simple conveyance, dispose of the absolute interest, as against the issue and the

(*a*) *Penny* v. *Allen*, 7 De G. M. & G. 425.

(*b*) *North* v. *Williams*, 2 Ch. Ca. 64, *per* Lord Nottingham; *Highway* v. *Banner*, 1 B. C. C. 586; and see *Wickham* v. *Wickham*, 18 Ves. 418.

(*c*) *Philips* v. *Brydges*, 3 Ves. 128, *per* Lord Alvanley; *Salvin* v. *Thornton*, Amb. 585; *S. C.*, 1 B. C. C. 73, note.

(*d*) *Philips* v. *Brydges*, 3 Ves. 126, *per* Lord Alvanley; *Marwood* v. *Turner*, 3 P. W. 171; *Goodrick* v. *Brown*, 2 Ch. Ca. 49; *S. C.*, Freem. 180.

(*e*) *Philips* v. *Brydges*, 3 Ves. 120; *Robinson* v. *Comyns*, Cas. *t.* Talb. 164; *S. C.*, 1 Atk. 172.

(*f*) 3 & 4 Will. 4. c. 74.

[(*g*) A mere declaration of trust is not such a disposition as will bar an estate tail under the Act; *Green* v. *Paterson*, 32 Ch. D. (C.A.) 95; *Carter* v. *Carter*, (1896) 1 Ch. 62.]

(*h*) *Honywood* v. *Foster*, 30 Beav. (No. 1), 1; [*Green* v. *Paterson*, 32 Ch. D. (C.A.) 95; *Gibbons* v. *Snape*, 1 De G. & Sm. 621].

remainderman, and may even bind them in equity by his contract.

β. But if *quasi* tenant in tail be in *remainder* after a prior estate under the same settlement, he must have the consent of the tenant for life or other precedent freeholder, as otherwise, though he may bind his issue, he cannot destroy the remainder.

γ. If lands held *pur autre vie* be limited to or in trust for A. and the heirs of his body, with remainder over, the entirety of the estate is vested in A., and the issue and the remainderman stand in the light of mere special occupants, that is, they have no title *jure suo* to any present interest, but merely take the estate by devolution where the owner has made no disposition.

δ. A limitation in *quasi* entail of an estate *pur autre vie* has been commonly assimilated to an estate in fee-conditional; but the natures of the two estates are not to be confounded. The tenant of a fee-conditional can only aliene after issue born, but tenant in *quasi* entail *pur autre vie* may dispose absolutely as above without reference to the fact of there being issue or not (*a*).

Assignee bound by all equities.

Secondly. The *assignee* of an *equity* is bound by all the *equities* affecting it (*b*).

1. In order to understand the limits of the rule, it will be necessary before entering upon the cases to make a few preliminary remarks.

Application of rule to *choses in action.*

If A. be possessed of a legal *chose in action* (*c*), as if he be obligee of a bond, and assign it in equity for valuable consideration, here at the time of the assignment no equity existed in A.; and yet, as this case is confessedly within the operation of the rule, the maxim might be more accurately expressed by saying that the owner of an equity by assignment is bound by all the equities affecting what is assigned.

Exception as to conflicting equities of persons claiming under assignor.

Again, if A., having a debt due to him, or being entitled to an

(*a*) See the law upon this subject collected by Lord St Leonards in *Allen* v. *Allen*, 1 Conn. & Laws. 427; 2 Dru. & War. 307; and see *Edwards* v. *Champion*, 1 Eq. Rep. 419; *Betty* v. *Humphreys*, 9 I. R. Eq. 332; *Batteste* v. *Maunsell*, 10 I. R. Eq. 97, 314; [*Re Barber's Settled Estates*, 18 Ch. D. 624; *Blackhall* v. *Gibson*, 2 L. R. Ir. 49].

[(*b*) A right of set-off subsisting between the assignor and the person against whom the equity is enforceable, being a right not attaching to the equity, but personal to the parties, will not affect the assignee; *Beresford* v. *Chambers*, 5 Ir. Eq. R. 482; *Burrough* v. *Moss*, 10 B. & C. 558; *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(*c*) *Choses in action* are now made assignable if notice in writing be given to the debtor or trustee, [but they are expressly made subject in the hands of the assignee to the subsisting equities]. See the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 6; *post*, p. 919.

equitable interest, charges it in favour of B., the equity which remains in A. is the debt or equitable interest subject to the charge. If, therefore, A. afterwards assign the same subject matter to C., it might be thought that C. could take nothing more than the interest of A. subject to the charge. This, however, is not the case, for the priorities of B. and C. will be regulated by the better or inferior equities of the respective parties. The rule does not mean that the assignee of an equity shall be bound by all the equities affecting the assignor as between him and previous purchasers or incumbrancers under the assignor, but only by such as affect the assignor as between himself or his debtor and any persons not claiming under himself. The assignor can indisputably only give what he himself has, but as between two persons claiming through him a conflict of right may well arise. This will be better understood by the instances exemplifying the rule, to which we now proceed.

Transfer of equitable mortgage.

2. A person taking an equitable mortgage, with *notice of a prior charge*, transfers his mortgage to another who has no notice of the prior charge. The assignee is bound by the equity with which the assignor was affected (*a*).

Transfer of equitable interest obtained by fraud.

3. A. mortgages or sells an equitable interest to B., which mortgage or sale is *fraudulently* obtained, and then B. transfers to C. Here C., whether he has notice of the fraud or not, takes subject to A.'s equity to have the mortgage or sale set aside (*b*).

Trustee or *cestui que trust* debtor to trust estate.

4. A trustee or executor has a beneficial interest, but is a *debtor to the trust or executorship*, and then assigns his beneficial interest to a stranger. The assignee cannot claim the beneficial interest without discharging the debt (*c*). And a similar equity attaches upon an assignee from a *cestui que trust* who is a debtor to the estate (*d*), [or whose interest is liable to be impounded by reason of his complicity in a breach of trust (*e*). And where at

(*a*) *Ford* v. *White*, 16 Beav. 120.

(*b*) *Cockell* v. *Taylor*, 15 Beav. 103; *Barnard* v. *Hunter*, 2 Jur. N.S. 1213; *Daubeny* v. *Cockburn*, 1 Mer. 626, see 638; *Parker* v. *Clarke*, 30 Beav. 54; [but as to the last case, see *Bickerton* v. *Walker*, 31 Ch. D. (C.A.) 151; *French* v. *Hope*, 56 L. J. Ch. 363; *Powell* v. *Browne*, (1907) W. N. 152, 228; and see *Perham* v. *Kempster*, (1907) 1 Ch. 373, where a bank, knowing that a customer, with whom they were dealing, was a trustee mortgaging trust estate, were subject to a prior equity, notwithstanding their subsequent acquisition of the legal estate].

(*c*) *Clack* v. *Holland*, 19 Beav. 262; *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Cole* v. *Muddle*, 10 Hare, 186; *Wilkins* v. *Sibley*, 4 Giff. 442.

(*d*) *Priddy* v. *Rose*, 3 Mer. 86; *Willes* v. *Greenhill* (No. 1), 29 Beav. 376; *Stephens* v. *Venables* (No. 1), 30 Beav. 625; [*Corr* v. *Corr*, 3 L. R. Ir. 435; *Re Moore*, 45 L. T. N.S. 466; *Re Langham*, 74 L. T. N.S. 611].

[(*e*) *Bolton* v. *Curre*, (1895) 1 Ch. 544.]

the time of the assignment of a legacy, a suit by the legatee was pending to recall the probate, and the suit failed with costs to be paid by the legatee, the executor was allowed to set off the costs against the legacy, notwithstanding the assignment (*a*). But where assets have been set apart and appropriated by executors to meet a trust legacy, no part of the appropriated assets can be retained or impounded to satisfy a debt from the legatee to the general estate of the testator, for the right of the legatee or his assignee is against the holders of the appropriated assets in their character of trustees, while the liability of the legatee is to them in their capacity of executors (*b*).] And where the assignor is a trustee or executor it is immaterial whether the debt to the trust or executorship was contracted before or *after the assignment* of the beneficial interest (*c*), [or whether the beneficial interest of the trustee devolved on him directly under the trust instrument or was derived subsequently by purchase or otherwise (*d*)]. But if the assignor did not *become trustee or executor* until *after the date of the assignment* there is no equity against the assignee in respect of a subsequently incurred debt (*e*). If the assignor be a *cestui que trust*, the trustee *after notice* cannot *create* any new charge or right of set-off, *as between him and the assignor*, so as to bind the assignee (*f*).

[The right to consolidate mortgages being an equitable right, the assignee of a mortgagee can have no better right to consolidate than his assignor (*g*).]

Debtor and creditor.

5. A *creditor* transfers his debt to a person who has no notice that part of it has been discharged. The assignee is, nevertheless, bound by the state of the accounts at the time of the assignment (*h*); and when the assignee does not give notice to the

[(*a*) *Re Knapman*, 18 Ch. D. 300; *Re Jones*, (1897) 2 Ch. 190. It must be borne in mind that the right to set off costs against costs in another matter or against a money payment is, in general, subject to the solicitor's lien, and can only be exercised with his consent, or where his interest will not be prejudiced by the exercise; *Ex parte Cleland*, 2 L. R. Ch. App. 808; *Re Harrald*, 52 L. J. N.S. Ch. 435; 48 L. T. N.S. 352; 53 L. J. N.S. Ch. 505; 51 L. T. N.S. 441. But the lien does not interfere with the right to set off costs payable out of a trust fund against a debt due to that trust, the lien of the solicitor being itself subject to this equitable right of set-off; *Re Harrald*, 53 L. J. N.S. Ch. 505; 51 L. T. N.S. 441.]

[(*b*) *Ballard* v. *Marsden*, 14 Ch. D. 374.]

(*c*) *Hopkins* v. *Gowan*, 1 Moll. 561; *Morris* v. *Livie*, 1 Y. & C. C. C. 380; [*Re Hervey*, 61 L. T. N.S. 429].

[(*d*) *Doering* v. *Doering*, 42 Ch. D. 203; *Jacubs* v. *Rylance*, 17 L. R. Eq. 341; and see *Re Carew*, (1896) 1 Ch. 527, 535; *S. C.*, (1896) 2 Ch. (C.A.) 311.]

(*e*) *Irby* v. *Irby*, 35 Beav. 632.

(*f*) *Stephens* v. *Venables* (No. 1), 30 Beav. 625.

[(*g*) *Bird* v. *Wenn*, 33 Ch. D. 215.]

(*h*) *Ord* v. *White*, 3 Beav. 357; *Smith* v. *Parkes*, 16 Beav. 115; *Rolt* v. *White*, 31 Beav. 520; *Re Natal Investment Company*, 3 L. R. Ch. App.

debtor of the assignment so as to dissolve the relation of debtor and creditor between the original parties, the assignee is compelled to allow the payments to the creditor subsequent to the assignment (*a*); [unless the knowledge of another is to be imputed to the debtor, as it may be where he has put himself entirely in the hands of his solicitor (*b*)].

Set-off as affecting assignee.

6. It was decided in the case of *Cavendish* v. *Geaves* (*c*), that the assignee is liable to the same equities as his assignor, not merely in respect of the actual *payments*, but in regard to the right of *set-off*. In that case Sir John Romilly, M.R., laid down the following canons:—

Cavendish v. Geaves.

α. If a *customer* borrow money from his *bankers*, and give a *bond* to secure it, and afterwards, on his general banking account, a balance is due to the customer from the same bankers, who are obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

β. If the firm be altered, and the *bond* be assigned by the original obligees to the *new firm*, and *notice* of that assignment be given to the *debtor* (*d*), and if, after this, a balance be due to him from the new firm (the assignees of the bond), then no right of set-off exists at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond and the debtors on the general account are different persons; but as, in equity, the persons entitled to the bond and the debtors on the general account are the same persons, a right of set-off exists in equity, and the customer is entitled to set off the balance due to him against the bond debt due from him.

γ. If the *bond* be assigned to *strangers*, and *no notice* of that assignment be given to the original *debtor* (the obligor of the bond), then his rights remain the same. Thus, if the assignment be made to the stranger before any alteration of the firm, then the right of set-off still remains at law, where the obligees of the bond and the debtors on the general account are the same persons, and in equity also, if the matter of account be brought into Chancery, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

355; [and see *Government of Newfoundland* v. *Newfoundland Railway Company*, 13 App. Cas. 199, 210, 213].

(*a*) *Norrish* v. *Marshall*, 5 Mad. 475; and see *Stocks* v. *Dobson*, 4 De G. M. & G. 11; [*Turner* v. *Smith*, (1901) 1 Ch. 213].

[(*b*) *Dixon* v. *Winch*, (1900) 1 Ch. (C.A.) 736.]

(*c*) 24 Beav. 163, see 173; [see *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98].

(*d*) See as to this the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

δ. If *notice* of the assignment be given to the original *debtor*, no right of set-off exists in equity for the *balance subsequently due* by the bankers to the obligor; because the persons entitled to the bond are, as the obligor knew, different persons from the debtors to him on the general account, with whom he had continued to deal.

ε. If the assignment of the bond be made to the *new firm*, with *notice* to the *obligor*, the new firm would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

ζ. If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor, the *bond* be assigned by the new firm to *strangers*, and *no notice* of that second assignment given to the obligor, then the rights of set-off still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it; because the assignees of the bond take it subject to all the equities which affect the assignors.

Set-off recognised in equity previously to statutes of set-off.

7. It may be observed that the right of *set-off*, though unknown to the common law, was recognised in equity previously to the statutory enactments on the subject. Thus where A. and B. were mutually indebted by *simple contract* dealings, and B. died also indebted to others by simple contract and to one by *specialty*, in such a case, though it was contended that if A. could set off his own debt, he was to that extent paid in full, in preference to the other simple contract creditors, and at the expense of the specialty creditor, yet a Court of Equity presumed an agreement between A. and B. that such set-off should be had, and as B. in his lifetime could not have recovered from A. without the set-off, it held that the personal representative of B. was bound by the same equity (*a*).

Autre droit.

8. The equity jurisdiction in respect of set-off has been chiefly, if not entirely, confined to cases where one or both of the cross demands is or are of an equitable kind (*b*). And it

(*a*) *Downam* v. *Matthews*, Pr. Ch. 580; see *Jeffs* v. *Wood*, 2 P. W. 128; and see 2 G. 2. c. 22; 8 G. 2. c. 24, s. 5; [since repealed by 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49; and see the Judicature Act, 1873 (36 & 37 Vict. c. 66), and Rules of Supreme Court, Ord. XIX. Rule 3].

(*b*) See now the Judicature Act, 1873 (36 & 37 Vict. c. 66), and Rules of Supreme Court, Ord. XIX. Rule 3. [Where a trustee sues to recover a debt due to him as such, the defendant is entitled to plead that the *cestui que trust* is indebted to him in a sum for unliquidated damages exceeding the amount of the claim: *Bankes* v. *Jarvis*, (1903) 1 K. B. 549.]

seems to be established that set-off will not be allowed, even in equity, where the mutual demands are between the parties in different rights; as if A. give a legacy to B., and appoint C. his executor, or executor and residuary legatee, B. may sue C. for the legacy, and C. cannot set off a debt owing by B. to C. not as executor, but in C.'s own right (*a*). [So where an executorship account was kept with bankers in the joint names of two executors, one of whom was the residuary legatee under the will, but the executorship account had never been wound up so as to make the executors mere trustees for the residuary legatee, on the failure of the bankers it was held that the residuary legatee was not entitled to have another account of his own with the bankers, which was overdrawn, set off against the executorship account; for "the case could not be brought within the rules of equitable set-off or mutual credit, unless the residuary legatee was so much the person beneficially interested that a Court of Equity, without any terms or further inquiry, would have obliged the other executor to transfer the account into the name of the residuary legatee alone" (*b*). But where, at the time of the failure of a bank, two accounts were standing in the name of a customer, one his private account, which was overdrawn, and the other an executorship account, and the executor, who was also residuary legatee, had assets in his hand, independently of the balance at the bank, more than sufficient to satisfy the pecuniary legacies and all other claims against the estate, it was held that he was entitled to set off the one account against the other, on the ground that there was a clear legal right of set-off, and that there were no such equities affecting the money standing to the executorship account as to prevent the customer from treating the balance as a fund to which he

(*a*) *Whitaker* v. *Rush*, Amb. 407; *Bishop* v. *Church*, 3 Atk. 691; *Freeman* v. *Lomas*, 9 Hare, 109; *Chapman* v. *Derby*, 2 Vern. 117; *Medlicott* v. *Bower*, 1 Ves. 207; *Middleton* v. *Pollock*, 20 L. R. Eq. 29; [*Ballard* v. *Marsden*, 14 Ch. D. 374]. *Cherry* v. *Boultbee*, 4 M. & Cr. 442, which was questioned by V. C. Wigram in *Freeman* v. *Lomas*, 9 Hare, 115, turned on the facts that C. F. Boultbee never proved her debt so as to make it a liability of the assignees, and that T. Boultbee never claimed his certificate, so that his liability remained, and thus the legacy was owing to one set of persons, viz. the assignees, and the debt *from* another, viz. T. Boultbee. In *Bell* v. *Bell*, 17 Sim. 127, it does not appear whether the creditor had or not proved under the insolvency. If he had, the case could not be supported on the authority of *Cherry* v. *Boultbee*, but if he had not it must stand or fall with that case. It is believed that in a subsequent stage of the suit, V. C. Kindersley decided the other way. See also *Stammers* v. *Elliott*, 3 L. R. Ch. App. 195; *Taylor* v. *Taylor*, 20 L. R. Eq. 159; [*Re Hodgson*, 9 Ch. D. 673, in which case *Cherry* v. *Boultbee* was followed].

[(*b*) *Ex parte Morier*, 12 Ch. D. (C.A.) 491.]

was beneficially as well as legally entitled (*a*). And an executor or administrator] may make such admissions in an action as to preclude himself from objecting to the set-off at the hearing (*b*). And an admission of assets for payment of the legacy will not be material, for the right of set-off exists independently of the amount of the assets (*c*). A legacy to one of the members of a firm may be set off against a debt owing by the firm (*d*), [and money due to a testator from a specific legatee of the profits of the testator's business may be retained by the executors out of such profits received by them pursuant to the will (*e*).] But a legacy bequeathed in reversion to a married woman, and assigned by her under the Married Women's Reversionary Interests Act, 1857 (*f*), cannot, when it becomes payable, be retained by the executor as against the assignee in discharge of a debt by the husband to the testator's estate (*g*).

[Debt statute-barred.]

[And although the remedy for the debt is barred by the Statute of Limitations, yet as the debt itself still subsists, the executor may deduct the amount of it from the legacy (*h*), as he is entitled to say that the legatee has so much of the assets already in his hands, and consequently is satisfied *pro tanto* (*i*); and in a recent case, where residuary *real* and personal estate was given to trustees and executors upon trusts for conversion, payment of debts, and distribution of the proceeds, it was held that beneficiaries, from whom debts, statute-barred, were owing to the testator, were bound to bring the debts into account as against their shares of the proceeds of sale of the residuary real estate, as well as of the personal estate, and it was said that the

[(*a*) *Bailey* v. *Finch*, 7 L. R. Q. B. 34; and see the observations on this case in *Ex parte Morier*, 12 Ch. D. (C.A.) 491, where Cotton, L.J., at p. 502, observed: "As I understand it, the principle of the decision (whether right or wrong) was this, not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account against which claims were likely to be made, and that if claims had at the time of the bankruptcy been made against it, they would have prevented the legal right of set-off from arising, but that, as it was not shown there were any equitable claims against the fund, the legal right of set-off could not be interfered with."]

(*b*) *Jones* v. *Mossop*, 9 Hare, 568, 576.

(*c*) *Freeman* v. *Lomas*, 9 Hare, 109.

(*d*) *Smith* v. *Smith*, 3 Giff. 263, see 270.

[(*e*) *Re Taylor*, (1894) 1 Ch. 671.]

(*f*) 20 & 21 Vict. c. 57, see *ante*, p. 21.

(*g*) *Re Batchelor*, 16 L. R. Eq. 481; [and see *Re Briant*, 39 Ch. D. 471].

[(*h*) *Courtenay* v. *Williams*, 3 Ha. 539; *S. C.* on appeal, 15 L. J. N.S. Ch. 204; *Coates* v. *Coates*, 10 Jur. N.S. 532; 33 Beav. 249; *Gee* v. *Liddell*, 35 Beav. 629; *Re Cordwell*, 20 L. R. Eq. 644; and see *Cherry* v. *Boultbee*, 4 My. & Cr. 442; *Re Watson*, (1896) 1 Ch. 925; *Re Lloyd*, (1903) 1 Ch. (C.A.) 385, 401.]

[(*i*) *Courtenay* v. *Williams*, 15 L. J. N.S. Ch. 208.]

principle to be deduced from the authorities was that a person who owes an estate money, that is, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without making the contribution which completes it (*a*). But the principle was held inapplicable as to freehold and leasehold properties specifically given to the beneficiaries (*b*); nor does the principle apply so as to entitle executors to the benefit of a statute-barred debt as against a person who is claiming a legal right to damages against the testator's estate (*c*), nor unless the legal relation of debtor and creditor subsists (*d*).

[Debt due by testator and debt due to executor.]

A mortgagee who, on realising his security after the death of the mortgagor, had a surplus in his hands after paying himself the mortgage debt, was held not to be entitled, as against the executor of the mortgagor, to retain such surplus in satisfaction of an unsecured debt owing to him by the mortgagor (*e*); and North, J., in so deciding, said that there was ample authority for the proposition, that "there can be no set-off between a debt due by a testator and a debt accruing to his executor."

A right to damages against an assignor which does not ripen into a debt until after his assignment of a debt due to him, cannot be set off against such debt (*f*); and a debt due from a liquidating debtor who has not obtained his discharge, cannot, during three years from the close of the liquidation, be set off against a legacy bequeathed to him (*g*); and executors are not entitled to retain a share of residue as against future instalments of a debt payable by the legatee of the share to the testator (*h*).

[Bankruptcy of debtor or creditor.]

Where a legatee becomes bankrupt after the death of the testator, the executors, not having proved in the bankruptcy, may retain out of his legacy the amount paid by them in respect of a liability incurred by the testator as surety for the legatee (*i*), but it would seem that there can be no such retainer so long as the

[(*a*) *Re Akerman*, (1891) 3 Ch. 212, *per* Kekewich, J.; and see *Re Taylor*, (1894) 1 Ch. 671; *Re Goy & Co.*, [1900] 2 Ch. 149, 153; *Re Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743; *Re Rhodesia Goldfields*, (1910) 1 Ch. 239.]

[(*b*) *Re Akerman*, *sup.*; and see *Re Taylor*, *sup.*]

[(*c*) *Dingle* v. *Coppen*, (1899) 1 Ch. 726.]

[(*d*) *Re Bruce*, (1908) 2 Ch. (C.A.) 682, where a legatee, entitled to a share of residue under a will, was held not bound to bring into account the amount of a statute-barred debt due to the estate from a testatrix of whom he was sole residuary legatee and also an executor.]

[(*e*) *Re Gregson*, 36 Ch. D. 223.]

[(*f*) *Ex parte Theys*, 22 Ch. D. 122; 25 Ch. D. (C.A.) 587; *Re Goy & Co.*, (1900) 2 Ch. 149, 153; *Re Brown & Gregory*, (1904) 1 Ch. 627, 631.]

[(*g*) *Re Rees*, 60 L. T. N.S. 260; and see *Re Smith*, 22 Ch. D. 586.]

[(*h*) *Re Abrahams*, (1908) 2 Ch. 69.]

[(*i*) *Re Watson*, (1896) 1 Ch. 925.]

principal creditor remains unpaid (*a*). A person who owes a debt to a bankrupt at the time of his bankruptcy and has no right of set-off, cannot acquire such a right by taking an assignment of another debt due to a creditor of the bankrupt (*b*); nor can a creditor who has at the time of the debtor's bankruptcy no right of set-off, acquire such a right by any subsequent transaction (*c*). And where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy (*d*).

[Purchaser completing bankrupt's contract without notice of bankruptcy.]

9. Where a bankrupt before adjudication contracted to sell leasehold property, and received a deposit in respect of the purchase-money, and after the adjudication, but before the purchaser had any notice of any act of bankruptcy, received the balance of the purchase-money from the purchaser, it was held that the trustee in bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying him the purchase-money. The equity of the purchaser under the contract was to have the property conveyed to him upon payment of the purchase-money to the person to whom the property belonged; and it was the purchaser's misfortune if he paid the money to a person who had ceased to be the owner of the property (*e*).

[Trustees holding on separate trusts.]

10. Where a policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed binding the policy in the hands of the trustees, but it was expressly provided that nothing in the settlement should vest in the trustees any bonus, and H. obtained possession of and misappropriated part of the trust funds, it was held, in an action by the executrix of H. to recover bonuses received by the trustees after the death of H., that the trustees held the bonuses under a resulting trust independently of the settlement, and could not retain them against the losses incurred in respect of the funds misappropriated by H., and that as the claim of the executrix was in respect of money which was never payable to H. personally, but only after his death, while the claim of the trustees was for money due from him in his lifetime, there was no right of set-off on the footing of mutual debts (*f*).

[(*a*) *Re Binns*, (1896) 2 Ch. 584.]

[(*b*) *Per* Lord Selborne, L.C., *Ex parte Theys*, 25 Ch. D. 592.]

[(*c*) *Re Gillespie*, 14 Q. B. D. 963.]

[(*d*) *Re Gillespie*; *Ex parte Reid*, 14 Q. B. D. 963; 33 W. R. 707.]

[(*e*) *Ex parte Rabbidge*, 8 Ch. D. (C.A.) 367.]

[(*f*) *Hallett* v. *Hallett*, 13 Ch. D. 232; and see *Rees* v. *Watts*, 11 Exch. 410; *Newell* v. *National Provincial Bank of England*, 1 C. P. D. 496.]

11. Shares in joint stock and other companies, being by various statutes made transferable at law, rest upon a different footing from ordinary *choses in action* (*a*), and a *bonâ fide* transferee for value of such shares who has completed his legal title to them by registration or otherwise, or, *semble*, who has fulfilled all necessary conditions to give him as between himself and the company "a present, absolute, unconditional right to have the transfer registered, before the company is informed of the existence of a better title" (*b*), will not be bound by the equities which affected the transferor (*c*), but until the transferee has thus acquired the full status of a shareholder (or, *semble*, its equivalent as above indicated), a prior equitable title will prevail against him (*d*); and of course even the full legal title will not avail if it is acquired with notice of a prior equitable title (*e*). [Shares in companies.]

12. In the case of securities issued by companies, the following rules seem to apply— [Securities issued by companies.]

(1) Where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*.

(2) If the security be legally transferable, such an irregularity, and *a fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice.

[(*a*) The question whether shares are *choses in action* was considered but not decided in *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, 439; *S. C.*, 30 Ch. D. (C.A.) 261, where it was held that shares in an incorporated company, whether *choses in action* or not, were things in action within the meaning of the Bankruptcy Act, 1883, s. 44, sub-s. iii.]

[(*b*) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29, *per* Lord Selborne. In applying this principle the difficulty would seem to be to ascertain the point of time at which the transferee acquires the right indicated. By the Companies Act, 1862, s. 22, shares are "capable of being transferred in manner provided by the regulations of the company," so that in many cases the solution of the question will turn upon the construction of the company's articles of association, see *Moore* v. *North Western Bank*, (1891) 2 Ch. 599, 603, and cases there cited; *Ireland* v. *Hart*, (1902) 1 Ch. 522.]

[(*c*) *Société Générale de Paris* v. *Walker*, *ubi sup.*; *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North Western Bank*, *ubi sup.*; *Briggs* v. *Massey*, 42 L. T. N.S. 49; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, distinguishing *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *Collis* v. *Hibernian Bank*, 31 L. R. Ir. 261; *Rearden* v. *Provincial Bank*, (1896) 1 I. R. 532. That knowledge of the existence of debentures which are a mere floating security is not equivalent to notice of an assignment, see *Biggerstaff* v. *Rowatt's Wharf Co.*, (1896) 2 Ch. (C.A.) 93. As to the general law upon the subject (which it is beyond the scope of this work to enter upon) see Lindley on Companies, 6th ed., p. 652, *et seq.*, and Buckley on Companies, 8th ed. p. 517.]

[(*d*) See *Powell* v. *London and Provincial Bank*, (1893) 2 Ch. 555, 562.]

[(*e*) *Nanney* v. *Morgan*, 37 Ch. D. 346; *Dodds* v. *Hills*, 2 H. & M. 424.]

(3) Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity.

(4) Nor can such an equity be set up against an equitable transferee of a security, purporting on the face of it to be legally transferable, who has taken an equitable transfer *bonâ fide* and without notice from a transferor who, by reason of notice of the irregularity, could not have enforced the security. But in this case the transferee can only recover the amount actually advanced or given by him upon the transfer (*a*).]

Thirdly. Of *Notice* to the trustee.

Notice.

1. As between *assignor and assignee* notice to the trustee is not necessary for the completion of an assignment (*b*), even though the assignment be voluntary (*c*). Nor is notice necessary for the purpose of making the assignment effectual as against subsequent volunteers (*d*), or as against persons claiming only a *general equity* under the assignor, such as a judgment creditor who obtains a charging order (*e*), or a garnishee order under Order XLV. (*f*), or equitable execution by the appointment of a receiver subject to existing incumbrances (*g*). But the omission of notice may be followed by very dangerous consequences by the operation of the

[(*a*) *Per* Kay, J., *Re Romford Canal Company*, 24 Ch. D. 85, 92; *Fountaine* v. *Carmarthen Railway Company*, 5 L. R. Eq. 316; *Webb* v. *Commissioners of Herne Bay*, 5 L. R. Q. B. 642; *Re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Re Blakely Ordnance Company*, 3 L. R. Ch. App. 154; *Dickson* v. *Swansea Vale Railway Company*, 4 L. R. Q. B. 44; *Higgs* v. *Northern Assam Tea Co.*, 4 L. R. Ex. 387.]

(*b*) *Burn* v. *Carvalho*, 4 M. & Cr. 702; *Bell* v. *London and North Western Railway Company*, 15 Beav. 552; *Dufaur* v. *Professional Life Assurance Company*, 25 Beav. 599; *Re Lowe's Settlement*, 30 Beav. 95; [*Gorringe* v. *Irwell India Rubber and Gutta Percha Works*, 34 Ch. D. (C.A.) 128].

(*c*) *Donaldson* v. *Donaldson*, Kay, 711.

(*d*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289; *Re Webb's Policy*, 36 L. J. N.S. Ch. 341.

(*e*) *Scott* v. *Hastings*, 4 K. &. J. 633; [*Pickering* v. *Ilfracombe Railway Co.*, 3 L. R. C. P. 235; *Robinson* v. *Nesbitt*, Ib. 264; *Gill* v. *Continental Gas Co.*, 7 L. R. Ex. 332; *Punchard* v. *Tomkins*, 31 W. R. 286; *Re Bell*, 54 L. T. N.S. 370; *Re Leavesley*, (1891) 2 Ch. 1].

[(*f*) *Re General Horticultural Co.*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 38 Ch. D. (C.A.) 238; *Re Marquis of Anglesey*, (1903) 2 Ch. 727; but as to the effect of a Scotch arrestment, which is equivalent to assignment with notice, see *Re Queensland Mercantile Co.*, (1891) 1 Ch. 536; (1892) 1 Ch. (C.A.) 219; and that notice of an action pending as to the subject matter of the assignment is equivalent to notice of a solicitor's right to a lien under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, see *Cole* v. *Eley*, (1894) 2 Q. B. 180; Ib. (C.A.) 350; *Faithful* v. *Ewen*, 7 Ch. D. 495.]

[(*g*) *Arden* v. *Arden*, 29 Ch. D. 702.]

reputed ownership clause under the bankrupt laws (*a*), or the acquisition of priority by subsequent purchasers or incumbrancers. And if the title be a derivative one, and not one that appears upon the face of the instrument creating the settlement, the trustee may, having neither express nor constructive notice, pay upon the footing of the original title, and in that case he cannot be made to pay over again to the assignee under the derivative title (*b*).

Priority of charge from priority of notice,

2. If the owner of an equitable interest in money or stock, or generally of any *chose in action*, assign it to A., who gives no notice of the transfer to the trustee or debtor, and then for valuable consideration assigns it over again to B., who having had no notice of the prior assignment when he advanced his money, gives notice of his own assignment to the trustee or debtor, in this case B. has priority over A. That a purchaser's notice will secure to him this advantage of priority has been only settled in modern times. In *Cooper* v. *Fynmore* (*c*), Sir T. Plumer, V.C., decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shown as, in a Court of Equity, would amount to fraud; but in *Dearle* v. *Hall* (*d*), and *Loveridge* v. *Cooper* (*e*), nine years after, his Honour, when Master of the Rolls, came to a contrary conclusion, and delivered a very elaborate argument that notice *would* gain priority. His Honour's judgments were affirmed on appeal (*f*), and the doctrine, [whatever may be the difficulty of defining the precise principle upon which it is based (*g*)], has been recognised in numerous subsequent cases (*h*).

Dearle v. Hall.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. [See *ante*, p. 271; and see *Ex parte Arkwright*, 3 Mont. D. & De G. 129; *Bartlett* v. *Bartlett*, 1 De G. & J. 127; *Re Webb's Policy*, 36 L.J.N.S. Ch. 341; *Daniel* v. *Freeman*, 11 I. R. Eq. 233, 638; *Re Irving*, 7 Ch. D. 419, where it was held that an equitable assignment created a trust for the assignee and so took the case out of the order and disposition clause: *Re Power*, 11 L. R. Ir. 93; *Rutter* v. *Everett*, (1895) 2 Ch. 872, where it was held that under a mortgage of book debts neither the appointment of a receiver by the mortgagee nor a like appointment by the Court was sufficient to take the case out of the clause, unless followed, within a reasonable time, by notice to the debtors.]

(*b*) *Cothay* v. *Sydenham*, 2 B. C. C. 391; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91; [and see *Re Lord Southampton's Estate*, *Banfather's Claim*, 16 Ch. D. 178; *Re Lord Southampton's Estate*, *Roper's Claim*, 50 L. J. N.S. Ch. 155].

(*c*) 3 Russ. 60; A. D. 1814.

(*d*) 3 Russ. 1; A. D. 1823.

(*e*) Ib. 30.

(*f*) Ib. 38, 48.

[(*g*) See *Ward* v. *Duncombe*, (1893) A. C. 369, *per* Lord Macnaghten; *S. C.*, *Re Wyatt*, (1892) 1 Ch. 188, 206, *per* Fry, L.J.; *Lloyds' Bank* v. *Pearson*, (1901) 1 Ch. 865.]

(*h*) *Hutton* v. *Sandys*, 1 Younge, 602, see 607; *Smith* v. *Smith*, 2 Cr. & M. 231; *Foster* v. *Blackstone*, 1 M. & K. 297, see 307; [*Ward* v. *Duncombe*, *sup.*; *Mack* v. *Postle*, (1894) 2 Ch. 449; *Stephens* v. *Green*, (1895) 2 Ch. (C.A.) 148; *Re Wasdale*, (1899) 1 Ch. 163; *Lloyds' Bank* v. *Pearson*, *sup.*]. For the principles upon which Sir T. Plumer proceeded, see 3 Russ. pp. 12-14, 20-22.

[Application of rule.]

[3. The rule thus established applies where the owner of the equitable interest has died after making an assignment, and his *legal personal representative* has made a subsequent assignment of the interest to a purchaser for value, without notice of the prior assignment (*a*). But the priority is only gained so far as regards the particular fund as to which notice is given, and if the assignment deals with two distinct funds, and the notice relates only to one of them, the priority gained by the notice will be confined to such fund (*b*).]

As against trustees in bankruptcy.

And this rule as to gaining priority by notice has been held to prevail not only as between two purchasers for value, but also as between a purchaser for value and the assignees of a bankrupt neglecting to give notice; as, if A. being entitled to an equitable interest become bankrupt, and then assign it to a purchaser for valuable consideration without notice of the bankruptcy, who serves notice on the trustee, the purchaser gains priority over the assignees who gave no notice (*c*). In a case, however, arising under the Bankruptcy Act of 1849, it was held that an assignment, after bankruptcy, to an assignee who gave notice to the trustee before the assignees in bankruptcy, could not prevail against the title of the latter (*d*); [and in a subsequent case (*e*), where the same view was adopted by the Court of Appeal, L. J. Baggallay held that the 141st section of the Act of 1849, which governed the case, applied equally to all bankruptcies under the Act of 1861]. The judgment of the Court was grounded on the strong negative words in the Act (*f*); but similar words occur in the original Bankrupt Act of James I. (*g*), and the principle of the former decisions was that, as regards *equitable interests*, the Act can pass nothing more than the fullest assignment which the bankrupt could have made, and that *assignees by operation of law* cannot in a Court of Equity be viewed as under less obligation to give notice than a *particular assignee*, who, generally speaking, is more favoured. It would seem that the rule as to

[(*a*) *Re Freshfield's Trust*, 11 Ch. D. 198; *Montefiore* v. *Guedalla*, (1903) 2 Ch. (C.A.) 26, where the first assignment was a "Ketubah" or contract in Morocco by way of settlement.]

[(*b*) *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. (C.A.) 460.]

(*c*) *Re Barr's Trusts*, 4 K. & J. 219; *Re Atkinson*, 4 De G. & Sm. 548; 2 De G. M. & G. 140; *Re Russell's Policy Trusts*, 15 L. R. Eq. 26; [*Palmer* v. *Locke*, 18 Ch. D. (C.A.) 381; *Re Stone's Will*, W. N. (1893) p. 50]; and see *post*, p. 917.

(*d*) *Re Mary Coombe's Will*, 1 Giff. 91.

[(*e*) *Re Bright's Settlement*, 13 Ch. D. (C.A.) 413; see the observations on this case in *Palmer* v. *Locke*, 18 Ch. D. (C.A.) 381, and in *Re Jakeman's Trusts*, 23 Ch. D. 344; and see Robson on Bankruptcy, p. 421.]

(*f*) "And after such appointment (*i.e.* of assignees) neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same," &c.; 12 & 13 Vict. c. 106, s. 141.

(*g*) 1 Jac. 1. c. 15, s. 13.

notice cannot be applied as against assignees in bankruptcy where the subject matter of assignment is a *debt which was recoverable at law* by the bankrupt, since in that case the *legal title* vests in the assignees.

[As against incumbrancers under assignments antecedent to the bankruptcy, the trustee in bankruptcy, being only statutory assignee of the bankrupt's *choses in action* subject to existing equities, cannot obtain priority by giving notice (*a*). [Notice by trustee in bankruptcy does not give priority.]

4. A solicitor having a lien for costs on a policy of insurance in his possession, is under no obligation to give any notice of his lien to the insurance company, for the fact of his having possession of the document is notice to all the world of the only fact (viz. possession) necessary to raise the lien, and he has no right to convert the insurance office into trustees for him, but merely the negative right of retention of the document. A subsequent assignee of the policy who has given notice will accordingly not gain priority (*b*). [Solicitor's lien.]

5. As respects the shares of companies registered under the Companies Act, 1862, it is provided by the 30th section of that Act that no notice of any trust expressed, implied, or constructive shall be entered on the register (*c*), and accordingly it has been held that the principle of *Dearle* v. *Hall* (*d*) does not apply to such shares as between the company and a person having an equitable title (*e*). The course which the assignee of an equitable interest in such shares should adopt for his protection is to serve a notice in lieu of *distringas* on the company under the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 5, and Order XLVI. of the Rules of the Supreme Court, which will prevent any legal transfer being made of the shares without notice to the equitable assignee, and will give him an opportunity to obtain an order restraining the transfer (*f*). [Shares in companies.]

It must not, however, be assumed that the directors of a company may safely ignore a notice given to them, and allow shares, which are to their knowledge affected by equitable rights, to be fraudulently transferred so as to destroy such rights. For if knowledge of the fraud can be brought home to the directors they would be liable as parties to the fraud; and in the opinion

[(*a*) *Re Wallis*, (1902) 1 K. B. 719.]

[(*b*) *West of England Bank* v. *Batchelor*, 51 L. J. N.S. Ch. 199; 46 L. T. N.S. 132; 30 W. R. 364.]

[(*c*) As to registration of trusts in which the public trustee is acting, see *ante*, Chap. XXIII. p. 707.]

[(*d*) 3 Russ. 1.]

[(*e*) *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. (C.A.) 424; *S. C. nomine Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 30, *per* Lord Selborne; and see *Roots* v. *Williamson*, 38 Ch. D. 485; *Simpson* v. *Molson's Bank*, (1895) A. C. 270.]

[(*f*) See *post*, Chap. XXXIII. s. 1.]

of Cotton, L.J., "where directors are asked to register a transfer, which from circumstances in fact known to them at the time would be in violation of the rights of others, they cannot either safely to themselves or without disregard of their duty register the transfer without allowing time for inquiry and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer"; and in the opinion of Lindley, L.J., "a refusal by directors or an omission on their part to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register a transfer for such time as might be necessary to allow him to apply for a proper restraining order, would be *primâ facie* improper. Such conduct on the part of directors would be strong evidence of fraud" (*a*).

Thus where a shareholder deposited his share certificates as a security, and the depositees gave notice to the company, the notice was effectual to prevent the company from asserting a right of lien under their articles in respect of money which subsequently became due to them, as the depositees by giving the notice did not seek to affect the company with notice of a trust, but only in their capacity of traders with notice of the interest of the depositees (*b*); and where the directors had by the articles of the company powers in reference to the approval of transfers, and notice of an equitable title was given to them after a transfer was sent in, but before its approval, it was held that they were justified in refusing to proceed further with the transfer until the claimants should obtain the direction of the Court in an action, which they at once instituted (*c*).]

Purchase by a trustee without notice of prior charge by the *cestui que trust*.

6. If a *cestui que trust* charges his interest, but gives no notice to the trustees, or gives notice to one trustee, who dies, so that the notice falls to the ground (*d*), and then a trustee subsequently appointed, and having no notice of the charge, purchases from the *cestui que trust*, or takes a mortgage of his interest, such trustee stands in the position of an assignee, who, having no notice of

[(*a*) *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q.B. D. (C.A.) at pp. 445, 453. But see the observations of M.R., at p. 440.]

[(*b*) *Bradford Banking Co.* v. *Briggs & Co.*, 12 App. Cas. 29; 31 Ch. D. 19; and see *Rearden* v. *Provincial Bank*, (1896) 1 I. R. 532; and as to the nature and effect of such lien, see *Bank of Africa* v. *Salisbury Gold Mining Co.*, (1892) A. C. 281; *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.]

[(*c*) *Moore* v. *North Western Bank*, (1891) 2 Ch. 599, 604; and see *Ireland* v. *Hart*, (1902) 1 Ch. 522.]

[(*d*) But see observations of Lord Macnaghten in *Ward* v. *Duncombe*, (1893) A. C. 369.]

the prior charge and giving notice of his own charge, gains a priority (*a*).

Precautions in assignment of equitable interests.

7. There are two precautions which the purchaser of an equitable interest in *choses in action* should, for his security, never dispense with. *First*, he should make inquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance.

[Trustee not bound to answer inquiries.]

[The trustee, however, is under no equitable obligation to answer inquiries made by a person about to deal with his *cestui que trust*. Such a person can have no greater rights than the *cestui que trust* himself, and though it is the duty of a trustee to give his *cestui que trust* on demand information with respect to the mode in which the fund has been dealt with, and where it is (*b*), yet it is no part of his duty to tell his *cestui que trust* what incumbrances the *cestui que trust* has created, nor which of his incumbrancers have given notice of their respective rights. If the trustee thinks fit to answer the inquiry, he is not bound to do more than give an honest answer, that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he had said; but unless he does one or the other he will not, consistently with the decision of the House of Lords in *Derry* v. *Peek* (*c*), if he answers honestly, expose himself to liability (*d*).]

[Nor to do more than answer honestly.]

Secondly, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee

(*a*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 572.

[(*b*) See cases referred to, *ante*, p. 887, note (*g*).]

[(*c*) 14 App. Cas. 337.]

[(*d*) *Low* v. *Bouverie*, (1891) 3 Ch. (C.A.) 82, *per* Lindley, L.J. His lordship further observed that *Browne* v. *Savage* (4 Drew. 639) is no authority for the proposition that trustees are bound to answer such inquiries; that *Burrowes* v. *Lock* (10 Ves. 470), where the trustee was held liable for loss arising from his misrepresentation that the property was not incumbered, is to be supported as a decision on the ground of estoppel, and so regarded is wholly untouched by *Derry* v. *Peek;* and that *Slim* v. *Croucher* (1 De G. F. & J. 518), fraud on the part of the trustee being in that case negatived, was inconsistent with and therefore overruled by *Derry* v. *Peek;* see also *Ward* v. *Duncombe*, (1893) A. C. 369, 393. Where intending mortgagees of a trust fund induced a trustee to sign a memorandum that he had not received any notice of prior charge, but made statements leading him to believe (contrary to the fact) that he was signing with the approval of his solicitors, they could not rely upon the memorandum as against a prior charge, notice of which had been received but forgotten by the trustee; *Porter* v. *Moore*, (1904) 2 Ch. 367. As to information to be given by the public trustee, see *ante*, Chap. XXIII. p. 708.]

or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if, after such notice, he part with the fund to any person not having a prior claim (*a*).

Doctrine of priority by notice not applicable to real estate.

8. Between *choses in action* and *real estate* there is an observable distinction. As regards the former the purchaser knows the legal title is outstanding in a third person, and is therefore bound to give notice of his incumbrance; but in *lands* it often happens that the vendor professes to have the legal ownership in himself, whereas it afterwards appears that it was really vested in some stranger. If the purchaser be not cognisant of the outstanding legal estate, he cannot give notice of his interest, and therefore cannot be held to have forfeited his right by having neglected a precaution that was impossible. On the other hand, to hold that the doctrine of notice does not apply at all to real estate, renders any dealings with equitable interests therein needlessly dangerous. Thus, A. is entitled to an equitable interest, of which the legal estate is in B. upon trusts requiring B. to retain possession of the title-deeds, and not to part with the legal estate. A. conveys his interest to C., who makes no inquiries about incumbrances, and gives no notice to the trustee; A. afterwards, fraudulently concealing the previous assurance, conveys the same interest to D., who makes inquiries of the trustee respecting incumbrances, and gives him notice of his own charge. There seems no sound reason for postponing D., who has taken these precautions, to C., who has merely priority in point of time. It is, however, now settled that the incumbrances in such a case are not governed by the law of notice, but rank *primâ facie*, and in the absence of other controlling equities, in order of date (*b*).

Rule as to notice applicable to money charged on land.

However, the rule as to notice, though not applicable to estates in land, whether freehold or leasehold (*c*), applies when the

(*a*) *Hodgson* v. *Hodgson*, 2 Keen, 704; *Roberts* v. *Lloyd*, 2 Beav. 376; *Andrews* v. *Bousfield*, 10 Beav. 511.

(*b*) *Lee* v. *Howlett*, 2 K. & J. 531; *Wiltshire* v. *Rabbits*, 14 Sim. 76; and see *Wilmot* v. *Pike*, 5 Hare, 14; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 392; *Rochard* v. *Fulton*, 7 Ir. Eq. Rep. 131; *Rooper* v. *Harrison*, 2 K. & J. 86; *Prosser* v. *Rice*, 28 Beav. 68; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576; *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; [*Union Bank of London* v. *Kent*, 39 Ch. D. 238, 245; *Re Richards*, 45 Ch. D. 589; (and see *Hopkins* v. *Hemsworth*, (1898) 2 Ch. 347); *Ward* v. *Duncombe*, (1893) A. C. 369, 390; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231; *Re Baldwin's Estate*, (1903) 1 I. R. 339]. As to the effect of notice upon a transfer of railway shares, see *Dunster* v. *Lord Glengall*, 3 Ir. Ch. Rep. 47.

(*c*) *Wiltshire* v. *Rabbits*, 14 Sim. 76; [*Union Bank of London* v. *Kent*, 39 Ch. D. 238; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231].

subject matter is a sum of money to arise from a trust for sale of land (*a*), or which is charged upon land (*b*), [or a reversionary interest in the proceeds of land held upon trust for sale (*c*); but not to the case of a mortgage debt, for although such debt is a *chose in action*, yet where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty (*d*). Where a solicitor held a mortgage of land in his own name as trustee for a client, and deposited the mortgage deed by way of equitable security, the depositees gained no priority over the *cestui que trust* by giving notice to the mortgagors (*e*).

[*Secus*, a mortgage debt.]

9. Where the Court is administering an English trust fund settled by the will of an English testator, the rights of the claimants to the fund must be regulated by English law, and accordingly, an assignee who has given notice to the trustees will have priority over a previous assignee in New York who has not given notice, although notice is not material according to the law of the state of New York (*f*).]

[English law when applicable.]

10. A second incumbrancer who advances his money *without inquiry* as to the existence of previous charges, but afterwards, and before any notice given by the first incumbrancer, gives notice of his own security, obtains thereby priority (*g*). The reason is, that, in the case supposed, non-inquiry by the second incumbrancer is immaterial, since the answer to any inquiry would have been that there were no prior charges, whereas the absence of notice by the first incumbrancer works an *ex post facto* injury to the second, who, if informed at the time of giving his own notice of the existence of the earlier charge, would immediately have exerted himself to obtain repayment of his money (*h*).

Second incumbrancer giving notice, but making no inquiries.

11. If notice be given to *one of several* co-trustees, it is sufficient as against all subsequent incumbrancers *during the*

Notice to one of several co-trustees.

(*a*) *Lee* v. *Howlett*, 2 K. & J. 531; *The Consolidated Investment, &c., Company* v. *Riley*, 1 Giff. 371; *Foster* v. *Blackstone*, 1 M. & K. 297; 9 Bligh, N.S. 332; [*Arden* v. *Arden*, 29 Ch. D. 702].

(*b*) *Re Hughes' Trust*, 2 H. & M. 89; [*Daniel* v. *Freeman*, 11 I. R. Eq. 233, 638].

[(*c*) *Lloyds' Bank* v. *Pearson*, (1901) 1 Ch. 865.]

[(*d*) *Jones* v. *Gibbons*, 9 Ves. 407, 410; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. C.A. 231.]

[(*e*) *Re Richards*, 45 Ch. D. 589; and see *post*, p. 925.]

[(*f*) *Kelly* v. *Selwyn*, (1905) 1 Ch. 117.]

(*g*) *Foster* v. *Blackstone*, 1 M. & K. 297; *Foster* v. *Cockerell*, 9 Bligh, N.S. 376; *Timson* v. *Ramsbottom*, 2 Keen, 49; and see *Etty* v. *Bridges*, 2 Y. & C. C. C. 494; *Warburton* v. *Hill*, Kay, 478; [*Re Lake*, (1903) 1 K. B. 151].

(*h*) *Meux* v. *Bell*, 1 Hare, 86, 87.

lifetime of that trustee; for the subsequent incumbrancer should have made inquiry of *all* the trustees, and if he had done so he would [presumably] have come to a knowledge of the prior charge, so that *here* non-inquiry is material (*a*); [and where the one trustee to whom the notice has been given, on inquiry made by the subsequent incumbrancer, returns an evasive or unsatisfactory answer, not disclosing the existence of any prior incumbrance, the subsequent incumbrancer proceeds at his own risk (*b*)].

Death of the single trustee to whom notice was given.

If a prior incumbrancer content himself with giving notice to *one* of the trustees, and that trustee *dies,* and [previously to the death of the trustee a second incumbrancer has given notice of his assignment to all the trustees, the priority gained by the first incumbrancer is not lost by reason of the death (*c*); but it seems that if, after the death of the trustee, a second incumbrancer gives notice of his assignment to the then existing trustees], then, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer had no means in his power of detecting the fraud, the loss will fall on the person who has so far occasioned that he might have prevented it (*d*). [But the practical application of these principles is attended with difficulty (*e*).]

Inquiry by incoming trustees of outgoing trustees.

12. If there be two trustees, and notice be given to *both of them,* and then one dies and the other retires, and new trustees are appointed in the place of both, and the new trustees, having no notice of the charge, distribute the fund, the incumbrancer cannot hold the *new trustees liable* as for a misapplication on the

(*a*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Ex parte Rogers*, 8 De G. M. & G. 271; *Willes* v. *Greenhill* (No. 2), 29 Beav. 387; *S. C.*, 4 De G. F. & J. 147; and see *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Wise* v. *Wise*, 2 Jon. & Lat. 412.

[(*b*) *Ward* v. *Duncombe*, (1893) A. C. 369; *S. C.*, *Re Wyatt*, (1892) 1 Ch. (C.A.) 188.]

[(*c*) *Ward* v. *Duncombe*, (1893) A. C. 369; *S. C.*, *Re Wyatt*, (1892) 1 Ch. (C.A.) 188.]

(*d*) See *Meux* v. *Bell*, 1 Hare, 73; *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Timson* v. *Ramsbottom*, 2 Keen, 35; [*Re Hall*, 7 L. R. Ir. 180; *Freeman* v. *Laing*, (1899) 2 Ch. 355, 358; *Re Phillip's Trusts*, (1903) 1 Ch. 183]; but see *Willes* v. *Greenhill* (No. 2), 29 Beav. 387. [Where an option of purchase is given to a lessee by trustees, the terms of the instrument must be adhered to, and notice to one of the trustees will not necessarily be notice to all; *Sutcliffe* v. *Wardle*, 53 L. T. N.S. 329.]

[(*e*) The difficulty is well shown by the ingenious puzzle propounded in argument, and dealt with by the L.J. Fry in his judgment, in *Re Wyatt* (*sup.*). See also, as to the soundness of the principle last stated, the observations of Lord Macnaghten in the end of his judgment in *Ward* v. *Duncombe* (*sup.*). The case put seems to be analogous to that of judgment creditors, where one by omitting to re-register does not lose an existing priority, but is postponed to one who came on the register during the period of omission; see *Re Lord Kensington*, 29 Ch. D. 527.]

ground that, when appointed, they ought to have inquired of the retiring trustee whether he had notice of any charge, in which case it would have come to their knowledge (*a*).

Where the assignor or assignee is one of the trustees.

13. As the rule requiring notice is not only to prevent the trustees from parting with the fund, but also and more particularly to enable future purchasers to ascertain prior incumbrances, it has been held that where the *assignor*, the party beneficially interested, is also one of the trustees, the notice which he has is not sufficient, as it is so strongly his interest to suppress the assignment (*b*). But if the *assignee* be one of the trustees, the notice which *he* has is sufficient, for he will of course, for his own protection, take care to apprise future incumbrancers of the assignment to himself (*c*).

[A trustee having himself a charge upon the trust fund is not, in the absence of inquiry, bound to communicate that charge to a person giving him notice of a subsequent charge (*d*); but a trustee concealing his own prior charge would be narrowly watched by the Court, and it is conceived that if by his conduct he had led the subsequent incumbrancer to believe the fund to be unincumbered, he would lose his priority.]

Notice to *all* the trustees, and *all* dying.

14. If an incumbrancer may, by giving notice to one trustee, complete his title for the time, and yet afterwards, by the death of the trustee, be displaced (*e*), [it has been thought] that if notice be sent to *all* the trustees, and they *all* die, a second incumbrancer, who gives notice to the succeeding trustees, will gain priority, notice properly given at the time being held not to make an absolute title, but one liable to be defeated by an alteration of circumstances (*f*); [but it has recently been decided that if notice is given to *all* the trustees, the priority thus gained will not be lost by reason of subsequent changes in the trusteeship, and that the assignee who has given such notice is not, for the purpose of preserving priority, bound to renew the notice on any change of trustees (*g*). Nevertheless, for the purpose of protection,

(*a*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; [and see *Hallows* v. *Lloyd*, 39 Ch. D. 686, *ante*, p. 832].

[(*b*) *Lloyds' Bank* v. *Pearson*, (1901) 1 Ch. 865; following *Browne* v. *Savage*, 4 Drew. 635.]

(*c*) *Browne* v. *Savage*, 4 Drew. 635; *Willes* v. *Greenhill*, (No. 1), 29 Beav. 376; *S. C.* (No. 2), 29 Beav. 391; [*Newman* v. *Newman*, 28 Ch. D. 674].

[(*d*) *Re Lewer*, 4 Ch. D. 101; 5 Ch. D. (C.A.) 61.]

[(*e*) See *ante*, p. 910.]

(*f*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; and see *Meux* v. *Bell*, 1 Hare, 97; but see *Etty* v. *Bridges*, 2 Y. & C. C. C. 492; *Browne* v. *Savage*, 4 Drew. 635; *Re Durand's Trusts*, 8 W. R. 33.

[(*g*) *Re Wasdale*, (1899) 1 Ch. 163; and see *Freeman* v. *Laing*, (1899) 2 Ch. 355, 358; *Re Phillip's Trusts*, (1903) 1 Ch. 183, 187.]

in many cases] an incumbrancer would do well not only to give notice to *all* the trustees in the first instance, but to watch as well as he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a set of trustees of whom there is not at least *one* who has notice of his charge.

Time of giving notice.

15. Notice of an equitable incumbrance ought to be given to the trustees as early as possible, but if delayed for any length of time, it will be equally efficacious, provided no notice of any other charge has been served in the interval (*a*). Therefore, if the owner of an equitable interest, who has given no notice to the trustees, contract for the sale of it, the purchaser cannot object to the title on the ground of no notice having been given, unless he can show some intermediate incumbrance; but it is the vendor's duty, by pointing out who have been the trustees from time to time, to furnish full means to the purchaser of inquiring whether or no any such charge has been created (*b*).

Notice to a person *about* to become a trustee.

16. Notice to a person who is *not actual trustee at the time*, but who may and probably will become such, confers no right to priority. Thus, where A. had a first charge, and B. the second charge, on the proceeds to arise from the sale of an officer's commission; and B. first, and then A., gave notice of their respective charges to the army agent of the regiment; but both notices preceded the time when the army agent first actually assumed the character of trustee; it was held that A. retained his priority (*c*). [Where an officer retires under the Regulation of the Forces Act, 1871 (*d*), the amount payable on his retirement, though previously lodged with the army agents and entered in their books under the officer's name, cannot be affected by notice of an incumbrance created by him until after his retirement is gazetted (*e*). But as soon as the retirement is gazetted, the amount lodged becomes the money of the retiring officer in the hands of the army agents, and is liable to set-off in respect of any moneys owing by the officer to the army agents (*f*).]

[Charge on commission of officer in army.]

(*a*) *Meux* v. *Bell*, 1 Hare, 86, *per* Sir J. Wigram; *Browne* v. *Savage*, 5 Jur. N.S. 1020; and see *Stocks* v. *Dobson*, 4 De G. M. & G. 17.

(*b*) *Hobson* v. *Bell*, 2 Beav. 17.

(*c*) *Addison* v. *Cox*, 8 L. R. Ch. App. 76; *Buller* v. *Plunkett*, 1 J. & H. 441; *Webster* v. *Webster*, 31 Beav. 393; *Somerset* v. *Cox*, 33 Beav. 634; [*Roxburghe* v. *Cox*, 17 Ch. D. (C.A.) 520;] and see *Calisher* v. *Forbes*, 7 L. R. Ch. App. 109; *Yates* v. *Cox*, 17 W. R. 20; [*Re Dallas*, (1904) 2 Ch. (C.A.) 385, where a like principle was applied as between incumbrancers on the legacy of a sole executor who had renounced probate, priorities being governed by the dates of notice to the administrator; *Re Kinahan's Trusts*, (1907) 1 I. R. 321].

[(*d*) 34 & 35 Vict. c. 86.]

[(*e*) *Johnstone* v. *Cox*, 16 Ch. D. 571; 19 Ch. D. (C.A.) 17.]

[(*f*) *Roxburghe* v. *Cox*, 17 Ch. D. (C.A.) 520; and see *Webb* v. *Smith*, 30 Ch. D. (C.A.) 192.]

Cases as to such charges no exception from general rule.

17. These cases do not disturb the great principle that an equitable assignment is complete, if notice be given to the person by whom payment of the assigned debt is to be made, whether that person be himself liable, or is merely charged with the duty of making the payment; and it is not material whether the right to receive the money and the consequent obligation to pay is at the time when the notice is given absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation at the time when notice reaches him to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied. The cases on the sales of commissions turn upon the fact that the notice was given to a mere *possible* agent before he was an *actual* agent,—before the time when he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question (*a*).

Notice as between volunteers.

18. The doctrine of priority by notice applies only in favour of *purchasers;* for as between two *volunteers* notice is not necessary, but *qui prior est tempore potior est jure,* whether the first assignee did or did not give notice (*b*).

Simultaneous notices.

19. Where two or more notices are served simultaneously, the incumbrances rank according to their respective dates (*c*).

[To whom notice should be given.]

[20. In considering to what persons notice ought to be given, it is important to distinguish between notice *for the purpose of obtaining priority,* and notice for the purpose of protecting the assignee's interest in the property assigned (*d*). Where there are *two* settlements, one original and the other derivative, and the subject matter of the assignment is the interest of a *cestui que trust* under the derivative settlement, notice for the purpose of obtaining priority must in general be given to the trustees of the derivative settlement, but notice to the trustees of the original settlement may constitute a valuable protection which ought not to be overlooked. Thus in *Stephens* v. *Green* (*e*), there was a fund in Court in an action for the administration of a testator's estate; an interest in the fund devolved on, and passed under the will of a

(*a*) *Addison* v. *Cox*, 8 L. R. Ch. App. 79, *per* L. C. Selborne.

(*b*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289. This was so laid down by L. C. Brady, and his opinion carries the greater weight with it, as at the original hearing he had thought otherwise; see *S. C.*, 10 Ir. Ch. Rep. 489.

(*c*) *Calisher* v. *Forbes*, 7 L. R. Ch. App. 109; [*Johnstone* v. *Cox*, 16 Ch. D. 571; 19 Ch. D. (C.A.) 17].

[(*d*) It is also to be distinguished from notice for the purpose of preventing tacking of mortgages; see *Freeman* v. *Laing*, (1899) 2 Ch. 355; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231, 259.]

[(*e*) (1895) 2 Ch. (C.A.) 148, distinguishing and explaining *Bridge* v. *Beadon*, 3 L. R. Eq. 664.]

second testator, and a beneficiary under that will made a marriage settlement of his share in the fund, and then, without disclosing the settlement, assigned such share by way of mortgage; the mortgagees obtained a stop-order, the equivalent of notice to the executor of the first testator (*a*), but gave no notice to the executor of the second testator; the trustees of the marriage settlement obtained a subsequent stop-order, and gave notice to the executor of the second testator; and it was held that, for the purpose of obtaining priority, the notice to the executor of the second will as trustee for the assignor was the effective step, and that the trustees of the marriage settlement had priority over the mortgagees; but it was pointed out that the stop-order obtained by the mortgagees, though ineffectual to give priority, was a very valuable protection (*b*). And in *Ward* v. *Duncombe* (*c*), it was observed that if the rule in *Dearle* v. *Hall* (*d*) had never been invented, it would still have been necessary for an equitable assignee, for his own protection, to give notice to the legal holders of the fund the subject of the assignment, and that a solicitor employed in such a transaction would still have incurred serious liability if he neglected so obvious a precaution.] The notice, written or unwritten (*e*), but better written, should be given to the trustees themselves; [and notice to the solicitors of the trustees will be of no effect unless the solicitors are expressly or impliedly authorised to receive such notices (*f*)]. Where notice to one trustee would be sufficient, it may be given to one who is not the acting trustee, the law recognising no distinction between an acting and a passive trustee (*g*).

Officers of company.

Where the trust fund consists of shares in a *company*, the notice may be sent to the *secretary* (*h*); but notice to A., a *director*, and B., the *actuary*, was in one case considered sufficient (*i*); and, in another, notice to A., one of the directors, and B., an *auditor* (*j*); and in another, verbal notice, not casually, but in the

[(*a*) See *post*, p. 918.]

[(*b*) *S. C.* p. 161, *per* Lindley, L. J.]

[(*c*) (1893) A. C. 369, 394, *per* Lord Macnaghten.]

[(*d*) 3 Russ. 1, see *ante*, p. 903.]

(*e*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 Deac. & Ch. 357, *per* Sir G. Rose; *S. C.*, 1 Mont. & Ayr. 695, note, *per eundem*; *Browne* v. *Savage*, 4 Drew. 640; *Re Tichener*, 35 Beav. 317; *Re Agra Bank*, 3 L. R. Ch. App. 555.

[(*f*) *Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. D. (C.A.) 406; *Arden* v. *Arden*, 29 Ch. D. 702; and see *Re Durand's Trusts*, 8 W. R. 33;] *Foster* v. *Blackstone*, 1 M. & K. 297, 306; *Rickards* v. *Gledstanes*, 3 Giff. 298; *Willes* v. *Greenhill* (No. 2), 29 Beav. 392.

(*g*) *Smith* v. *Smith*, 2 Cr. & M. 233.

(*h*) *Ex parte Stright*, Mont. 502; and see *Alletson* v. *Chichester*, 10 L. R. C. P. 319.

(*i*) *Ex parte Watkins*, 1 Mont. & Ayr. 689; *S. C.*, 4 Deac. & Ch. 87; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(*j*) *Ex parte Waithman*, 4 Deac. & Ch. 412; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

way of business, to the *board of directors* (*a*). [But the fact that the secretary or any other officer of the company had casual knowledge of any matter, acquired in his individual capacity, or as secretary or officer of another company, and not whilst engaged in transacting the business of the first mentioned company, will not affect that company with notice of it (*b*).] It was at one time held that, as notice to a *partner* was notice to the partnership, if by the constitution of an assurance office the person insuring became a partner, the assignment of a policy by him was *ipso facto* notice of it to the society (*c*); but this was going very far, as it was the assignor's interest to suppress the assignment, and the point has since been ruled the other way (*d*). The negotiation for the assignment through a solicitor, who happens to be the local agent of the insurance office, is not notice to the office (*e*). *Incidental* mention of the charge to a *clerk* of the company, though in the office of business, will not be constructive notice to the company itself (*f*); and the fact that the solicitor to the trustees was a creditor under an insolvency, and must have known of the insolvency, was no notice of it to the trustees (*g*). [And in general, notice through an agent will not be imputed where the circumstances are such as to raise a conclusive presumption that he would not communicate the fact to his principal (*h*).]

Partners, &c.

Solicitor, agent, &c.

21. If the notice be by parol it must be clear and distinct (*i*), [and sufficient to bring to the mind of the trustee an intelligent apprehension of the nature of the dealing with the trust property, so that he may regulate his conduct by it in the execution of the trust (*j*)].

Notice must be clear.

(*a*) *Re Agra Bank*, 3 L. R. Ch. App. 555; and see *Ex parte Richardson*, Mont. & Ch. 43; *Alletson* v. *Chichester*, 10 L. R. C. P. 319.

[(*b*) *Société Générale de Paris* v. *Tramways Union Company*, 14 Q. B. D. (C.A.) 424; *Re Hampshire Land Company*, (1896) 2 Ch. 743; *Re Fenwick Stobart & Co.*, (1902) 1 Ch. 507; *Re David Payne & Co.*, (1904) 2 Ch. (C.A.) 608.]

(*c*) *Duncan* v. *Chamberlayne*, 11 Sim. 126; *Ex parte Rose*, 2 Mont. D. & De G. 131; and see *Ex parte Cooper*, Ib. 1; *Re Styan*, Ib. 219, and 1 Ph. 105.

(*d*) *Ex parte Hennessey*, 1 Conn. & Laws. 559; *Thompson* v. *Speirs*, 13 Sim. 469; *Martin* v. *Sedgwick*, 9 Beav. 333; and see *Powles* v. *Page*, 3 C. B. 16; *Ex parte Boulton*, 1 De G. & J. 175.

(*e*) *Re Russell's Policy Trusts*, 15 L. R. Eq. 26.

(*f*) *Ex parte Carbis*, 4 Deac. & Ch. 354; *S. C.*, 1 Mont. & Ayr. 693, note (*a*).

(*g*) *Re Brown's Trust*, 5 L. R. Eq. 88.

[(*h*) *Cave* v. *Cave*, 15 Ch. D. 639, 644, *per* Fry, J. As to the doctrine of constructive notice generally, see Dart V. & P. 6th ed., pp. 969, *et seq.*; Fisher on Mortgage, 5th ed., pp. 505, *et seq.*]

(*i*) *Re Tichener*, 35 Beav. 317; *Re Brown's Trust*, 5 L. R. Eq. 88.

[(*j*) *Lloyd* v. *Banks*, 3 L. R. Ch. App. 488, 490; *Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. D. (C.A.) 406, where it was pointed

By whom notice should be given.

22. It was held by Lord Romilly, M.R., that the notice should be given by or on behalf of the *assignee himself*, and that notice to a trustee proceeding from a mere *stranger* would be insufficient (*a*); but the case on appeal was reversed on the ground that the trustee *had received such notice* as he would or should have acted upon (*b*).

Where trustee is incumbrancer.

23. Where the trustee himself is the assignee or incumbrancer, the transaction necessarily carries notice along with it, and no other notice is necessary (*c*). So in the case of a *Joint Stock Bank*, the lien of the bank under the deed of settlement for a debt owing from one of its members does not require any further notice than that which the bank, the only trustee, already possesses from the relative position of the parties (*d*).

Form of the notice.

24. The notice, if it go into details at all, should set forth the entire amount of the assignee's claim, for it has been held that the trustee is affected by notice only of the amount stated upon the face of the memorandum served, and not by notice of all the contents of the instrument to which the memorandum refers (*e*). But notice of a charge in *general terms*, without expressing any amount in particular, will be sufficient (*f*); and if there be no doubt as to the fund intended, a *mistake* in the description will not vitiate the notice as against a subsequent purchaser, but the Court will not extend the security beyond the amount of the sum mentioned in the notice as intended to be charged (*g*); [and the notice will not be invalidated by an error in an immaterial point, such as the date of the deed of which notice is given (*h*)].

Case of the fund being in Court.

25. Where the fund is in *Court*, the step equivalent to notice to the trustees of a fund out of Court is the obtaining of a *stop-order* to restrain the transfer of the fund, and as between two assignees the one who first gets a stop-order will have priority (*i*);

out by James, L.J., that the cases in which it has been held that notice to a person acting as solicitor, was sufficient to take a *chose in action* out of the order and disposition of the assignor, cannot be relied on for the purpose under consideration, which stands upon a very different footing; and see *Bence* v. *Shearman*, (1898) 2 Ch. (C.A.) 582.]

(*a*) *Lloyd* v. *Banks*, 4 L. R. Eq. 222; 3 L. R. Ch. App. 488.

(*b*) 3 L. R. Ch. App. 488; [and see *Bateman* v. *Hunt*, (1904) 2 K. B. (C.A.) 530, where *Lloyd* v. *Banks* is referred to as showing that no limitations as to the time within which notice is to be given, or the person by whom it is to be given, are found in the rules of Courts of Equity].

(*c*) *Elder* v. *Maclean*, 3 Jur. N.S. 283; *Ex parte Smith*, 4 Deac. & Ch. 579; *Ex parte Smart*, 2 Mont. & Ayr. 60; and see *ante*, p. 911.

(*d*) *Assignees of Dunne* v. *Hibernian Joint Stock Company*, 2 Ir. Rep. Eq. 82.

(*e*) *Re Bright's Trust*, 21 Beav. 430.

(*f*) *Re Bright's Trust*, 21 Beav. 430, 434.

(*g*) *Woodburn* v. *Grant*, 22 Beav. 483.

[(*h*) *Whittingstall* v. *King*, 46 L. T. N.S. 520.]

(*i*) *Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463; *Elder* v. *Maclean*, 3 Jur. N.S.

[though the other may have given prior notice to the trustees of the settlement (*a*); and] though the first stop-order was upon the general fund, and the second stop-order was the first upon the share when carried over to the separate account of the debtor and his incumbrancers (*b*); [and though the stop-order shows that a life interest only is charged, and does not in terms refer to the dividends (*c*);] and trustees in bankruptcy who claim under the order and disposition clause in the Bankruptcy Act will lose the benefit of the transfer to them, if an assignee for value give notice to the Court of his incumbrance before any notice is given of the assignment under the bankruptcy (*d*); but the incumbrancer who obtains the first stop-order will not prevail over an incumbrancer who gave the regular notice to the representative of the trust *before the money was paid into Court* (*e*); nor will he prevail over a prior incumbrancer of whose incumbrance he had notice at the time of making his advance (*f*); but notice of a prior incumbrance acquired after the date of the advance, but before the stop-order is obtained, will not prejudice the right to priority (*g*).

[But where part of the trust estate was in Court and part in the hands of the trustees, and a mortgagee gave notice to the trustees, but did not obtain a stop-order, and a subsequent incumbrancer both gave notice and obtained a stop-order, the first mortgagee had priority as to the funds in the hands of the trustees, and the subsequent mortgagee had priority as to the fund in Court (*h*).]

283; [*Mack* v. *Postle*, (1894) 2 Ch. 449; *Stephens* v. *Green*, (1895) 2 Ch. (C.A.) 148; *Montefiore* v. *Guedella*, (1903) 2 Ch. (C.A.) 26].

[(*a*) *Pinnock* v. *Bailey*, 23 Ch. D. 497.]

(*b*) *Lister* v. *Tidd*, 4 L. R. Eq. 462; [but where a fund, having been carried over to a separate account, is released from the general questions in the action, a stop-order obtained by a *bonâ fide* creditor of the person entitled to the fund may prevail over a liability of such person to the estate of the testator; *Re Eyton*, 45 Ch. D. 458; and see *Edgar* v. *Plomley*, (1900) A.C. (P. C.) 431].

[(*c*) *Mack* v. *Postle*, *ubi sup.*, where see observations of Stirling, J., as to the framing of stop-orders, and the advisability of expressing on the face of them whether capital or income or both are affected; and for forms of orders see Seton, 6th ed. pp. 491, *et seq.* A notice on the subject for use in his lordship's chambers was issued in which it was intimated that an assignee or incumbrancer of a life interest is entitled to notice of any dealing with the capital whether for change of investment or otherwise.]

(*d*) *Stuart* v. *Cockerell*, 8 L. R. Eq. 607; and see *ante*, p. 904.

(*e*) *Livesey* v. *Harding*, 23 Beav. 141; *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122; [and see *Re Marquis of Anglesey*, (1903) 2 Ch. 727, 732,] and in *Thomas* v. *Cross*, 2 Dr. & Sm. 423, the same doctrine was applied as between two judgment creditors.

[(*f*) *Re Holmes*, 29 Ch. D. (C.A.) 786.]

[(*g*) *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. (C.A.) 460.]

[(*h*) *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 32 Ch. D. (C.A.) 460, 470.]

Notice to trustee where fund in Court and neither assignee obtains a stop-order, confers priority.

26. Even after the money has been paid into Court, although the *legal* title is in the *Paymaster-General* (*a*), priority *may*, it seems, be gained by serving notice upon the trustees (*b*); thus, if an incumbrancer gives *notice* to the trustees, but *neglects to obtain a stop-order*, he will still take precedence of a prior incumbrancer, who has neither obtained an order nor given notice, or who had given notice to only one of several trustees, and that trustee had died before the time of the second incumbrance (*c*). It is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected to the detriment of the second incumbrancer, while the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice (*d*).

Practice where the fund is in Court.

27. If the trust fund be in Court, the following course should be adopted. The intended assignee should inquire at the Paymaster-General's and search at the Registrar's offices whether any stop-order has been made to restrain the transfer of the fund, and *also* inquire of the trustees whether notice has been given of any prior incumbrance; and, on the completion of his own assignment, he should give notice to the trustees personally, and obtain a stop-order himself, and leave it at the Paymaster-General's office to be noted in the Paymaster's books (*e*). The inquiry at the Paymaster-General's or search at the Registrar's offices is merely for the purchaser's greater satisfaction, and makes no part of his own title, for neither the Paymaster-General nor any official of the Court is the trustee, but the Court is the trustee, [and the object of obtaining the stop-order is to give effectual notice to the Court (*f*)]. The stop-order is the effective step, and whether or not previous inquiry or search was made at the offices is immaterial (*g*).

(*a*) *Thorndike* v. *Hunt*, 3 De G. & J. 563.

(*b*) *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; *Matthews* v. *Gabb*, 15 Sim. 51; *Warburton* v. *Hill*, Kay, 477; *Bartlett* v. *Bartlett*, 1 De G. & J. 127; [but see *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. (C.A.) 460; *Mack* v. *Postle*, (1894) 2 Ch. 449; Seton, 6th ed. p. 498].

[(*c*) But as to this, see *ante*, p. 910, note (*e*).]

(*d*) *Timson* v. *Ramsbottom*, MS.; *S. C.*, 2 Keen, 35, pp. 49 and 50; *Matthews* v. *Gabb*, 15 Sim. 51; [*Re Hall*, 7 L. R. Ir. 180; *Re Phillip's Trusts*, (1903) 1 Ch. 183].

[(*e*) The Registrar will pass and enter the order, but it is the duty of the assignee to leave it with the Paymaster; and generally as to the practice respecting stop-orders, see Rules of the Supreme Court, Ord. XLVI., Rules 12 & 13; and Seton on Judgments, 6th ed., Chap. XXVIII. s. 3.]

[(*f*) *Mack* v. *Postle*, (1894) 2 Ch. 449.]

(*g*) See *Warburton* v. *Hill*, Kay, 478.

Case where there is no trustee.

28. It may happen that at the time of the incumbrance there is *no representative* of the trust on whom notice can be served, as if A. be trustee of stock for B., and A. dies intestate, or his executor declines to act. In such a case it has been held that an incumbrancer gains priority by taking all the precautions that under the circumstances are practicable, as if he serves a [notice in lieu of] *distringas* on the bank (*a*) where the stock is standing (*b*).

Purchaser with notice.

29. A purchaser who gives notice, or obtains a stop-order, can gain no priority over an incumbrance of which he *has notice himself* at the time of his own purchase (*c*).

Judicature Act, 1873, s. 25, sub-s. 6.

30. By 36 & 37 Vict. c. 66, sect. 25, sub-sect. 6, any absolute assignment of any debt or *legal chose in action* by writing under the hand of the assignor (not purporting to be by way of charge only) (*d*), upon express notice in writing being given to the legal holder of the *chose in action*, is to be effectual in *law* to pass the legal right from the date of such notice, but subject to all the equities which would have been entitled to priority had the Act not passed.

[An assignment may be absolute within this enactment although a trust is thereby created, in respect of the proceeds of the debt or *chose in action*, in favour of the assignor, as in the case of a deed by creditors assigning their debts to a person who is to sue to recover the debts and pay the creditors proportionately out of the money recovered (*e*).

[Policy of assurance.]

31. The notice of assignment of a policy of assurance which is required to be given by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), to enable the assignee to sue, is not requisite to complete the title of the assignee as against a

[(*a*) Or company. See *post*, Chap. XXXIII. s. 1.]

(*b*) *Etty* v. *Bridges*, 2 Y. & C. C. C. 486. [See as to the notice which has been substituted in the place of the writ of distringas, Rules of the Supreme Court, Ord. XLVI., Rules 2, *et seq.*; and *post*, Chap. XXXIII. s. 1.]

(*c*) *Warburton* v. *Hill*, Kay, 470; *Re Holmes*, 29 Ch. D. (C.A.) 786.

[(*d*) As to the meaning of the words "absolute assignment" and "not purporting to be by way of charge only," see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Burlinson* v. *Hall*, 12 Q. B. D. 347; *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239; *Mercantile Bank of London* v. *Evans*, (1899) 2 Q. B. 613; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190; and see *Bateman* v. *Hunt*, (1904) 2 K. B. (C.A.) 530, 538 (intimating that the statute does not prescribe any limit of time within which the notice must be given, nor lay down that the notice must be given by any particular person). *Part* of a debt is not assignable within the statute: *Bowles* v. *Baker*, (1910) W.N. 24 (*per* Bray, J., affirmed in C.A.), not following *Skipper* v. *Holloway*, (1909) 79 L. J. K. B. 91.]

[(*e*) *Comfort* v. *Betts*, (1891) 1 Q. B. (C.A.) 737; *Weisener* v. *Rackow*, 76 L. T. N.S. 448 (C.A.); *Fitzroy* v. *Cave*, (1905) 2 K. B. (C.A.) 364.]

subsequent assignee; and accordingly a second incumbrancer who advanced his money with notice of a prior incumbrance, does not, by giving the statutory notice, gain priority over the prior incumbrancer who has neglected to give the notice (*a*).]

General rule.

Fourthly. Of the rule *Qui prior est tempore potior est jure.*

1. "The rule," observed V. C. Kindersley (*b*), "is sometimes expressed in this form:—'As between persons having only equitable interests, *qui prior est tempore potior est jure.*' This is an incorrect statement of it; for not only is it not universally true, as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it. Another form of stating the rule is this:—'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure.*' But even this enunciation of the rule (when accurately considered) seems to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the word 'equity'? For example, when we say that A. has a better equity than B., it means only that, according to those principles of right and justice which a Court of Equity recognises and acts upon, it will prefer A. to B. and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which the Court of Equity would altogether refuse to lend its assistance to either party as against the other. To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—' As between persons having only equitable interests, if their equities are *in all other respects* equal (*c*), priority of time gives the better equity; or *qui prior est tempore potior est jure.*'" "Questions of priority between equitable incumbrancers," said L. J. Turner, "are in general governed by the rule *qui prior est tempore potior est jure.* The rule, as I conceive is founded on this principle, that the creation or declaration of a trust vests an estate in the person in whose favour the

[(*a*) *Newman* v. *Newman*, 28 Ch. D. 674; and see *Re King*, 14 Ch. D. 179.]

(*b*) *Rice* v. *Rice*, 2 Drew. 77.

[(*c*) As to "equal equities," see *Re Ffrench's Estate*, 21 L. R. Ir. 283, 332; *Re Sloane*, (1895) 1 I. R. 146.]

trust is created or declared. Where, therefore, it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it" (*a*).

All circumstances to be considered.

2. For ascertaining priorities, the Court directs its attention to the nature and condition of the conflicting equitable interests, the circumstances and manner of their acquisition, and the whole conduct of the respective parties: in short, all the circumstances of the case (*b*). The following instances will suffice for illustration.

[Receipt by vendor.]

3. A vendor has an equitable lien for his purchase money; but if he deliver the deed of conveyance with a receipt for the purchase money indorsed and signed, [or with a receipt in the body of the deed within sect. 55 of the Conveyancing and Law of Property Act, 1881 (*c*),] and the purchaser then makes an equitable mortgage of the property by deposit, the equity of the mortgagee, who was deceived by the deed, is better than that of the vendor, who was careless enough to sign the receipt without payment of the money (*d*). But if the mortgagee have notice of the lien, he of course cannot complain, and is bound by it (*e*). [Where the vendor signing the receipt in full is a trustee, the estoppel against him does not extend to his *cestuis que trust* (not being parties to the transaction), and their prior equity will prevail over that of a subsequent innocent purchaser for value (*f*).

[Receipt signed by mortgagor.]

And the same principle applies as between a mortgagor who has signed a receipt in full for the mortgage money, part of which remains unpaid, and a transferee of the mortgage who has taken his transfer on the faith of the receipt in full, and without notice that part of the mortgage money had not been paid (*g*).

And where a blank transfer of shares, unaccompanied by the certificate, was deposited with a bank, who allowed the certificate

(*a*) *Cory* v. *Eyre*, 1 De G. J. & S. 167; [*Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. D. (C.A.) 402; *Taylor* v. *Russell*, (1891) 1 Ch. (C.A.) 8, 15; (1892) A.C. 244, 253, 255, 259; *London and County Bank* v. *Goddard*, (1897) 1 Ch. 642].

(*b*) *Rice* v. *Rice*, 2 Drew. 78, *per* V. C. Kindersley; [*National Provincial Bank of England* v. *Jackson*, 33 Ch. D. (C.A.) 1; and see *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182].

[(*c*) 44 & 45 Vict. c. 41.]

(*d*) *Rice* v. *Rice*, 2 Drew. 73; *West* v. *Jones*, 1 Sim. N.S. 205; *The Queen* v. *Shropshire Union Canal Company*, 8 L. R. Q. B. 420; 7 L. R. H. L. 496; [*Lloyd's Bank* v. *Bullock*, (1896) 2 Ch. 192; *King* v. *Smith*, (1900) 2 Ch. 425].

(*e*) *Mackreth* v. *Symmons*, 15 Ves. 349.

[(*f*) *Capell* v. *Winter*, (1907) 2 Ch. 376.]

[(*g*) *Bickerton* v. *Walker*, 31 Ch. D. (C.A.) 154; and see *Bateman* v. *Hunt*, (1904) 2 K. B. (C.A.) 530; *Berwick & Co.* v. *Price*, (1905) 1 Ch. 632, *post*, p. 924; *Powell* v. *Browne*, (1907) W.N. (C.A.) 228.]

to remain outstanding, and thereby enabled the mortgagor to obtain the certificate and effect a subsequent charge by deposit of blank transfer accompanied by the certificate, it was held in Ireland that as the bank by their negligence had allowed the mortgagor to represent himself as the owner, they had lost priority (*a*).]

Possession of title-deeds.

4. The possession of the *title-deeds* is a circumstance which may give the holder a better equity, provided they have come into his possession from want of due activity on the part of the prior incumbrancer, or through some neglect or default of such incumbrancer (*b*). But the *onus* lies on the holder to establish a case of blameable conduct against the first incumbrancer (*c*); and the second incumbrancer gains no priority if the deeds get into his hands by an accident, or by the misconduct of a stranger (*d*), or the wrongful act of the solicitor of the first incumbrancer (*e*), for it is not the doctrine of the Court that in the case of mere equitable interests priority can be obtained through the medium of a breach of trust or duty (*f*). [And an equitable incumbrancer, by getting possession of the title-deeds

[(*a*) *Kelly* v. *Munster and Leinster Bank*, 29 L. R. Ir. 19; and where an agent of a company is entrusted with a certificate of debenture stock, it will be assumed in favour of a purchaser or mortgagee that such agent had full authority to deal with it; *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841.]

(*b*) *Layard* v. *Maud*, 4 L. R. Eq. 397; see *Rice* v. *Rice*, 2 Drew. 80; *Waldron* v. *Sloper*, 1 Drew. 200; *Perry-Herrick* v. *Attwood*, 25 Beav. 205; 2 De G. & J. 21; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576; *Briggs* v. *Jones*, 10 L. R. Eq. 92; *Re Russell Road Purchase-moneys*, 12 L. R. Eq. 78; [*Clark* v. *Palmer*, 21 Ch. D. 124; *Re Lambert's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234; *Lloyd's Banking Company* v. *Jones*, 29 Ch. D. 221;] and see *Ratcliffe* v. *Barnard*, 6 L. R. Ch. App. 652; [*Spencer* v. *Clarke*, 9 Ch. D. 137; *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D. 182; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 19; (1892) A. C. 244; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231; *Rimmer* v. *Webster*, (1902) 2 Ch. 163].

(*c*) *Allen* v. *Knight*, 5 Hare, 272; 11 Jur. 527; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155; [*Union Bank of London* v. *Kent*, 39 Ch. D. 238; *Brown* v. *Stedman*, 44 W. R. 458; *Re Ingham*, (1893) 1 Ch. 352, where Stirling, J., said that the authorities are adverse in principle to interference against the legal title, except where the owner himself, or some predecessor of his in title, has personally either been guilty of misconduct, or conferred "an apparent authority to deal with the property as if it were unincumbered"; and see *Re Castell & Brown*, (1898) 1 Ch. 315, where it was held that persons entitled to a mere equitable charge on the property of a company by way of *floating security*, if they allow the title-deeds to remain in the custody of the company, will be postponed to subsequent equitable mortgagees by deposit of title-deeds without notice of the charge; and see *Re Valletort Steam Laundry Company*, (1903) 2 Ch. 654].

(*d*) *Rice* v. *Rice*, 2 Drew. 83.

(*e*) *Cory* v. *Eyre*, 1 De G. J. & S. 149; [*Bradley* v. *Riches*, 9 Ch. D. 189; *Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. D. (C.A.) 402].

(*f*) *Cory* v. *Eyre*, 1 De G. J. & S. 170; [*Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. D. (C.A.) 402; *Taylor* v. *Russell*, (1891) 1 Ch. (C.A.) 8; (1892) A.C. 244; and see *Harpham* v. *Shack-*

without any default on the part of a person who has previously contracted to purchase the property, does not gain priority over him, but takes subject to his contract (*a*).

[Negligence of trustees as to title-deeds.]

Where trustees having the legal estate are guilty of negligence in respect of title-deeds, they may be postponed; thus where, by a marriage settlement, land of the husband's was settled on trusts for husband and wife successively for life, and the solicitors who acted for all parties were in possession of a bundle of title-deeds, but were unaware that the settlor still retained the conveyance of the land to him, and he affected to mortgage it to an innocent mortgagee to whom he handed the deed, it was held that the trustees, being guilty of negligence, must be postponed, and that the wife, under the circumstances, was in no better position than the trustees (*b*).

[What conduct as to title-deeds will postpone mortgagee.]

The whole question as to the conduct in relation to the title-deeds on the part of a mortgagee who has the legal estate, which is sufficient to postpone such mortgagee to a subsequent equitable mortgagee who has obtained the title-deeds without knowledge of the legal mortgage, was fully discussed by the Court of Appeal in the case of *Northern Counties of England Fire Insurance Company* v. *Whipp* (*c*); in which the Court, after reviewing and classifying the earlier cases, arrived at the following conclusions :—

"(1) That the Court will postpone the prior legal estate to a subsequent equitable estate—(A), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot be otherwise explained; (B), where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

"But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner" (*d*).

lock, 19 Ch. D. (C.A.) 207]. But see *The Queen* v. *Shropshire Union Canal Company*, 8 L. R. Q. B. 420; 7 L. R. H. L. 496; [*Bradley* v. *Riches*, 9 Ch. D. 189].

[(*a*) *Flinn* v. *Fountain*, 58 L. J. Ch. 389.]

[(*b*) *Walker* v. *Linom*, (1907) 2 Ch. 104.]

[(*c*) 26 Ch. D. (C.A.) 482, 491, *per* Cotton, Bowen, and Fry, L.JJ.]

[(*d*) *S. C.* at p. 494. The whole judgment deserves careful perusal; and see *Lloyd's Banking Company* v. *Jones*, 29 Ch. D. 221; *Manners* v. *Mew*, 29

[Where prior estate equitable only, *quære.*]

In a recent case it was held by Kay, J., that this principle applies equally whether the prior estate is legal or equitable, and that in the case of innocent persons taking equitable mortgages from a fraudulent mortgagor, the negligence required to induce the Court to postpone the prior incumbrancer must be gross, *i.e.* so great as to make him responsible for the fraud committed on the subsequent incumbrancer (*a*), but in the same case in the House of Lords this proposition was doubted by Lord Macnaghten (*b*); and a similar doubt has been expressed in the Court of Appeal (*c*).

[Postponement of legal purchaser to prior equitable mortgagee.]

As between an equitable mortgagee and a subsequent legal purchaser for value without notice, in order that the latter may be postponed it is not necessary to show that he has been guilty of fraud, or of negligence amounting to fraud; it is sufficient that he has been guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his security, as for example, by omitting to obtain the title-deeds and resting satisfied with the mere statement of the vendor that they were in his possession, but would not be delivered up because they related also to other property (*d*).

[Constructive notice of sub-mortgage.]

A purchaser who, without requiring delivery or production of title-deeds, takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage, is affected with constructive notice of the sub-mortgage; the legal estate in the purchaser's hands is subject to the equitable incumbrance, and the notice raises a trust to the extent of the sub-mortgage. It is immaterial whether the purchaser employs a solicitor or not, and whether the solicitor, if one is employed, informs the purchaser of the sub-mortgage or not (*e*).

[Title of *cestui que trust* prevails in absence of negligence.]

5. If a trustee in whose name shares in a company are standing borrows money for his own purposes and deposits the certificates as a security for his debts, the equitable title of the mortgagee will not, in the absence of negligence on the part of the *cestui que trust*, prevail against the prior equitable title of the *cestui que trust* (*f*). And a *cestui que trust* is entitled to place reliance upon his trustee, and is not guilty of negligence if, in the absence

Ch. D. 725; and as to the case of a floating security, see *ante*, p. 922, note (*c*).]

[(*a*) *Taylor* v. *Russell*, (1891) 1 Ch. 8; reversed by C. A. ibid., but on other grounds.]

[(*b*) *Taylor* v. *Russell*, (1892) A. C. 244, 262, and see *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D. 182.]

[(*c*) *Taylor* v. *London and County BankingCo.*,(1901)2Ch.(C.A.)231,260.]

[(*d*) *Oliver* v. *Hinton*, (1899) 2 Ch. (C.A.) 264.]

[(*e*) *Berwick & Co.* v. *Price*, (1905) 1 Ch. 632.]

[(*f*) *Shropshire Union Railways and Canal Company* v. *The Queen*, 7 L. R. H. L. 496.]

of anything to raise suspicion, he omit to inquire whether a fraud has been committed upon him by the trustee (*a*); and as "any person is entitled to vest property in another as trustee for himself, and to leave the title-deeds in the hands of the trustee" (*b*), where the purchaser of an equity of redemption for his own convenience took the assignment in the name of a confidential clerk, ostensibly as absolute owner, but in fact as trustee, and allowed the assignment to remain in his custody, and the clerk availed himself of possession of the deed to effect an equitable charge, it was held that there was no such negligence as would deprive the *cestui que trust* of his prior equitable title (*c*); and so where the owners of shares in a ship allowed them to remain on the register in the name of a trustee as legal owner, they could not be held liable, on the ground of implied authority, to a charge wrongfully effected by a son of the trustee, acting as his business manager (*d*). These decisions are not applicable to cases governed by the principles of agency, and not of trusteeship, as where, for example, the owner of property gives all the indicia of title to another person with the intention that he should deal with the property, for then any limit which the owner has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent (*e*).

[Lien of banking company on shares.]

6. Where trust funds were invested in the names of two trustees in the shares of a bank, the articles of which provided that the bank should have a paramount charge on the shares held by more persons than one in respect of all moneys owing to the bank from all or any of the holders thereof, alone or jointly with any other person, it was held that the bank had a lien on the shares for a debt owing by a firm in which one of the trustees was a partner, which must prevail over the title of the *cestuis que trust* (*f*).]

Secret equity.

7. A party, having a secret equity, who stands by and permits the apparent owner to deal with others, as if he were the absolute

[(*a*) Ib.; *Re Vernon Ewens & Co.*, 32 Ch. D. 164; 33 Ch. D. (C.A.) 402; and see *Hartopp* v. *Huskisson*, 55 L. T. N.S. 773; *Re Richards*, 45 Ch. D. 589; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231.]

[(*b*) *Re Richards*, 45 Ch. D. 594, *per* Stirling, J.]

[(*c*) *Carritt* v. *Real and Personal Advance Company*, 42 Ch. D. 263; and see *Re Richards*, 45 Ch. D. 589; *Tendring Hundred Waterworks Company* v. *Jones*, (1903) 2 Ch. 615.]

[(*d*) *Burgis* v. *Constantine*, (1908) 2 K. B. (C.A.) 484.]

[(*e*) *Rimmer* v. *Webster*, (1902) 2 Ch. 163, 174.]

[(*f*) *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. D. (C.A.) 302; *Miles* v. *New Zealand Alford Estate Company*, 32 Ch. D. (C.A.) 266; but see *Bradford Banking Company* v. *Briggs & Co.*, 12 App. Cas. 29; 31 Ch. D. (C.A.) 19; 29 Ch. D. 149; *ante*, p. 906.]

owner, and as if there were no such secret equity, will not be permitted to assert such secret equity against a title founded upon such apparent ownership (*a*). *A fortiori*, if the person having the secret equity be party to a document which assumes that there is no such equity, or on having notice of a purchaser's claim do not give information of the equity, so as to enable him to proceed against the person by whom he has been deceived (*b*). ["It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it" (*c*).]

Canons laid down in Thornton *v.* Ramsden.

8. The doctrines of the Court on this subject were much discussed in the case of *Thornton* v. *Ramsden* (*d*), and the following canons were laid down by the highest authorities in the House of Lords on appeal:—

a. If a stranger begins to build on land, *supposing it to be his own*, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land.

b. But if a stranger builds on land *knowing* it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it (*e*).

c. If a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the

(*a*) *Mangles* v. *Dixon*, 1 Mac. & G. 446, *per* Lord Cottenham; *S. C.* 3 H. L. Cas. 739, *per* Lord Truro; *Troughton* v. *Gitley*, Ambl. (Blunt's ed.) 633, and cases cited, Ib. note (4); *Cornforth* v. *Pointon*, W. N. 1866, p. 189; [*Ex parte Bolland*, 9 Ch. D. 312; *Re Blachford*, W. N. 1884, p. 141].

(*b*) *Mangles* v. *Dixon*, 1 Mac. & G. 447; 3 H. L. Cas. 740.

[(*c*) *Per* Jud. Com. *Ramcoomar Koondoo* v. *Macqueen*, L. R. Ind. App. Supp. Vol. 40.]

(*d*) 4 Giff. 519; 1 L. R. H. L. 129, *nom. Ramsden* v. *Dyson;* and see *Bankart* v. *Tennant*, 10 L. R. Eq. 141; [*Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699].

(*e*) See also *Crampton* v. *Varna Railway Company*, 7 L. R. Ch. App. 562.

landlord from taking possession of the land and buildings when the tenancy has determined.

d. If the tenant, being a mere tenant at will, builds on the land in the *belief* that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, *knowing* that he is acting in that belief, and does not interfere to correct the error (*semble*), equity will interfere to compel the grant of a lease.

e. If a man under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the *knowledge* of the landlord, and, without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation (*a*).

[9. The ground upon which relief is given in these cases is fraud in the possessor of the legal right, and the elements necessary to constitute fraud of this description were enumerated by Fry, J. (*b*), as follows:— [Wilmott *v.* Barber.]

"(1) The plaintiff must have made a mistake as to his legal rights.

"(2) The plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.

"(3) The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff.

"(4) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights (*c*).

"(5) The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right."]

10. The question who has the better equity frequently arises where estates subject to a common charge, become vested in different owners, and each assignee endeavours to throw the charge upon the other. Estates subject to common charge.

11. It has been held in Ireland that if there be an *express* Express agreement to exonerate from a judgment.

[(*a*) See *Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699.]

[(*b*) *Willmott* v. *Barber*, 15 Ch. D. 96, 105; and see *Weller* v. *Stone*, 54 L. J. N.S. Ch. 497.]

[(*c*) See as to this *Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699.]

agreement that one estate shall exonerate another from a judgment, a purchaser with notice of the agreement will be bound by it (*a*). And a covenant that the one estate is *free from incumbrances* or for *quiet enjoyment* will amount to such an agreement (*b*).

Judgments as between two purchasers.

12. It has been further decided in Ireland that where A., the conusor of a judgment, settles an estate for valuable consideration, and afterwards sells an unsettled estate, the purchaser of the latter cannot have the judgment raised by a contribution from both estates (*c*); and even where a purchaser was not seeking relief against another purchaser, but the plaintiff was the judgment creditor seeking to have his debt raised, it was held that the whole onus must be borne by the subsequent purchaser (*d*); and the circumstance that the conveyance to the first purchaser contained a covenant against incumbrances or for quiet enjoyment does not appear, where it occurred, to have been the material ground on which the decision was rested (*e*). Neither did the Court distinguish the case where the subsequent purchaser had no notice of the prior charge. Indeed, in the leading case, the subsequent purchaser on whom the onus was thrown was apparently a purchaser without notice (*f*).

As between settled and unsettled estates.

13. It has been further ruled in Ireland that where the conusor of a judgment settles an estate with a covenant against incumbrances, the purchasers under the settlement can throw the judgments on the unsettled estates as against subsequent judgment creditors of the settlor, who had merely a general and roving lien, and did not stand in the place of specific purchasers (*g*), [and where the owner of two freehold properties mortgaged them, and then sold one property and conveyed it to the purchaser without disclosing the mortgage, and without any covenant against incumbrances, but with a covenant for further assurance, it was held by North, J., that as between the purchaser and the devisees of the other property, the burden of the incumbrance must fall on the

[Incidence of mortgage debt as between purchaser and devisees.]

(*a*) *Hamilton* v. *Royse*, 2 Sch. & Lef. 315; *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444.

(*b*) *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369; *Aicken* v. *Macklin*, 1 Dru. &. Walsh, 621.

(*c*) *Hartley* v. *O'Flaherty*, Beat. 61; Ll. & G. *t.* Plunket, 208; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*d*) *Aicken* v. *Macklin*, 1 Dru. & Wal. 621.

(*e*) *Aicken* v. *Macklin*, 1 Dru. & Wal. 621; *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444; and see *Hughes* v. *Williams*, 3 M. & G. 690; *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 259.

(*f*) See *Hartley* v. *O'Flaherty*, Beat. 69.

(*g*) *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 252; *Hughes* v. *Williams*, 3 Mac. & G. 683; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

latter (*a*); but where the settlement or conveyance is voluntary, no such effect can be attributed to a covenant for further assurance, for then the grantee takes only the estate which the grantor had, with all its incidents (*b*). [As between volunteers.]

So where estates were expressed to be settled for value, subject to charges amounting to 65,000*l.*, with a covenant against incumbrances except "the charges now existing thereon, amounting to the said sum of 65,000*l.*," and a power was reserved of further charging the property to a specific amount, which power was subsequently exercised, but the charges upon the estates at the time of the settlement in fact far exceeded 65,000*l.*, it was held that the purchasers under the settlement were entitled to be recouped, out of the proceeds of sale of the estate, the difference between the charges actually subsisting and the 65,000*l.*, in priority to the mortgagees under the power (*c*).]

Law in England.

14. The principles which have been acted upon in Ireland, will no doubt be followed to some extent in England. If, for instance, A., possessing Blackacre and Whiteacre [which are subject to a common incumbrance], mortgages Blackacre to B., and covenants that it is free from incumbrances, this is a contract between A. and B., and every purchaser of Whiteacre with notice of the incumbrance and of the contract must be bound by the contract.

Rule in equity in absence of contract.

15. But if there be no express contract between A. and B., then the right of B. depends on a rule of equity, and as against A. himself it is clear that B. can insist on throwing the whole incumbrance on Whiteacre (*d*); and so as against any person claiming a general and roving lien only as a judgment creditor of A. (*e*); and even if A. afterwards sell Whiteacre to C., who has notice of the incumbrance and of the mortgage, there is no ground for saying that B. has not the like equity as against C., but if C. have no notice of the incumbrance or no notice of the mortgage, the Court will probably refuse to enforce the rule against him. At least Lord St Leonards seems to have thought that the decisions in Ireland do not affect innocent purchasers — *i.e.* purchasers for valuable consideration without notice (*f*). And in the case of *Strong* v. *Hawkes* (*g*), L. J. Turner expressed a doubt whether the cases in Ireland had not gone too far.

[(*a*) *Re Jones*, (1893) 2 Ch. 461.]

[(*b*) *Ker* v. *Ker*, 4 I. R. Eq. 15, reversing *S. C.*, 3 I. R. Eq. 489; and see *Re Jones*, *sup.*]

[(*c*) *Re Barker's Estate*, 3 L. R. Ir. 395.]

(*d*) See *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 259.

(*e*) See *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 252.

(*f*) Vend. & P. p. 746, 14th ed.

(*g*) 4 De G. & J. 652, & MS.

Barnes *v.* Racster.

16. In *Barnes* v. *Racster* (*a*), a person mortgaged Foxhall to A., and then to B., and then Foxhall and No. 32 to A., and then Foxhall and No. 32 to C. All parties had notice of the prior transactions. It was held that B. could not compel A. to pay himself exclusively out of No. 32, so as to leave B. the first incumbrancer on Foxhall, but C. was entitled to have the charges thrown proportionately upon Foxhall and No. 32.

Specific or general and roving equity.

17. A purchaser of an equitable interest *specifically* has a higher equity than a person claiming under a *general* and *roving* charge such as a judgment, and therefore the purchaser of such an equitable interest without notice of an equitable judgment was properly held not to be bound by it (*b*).

[Rule where specific charge on one property and general lien on another.]

[18. If there be a specific charge on one property to secure a sum of money, and there be a general lien on other property (as, for instance, a banker's lien on his customer's securities in his hands) to secure the same sum, the property comprised in the specific charge must be primarily resorted to in exoneration of the property subject to the general lien (*c*).

[Where goods wrongfully pledged by a firm.]

19. The owner of goods which have been wrongfully pledged by a partnership firm to secure an advance to them, which is further secured by the guarantee of one of the partners, or by the deposit of partnership property, is entitled to have the securities marshalled, and to have the benefit of the guarantee or a lien on the deposited property (*d*).]

SECTION II

OF TESTAMENTARY DISPOSITION

How trusts of freeholds to be devised.

1. An equitable interest in lands is transmissible by *devise* (*e*). Indeed the old *use*, which preceded the trust, was devisable by

(*a*) 1 Y. & C. C. C. 401; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377; and see *Re Lawder's Estate*, 11 Ir. Ch. Rep. 346; *Re Mower's Trust*, 8 L. R. Eq. 110; [*Flint* v. *Howard*, (1893) 2 Ch. (C.A.) 54]. As to the right of judgment creditors to marshal *inter se*, see *Re Lynch's Estate*, 1 Ir. Rep. Eq. 396; [Seton, 6th ed. p. 2092].

(*b*) *Re Grady*, 13 Ir. Ch. Rep. 154. See *Wells* v. *Kilpin*, 18 L. R. Eq. 298.

[(*c*) *Re Dunlop*, 21 Ch. D. (C.A.) 583.]

[(*d*) *Ex parte Salting*, 25 Ch. D. (C.A.) 148; *Ex parte Alston*, 4 L. R. Ch. App. 168; *M'Mahon* v. *Featherstonhaugh*, (1895) 1 I. R. 83.]

(*e*) *Cornbury* v. *Middleton*, 1 Ch. Ca. 211, *per* Wyld, Just.; *Greenhill* v. *Greenhill*, 2 Vern. 679, *per* Lord Harcourt; *Philips* v. *Brydges*, 3 Ves. 127. [An equitable tenant for life is a "devisee" within sects. 6 and 8 of the Debts Recovery Act, 1830, so that a *bonâ fide* alienation by him, before action brought by a creditor of the testator, will be protected: *Re Atkinson*, (1908) 2 Ch. (C.A.) 307.]

parol previously to the Statute of Wills, 32 H. 8. c. 15 (*a*); but after that Act the trust, by analogy to legal estates, became devisable only by will in *writing*.

Statute of Frauds.

2. The Statute of Frauds, 29 Car. 2. c. 3, followed, which required a devise of "lands" to be by a will, *signed* by the testator in the presence of and attested by *three witnesses*. This enactment was applied by the Courts to a devise of the equitable interest in lands. Otherwise a door would have been opened to all the mischiefs and inconveniences the Statute was intended to prevent (*b*). Whether trusts were within the *letter* of the Act, or equity brought them under its operation by *analogy*, it is not easy to determine (*c*); but undoubtedly the word "lands" has often been extended to include trusts, and, if so, there seems to be little reason why trusts should not have fallen within the *express* terms of the Statute.

Trusts of copyholds.

3. *Copyholds*, strictly speaking, are not at common law a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender itself (*d*). Thus copyholds at *law* were out of the Statute of Frauds, and might have been devised by a will neither signed nor attested; and as equity followed the law, the trust of a copyhold was devisable in the same manner (*e*). And the equitable interest might always have been passed by will, though not preceded by a *surrender*, which previously to 55 G. 3. c. 192, was required to pass the *legal* estate (*f*).

Where no custom to devise the legal estate of copyholds.

4. As equitable interests in copyholds were regulated by analogy to the custom affecting the legal estate, one might have supposed that where the *legal* estate could not be devised, the *equitable* estate in like manner must have been left to descend. However, it was decided by the Court, that even assuming the absence of any power to devise the *legal* estate (*g*), the owner

(*a*) Shepp. Touch. 407; and see *ante*, p. 764, note (1).

(*b*) *Wagstaff* v. *Wagstaff*, 2 P. W. 259, *per* Lord Macclesfield; *Adlington* v. *Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Burgess* v. *Wheate*, 1 Eden, 224, *per* Lord Mansfield.

(*c*) See *Burgess* v. *Wheate*, *Wagstaff* v. *Wagstaff*, *ubi sup.*; *Doe* v. *Danvers*, 7 East, 322.

(*d*) *Hussey* v. *Grills*, Amb. 300, *per* Lord Hardwicke.

(*e*) *Appleyard* v. *Wood*, Sel. Ch. Ca. 42; *Wagstaff* v. *Wagstaff*, 2 P. W. 258; *Tuffnell* v. *Page*, 2 Atk. 37; and see *Attorney-General* v. *Andrews*, 1 Ves. 225; but see *Anon. case*, cited *Wagstaff* v. *Wagstaff*, 2 P. W. 261.

(*f*) *Greenhill* v. *Greenhill*, 2 Vern. 679; *Tuffnell* v. *Page*, 2 Atk. 37; *Gibson* v. *Rogers*, Amb. 93.

(*g*) As to the validity of a custom restraining surrenders to the uses of a will, see *Pike* v. *White*, 3 B. C. C. 286, and note 1, Ib.; *Doe* v. *Thompson*, 7 Q. B. 897.

of the equitable estate could pass it by *will* (*a*). Whether the will must have been executed according to the Statute of Frauds, or whether any instrument sufficient for declaring the uses on a surrender would have been enough, does not sufficiently appear.

Of customary freeholds.

But in a case of customary freeholds of which the legal estate could not be devised (and customary freeholds are now regarded as copyholds (*b*)), Lord Hardwicke held that the reason why the *equitable* interest in copyholds could be devised by an unattested will, was because the *legal* estate of copyholds could be devised by an unattested will, and that as, in the case of the customary freeholds before him, the legal estate could not be devised, the equitable interest could only pass by a will executed according to the Statute of Frauds (*c*). And *a fortiori* where a customary freehold, of which the legal estate was not devisable, was vested in a trustee upon such trusts as the *cestui que trust* should by will "to be by him *legally* executed" appoint, it was held that the equitable interest could not be devised by a will not executed according to the Statute of Frauds (*d*).

Wills Act.

5. Now by the Wills Act (*e*), as to wills made on or after 1*st January*, 1838, property, of whatever description, whether *real or personal*, freehold or copyhold, legal or equitable, may be devised or bequeathed by a will in writing, signed by the testator in the presence of and attested by *two* witnesses, and by such a will only.

Revocation of wills by alteration of estate.

6. If, before this Act, a testator seised of an equitable estate in fee had devised it, and then disturbed the *equitable seisin* by executing a conveyance and taking back a new estate in the same property, the will was revoked in like manner as if the estate had been legal (*f*). But if a testator had devised an equitable estate, and afterwards taken a conveyance so as merely to clothe the equitable estate with the legal, or was party to a conveyance for merely changing the trustees, such conveyances were not a revocation of the prior will (*g*). Now by the

(*a*) *Lewis* v. *Lane*, 2 M. & K. 449; *Wilson* v. *Dent*, 3 Sim. 385; [*Allen* v. *Bewsey*, 7 Ch. D. (C.A.) 453; but see *Hussey* v. *Grills*, Amb. 299].

(*b*) See *ante*, pp. 277, 278.

(*c*) *Hussey* v. *Grills*, Amb. 300. The whole argument in this case assumes that the will as opposed to the codicil was executed according to the Statute of Frauds, and yet the report states that the will was in writing, "but not attested according to the Statute of Frauds." The Reg. Lib. does not state whether the will was or not so executed. Amb. Blunt's edit.

(*d*) *William* v. *Lancaster*, 3 Russ. 108.

(*e*) 1 Vict. c. 26.

(*f*) *Locke* v. *Foote*, 5 Sim. 618; *Earl of Lincoln's case*, 1 Eq. Ca. Ab. 411; *S. C.*, Shower's P. C. 154.

(*g*) *Doe* v. *Pott*, 2 Doug. 710; *Watts* v. *Fullarton*, cited 2 Doug. 718; *Parsons* v. *Freeman*, 3 Atk. 741; *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 M. & K. 296.

Wills Act, a subsequent disturbance of the seisin, either at law or in equity, does not revoke the will (*a*).

SECTION III

OF SEISIN AND DISSEISIN

Equitable seisin.

1. The term *seisin* is properly applicable to *legal* estates; but a Court of Equity regards actual receipt of the rents and profits under the *equitable* title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Casborne *v.* Scarfe.

Thus, in *Casborne* v. *Scarfe* (*b*), it was disputed, whether, as curtesy did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said: "It is objected there is no *seisin* whatever of the legal estate in the wife in the consideration of law. But the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this Court is considered equivalent to an actual *seisin* of a freehold estate at common law—and I am of opinion there was —actual possession, clothed with the receipt of the rents and profits, is the highest instance of an *equitable seisin*, both of which were in this case."

Possessio fratris.

2. And so it was held that there was *possessio fratris* of a trust, in other words, that if a person inherited a trust, and died before actual *seisin* of the estate by receipt of the rents and profits, it should descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but that if there had been such a receipt of the rents and profits as constituted equitable *seisin*, the sister of the whole blood, as heir to the brother, would exclude the brother of the half blood (*c*).

Marquis of Cholmondeley *v.* Lord Clinton.

3. The doctrines of the Court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well-known case of the *Marquis of Cholmondeley* v. *Lord Clinton* (*d*). The circumstances were briefly these:—George, Earl of Oxford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body,

(*a*) 1 Vict. c. 26, s. 23.
(*b*) 1 Atk. 603; and see *Parker* v. *Carter*, 4 Hare, 413.
(*c*) See now the Inheritance Act, 1833 (3 & 4 W. 4. c. 106).
(*d*) 2 Mer. 171; 2 J. & W. 1; and see *Penny* v. *Allen*, 7 De G. M. & G. 422.

Marquis of Cholmondeley v. Lord Clinton.

remainder as he should by deed or will appoint, remainder to the *right heirs of Samuel Rolle*, with a power reserved of revocation and new appointment. Some time after, the Earl executed a mortgage in fee, which operated in equity as a revocation of the settlement *pro tanto*. In 1701 the Earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the Earl himself, as the *heir of Samuel Rolle at the date of the deed*), should have descended to the right heir of the Earl, but, the parties mistaking the law, the person who was *heir of Samuel Rolle at the death of the Earl* was allowed to enter on the premises, and continue in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the Earl against the mortgagee and the assign of the right heir of Samuel Rolle, for redemption of the premises, and an account of the profits. It was debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of the Earl's heir, to whom the equity of redemption belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*—first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it; and, secondly, because a tortious act could never be the foundation of an equitable title; that an equitable title might undoubtedly be *barred* by length of time, but could not be *shifted or transferred* (*a*); that the equity of redemption subsisted, and it must therefore belong to some one, and could only belong to the original *cestui que trust* (*b*); and that the *cestui que trust* could only be barred by barring the trustee (*c*). Sir W. Grant did not then decide the point, but directed a case for the opinion of the Queen's Bench on a question of law, and retained the bill in the meantime.

Re-heard.

The cause was afterwards re-heard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been *disseised* and was consequently barred (*d*). "The grounds," he said, "upon which it is contended that the holder of the rightful equity is not bound by *laches* and non-claim are that the tortious possessor does not claim to be the

(*a*) See *Hopkins* v. *Hopkins*, 1 Atk. 590.
(*b*) 2 Mer. 357-359.
(*c*) Ib. 361.
(*d*) 2 J. & W. 1.

holder of more than the equitable estate—that there is no *disseisin*, abatement or intrusion of a trust—that the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate, and he has therefore only a precarious and permissive possession—that tortious possession can never be the foundation of an equitable title (*a*). But this reasoning," he continued, "proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time (*b*). As to the argument that a title in a Court of Equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. If the negligent owner has for ever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. The plaintiff is barred of his remedy; the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity (*c*). If the mere existence of an old legal estate would have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail; quiet enjoyment for sixty, one hundred, or two hundred years or more, would be no security, if the old term had existed longer; it would always be open to inquiry in whom was vested the equitable title which originally existed when the old term was created" (*d*).

Marquis of Cholmondeley *v.* Lord Clinton.

On appeal to the House of Lords his Honour's decision was affirmed, and the principle on which it proceeded was approved. Lord Eldon said: "He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption,

Appeal to the House of Lords.

(*a*) 2 J. & W. 153.
(*b*) Ib. 155.
(*c*) Ib. 155, 156.
(*d*) Ib. 157.

and *worked the same effect as abatement or intrusion with respect to legal estates, and that for the quiet and peace of titles and the world it ought to have the same effect*" (*a*).

SECTION IV

OF MERGER

General view.

1. At law merger is the necessary consequence of the union of two estates in the same person in the same right, but in equity two estates without any intervening interest may meet in the same person in the same right without merger, and, on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Court is guided is the *intention;* and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested* (*b*).

Purchase subject to charges.

2. [The doctrine of merger applies to the merger of estates as well as to that of charges (*c*), but] the chief importance of the doctrine is with reference to charges. Thus A., the owner of an estate subject to a first incumbrance in favour of B., and a second incumbrance in favour of C., contracts to sell the estate to D. Here, if the purchaser knows of both the incumbrances, he of course will not accept the title until they have been discharged. But should he have *actual* notice of the incumbrance to B. only, and take a conveyance from A. and B. so as to extinguish the charge of the latter, this act (if, by reason of his having constructive notice of C.'s incumbrance or otherwise, the defence of purchase for value without notice is not available) lets in the incumbrance of C. as the first charge (*d*). If, on the other hand, the purchaser,

(*a*) 2 J. & W. 190, 191.

(*b*) *Lord Compton* v. *Oxenden*, 2 Ves. jun. 264; *Forbes* v. *Moffat*, 18 Ves. 390; *Horton* v. *Smith*, 4 K. & J. 630; [*Adams* v. *Angell*, 5 Ch. D. (C.A.) 634, at p. 646; *Re Pride*, (1891) 2 Ch. 135; *Thorne* v. *Cann*, (1895) A. C. 11, 18; *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. (C.A.) 726; *S. C.* reversed, (1898) A. C. 321; *Re Drax*, (1903) 1 Ch. (C.A.) 781; *Thellusson* v. *Liddard*, (1900) 2 Ch. 635, where it was questioned whether the above principle applies where a merger of a legal estate has actually taken place; *Re French-Brewster's Settlements*, (1904) 1 Ch. 713; *Hurley* v. *Hurley*, (1908) 1 I. R. 393 (no merger of term of wife, married before 1883, in reversion purchased by husband)].

[(*c*) *Capital and Counties Bank Limited* v. *Rhodes*, (1903) 1 Ch. (C.A.) 631; *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368.]

(*d*) *Toulmin* v. *Steere*, 3 Mer. 210; *Medley* v. *Horton*, 14 Sim. 226; *Parry* v. *Wright*, 1 S. & S. 369; 5 Russ. 142; *Smith* v. *Phillips*, 1 Keen, 694; *Brown* v. *Stead*, 5 Sim. 535; *Mocatta* v. *Murgatroyd*, 1 P. W. 393. [The case of *Toulmin* v. *Steere*, *ubi sup.*,

being apprehensive of some outstanding incumbrance, take an assignment of B.'s security to a trustee for him in order that it may be kept on foot, then the charge does not merge in the fee simple; but should C. take proceedings for raising his charge, the purchaser may protect himself by the shield of B.'s incumbrance as the first charge (*a*).

Purchase by person entitled to the charge.

3. The same principle under different circumstances applies where B., the first incumbrancer, buys up the interest of the owner subject to the charge; for if the charge be not kept on foot the incumbrance of C. will be let in, unless the defence of purchase for value without notice be applicable (*b*).

Purchaser may require the charge to be kept on foot.

4. The vendor must not be put to extra expense by the form in which the purchaser wishes the conveyance to be made, and where the vendor is under a personal liability he may insist on being discharged from it, but with these qualifications the purchaser can insist on having charges kept up instead of being merged (*c*). [If an intention to keep a charge alive is inconsistent with the real intention of the parties to the deed, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive (*d*).]

Mode and effect of keeping charge on foot.

5. If the purchaser desire to keep on foot a charge vested in

has been doubted, and in *Adams* v. *Angell*, 5 Ch. D. 634, 645, Sir G. Jessel, M.R., sitting in the Court of Appeal, while withholding his opinion as to whether it was binding in that Court, observed: "It amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled, as against the other incumbrancers of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." And in an Indian appeal the Privy Council refused to apply the doctrine of *Toulmin* v. *Steere* to India, on the ground that it did not rest on any broad intelligible principle of justice; *Gokuldoss Gopaldoss* v. *Rambux Seochand*, 11 L. R. Ind. App. 126, 130; and see *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515; *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. (C.A.) 726, 734; *S. C.* reversed, (1898) A. C. 321; *Thorne* v. *Cann*, (1895) A. C. 11, 18, *per* Lord Macnaghten; *Re Howard's Estate*, 29 L. R. Ir. 266 (C.A.).] As to *Greswold* v. *Marsham*, 2 Ch. Ca. 170, see Dart, 6th ed. p. 1040. See also *Anderson* v. *Pignet*, 8 L. R. Ch. App. 180.

(*a*) *Watts* v. *Symes*, 16 Sim. 646, *per* V. C. Shadwell; *Smith* v. *Phillips*, 1 Keen, 699, *per* Lord Langdale; *Parry* v. *Wright*, 1 S. & S. 379, *per* Sir John Leach.

(*b*) *Parry* v. *Wright*, 1 S. & S. 369; 5 Russ. 142; *Garnett* v. *Armstrong*, 2 Conn. & Laws. 458.

(*c*) *Cooper* v. *Cartwright*, Johns. 679.

[(*d*) *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. (C.A.) 726, 734, 735, *per* Lindley, L.J.; *S. C.* reversed, (1898) A. C. 321.]

himself, he should take a conveyance of the equity of redemption to a trustee, and the intention should be expressed on the face of the instrument, and if this be done the charge and the inheritance will both be sustained in equity, so as to afford protection against any intervening incumbrance (*a*).

Merger on a contingency.

6. A purchaser may even have the charge assigned so as to keep it on foot in one event and merge it in another event, should the contingencies affecting the estate make such a course desirable (*b*).

A trustee not absolutely necessary.

7. The assignment should in prudence be made to a trustee, but if the purchaser have the equity of redemption conveyed to *himself*, yet if the intention to keep up the charge be clear, no merger will take place (*c*).

Getting in a charge pending contract for purchase.

8. If a person *contracts* only for the purchase of an estate, and pays off a first charge with a view to the purchase, but before the completion of it, no merger takes place, but the purchaser stands in the shoes of the first incumbrancer (*d*).

Where the person who created the second charge buys up the first charge.

9. The question of merger has been spoken of as one of *intention* (*e*), but this principle must not be applied where a person has himself created two successive incumbrances, and then buys up the first charge, for in this case the mortgagor when he creates the second incumbrance is under a duty to discharge the debt previously incurred, and though the second mortgagee cannot compel him to do this, yet if the mortgagor do discharge the first debt, the second incumbrancer, whatever may have been the intention, will have the benefit of it. Besides, in most cases a mortgagor, in creating an incumbrance, enters into a covenant for further assurance, and this, independently of any general equity, would, it is conceived, give the incumbrancer a right to call for the assignment to him of any interest in the estate subsequently acquired by the mortgagor. Although, therefore, the mortgagor take an assignment of the prior charge to a trustee for himself to the intent that the same may be kept on foot, yet equity will not allow this as against the second incumbrancer (*f*).

(*a*) *Bailey* v. *Richardson*, 9 Hare, 736; and see *Holt* v. *Holt*, cited 1 P. W. 374.

(*b*) See *Selsey* v. *Lake*, 1 Beav. 146, 148.

(*c*) See *Davis* v. *Barrett*, 14 Beav. 542; *Forbes* v. *Moffatt*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*d*) *Watts* v. *Symes*, 1 De G. M. & G. 240.

[(*e*) *Adams* v. *Angell*, 5 Ch. D. (C.A.) 634; *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515, 526; *Re Pride*, (1891) 2 Ch. 135, 142; *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. (C.A.) 726, 734, 738; *S.C.* reversed, (1898) A. C. 321.]

(*f*) *Otter* v. *Lord Vaux*, 2 K. & J. 657, *per* V. C. Wood.

Otter *v.* Vaux.

10. This has been carried so far that where a mortgage was made with a power of sale, and then a second incumbrance was created, and then the mortgagor purchased under the power of sale in the first mortgage, it was held that by this means the second incumbrance was let in as the first charge upon the estate (*a*). It was clear that if the mortgagor had paid off the first mortgage and taken a reconveyance, this would have enured to the benefit of the second mortgagee; and the substance of the transaction was thought to be the same where the mortgagor took a reconveyance from the mortgagee by the machinery of the power of sale: it was, indeed, said that this would give the second incumbrancer a double security—first, the purchase-money in the hands of the first mortgagee, and then the estate in the hands of the mortgagor; but the answer was that the mortgagee could get no more than he was entitled to, viz. his principal money and interest (*b*). [This principle applies equally to a case where an existing incumbrancer or creditor ranks *pari passu* with the incumbrancer who is paid off (*c*).

[Trustee in bankruptcy buying up charge.]

11. But where the trustee in bankruptcy of the mortgagor purchased from the first mortgagee, it was held that the second mortgagee was unaffected by the transaction, that the trustee stood in the position of transferee of the mortgage, and the second mortgagee was entitled to redeem him upon the usual terms (*d*).]

Owner of a charge may buy equity of redemption and hold his charge against intervening incumbrancer.

12. It was observed by Sir William Grant (*e*), that the cases of *Greswold* v. *Marsham* (*f*) and *Mocatta* v. *Murgatroyd* (*g*) were express authorities to show that one purchasing an equity of redemption could not set up a prior mortgage of his own, nor consequently a mortgage which he had got in, against subsequent incumbrances of which he had notice. Now a person who borrows money cannot be his own creditor, or set up an incumbrance of his own, as against his own creditor (*h*); and if the vendor of the equity of redemption be himself personally liable for the charge, the purchaser will, as a general rule, be bound to indemnify him, but that one purchasing an equity of redemption cannot set up

(*a*) *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638, 643; [and see *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515, 526].

(*b*) *Otter* v. *Lord Vaux*, 2 K. & J. 657.

[(*c*) *Re Tasker & Sons*, (1905) 2 Ch. (C.A.) 586 (where debentures were paid off by the company who had issued them, and were then irregularly re-issued as though they were still subsisting).]

[(*d*) *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618.]

(*e*) *Toulmin* v. *Steere*, 3 Mer. 224.

(*f*) 2 Ch. Ca. 170.

(*g*) 1 P. W. 393.

(*h*) *Watts* v. *Symes*, 1 De G. M. & G. 244, *per* L. J. Knight Bruce.

a mortgage of his own, or one which he has got in, as against incumbrances not created by himself (a proposition not established by the authorities cited by Sir W. Grant (*a*)) is, it is conceived, not law at the present day (*b*). If the first mortgage be paid off and extinguished, of course the second charge is let in; but, subject to the equities flowing from the contract between the purchaser and his vendor, the first mortgage and the equity of redemption may be so vested in the same person as to keep the two separate, and so exclude the second incumbrance.

Effect of keeping a charge on foot.

13. It must be borne in mind that where the charge and the inheritance do not merge, the person in whom they are vested has two distinct possessions, and in the absence of any indication of intention that the charge shall in equity wait upon and attend the inheritance, the charge will go to the executor, subject to probate and legacy duty (*c*), and the inheritance to the heir (*d*). The question, therefore, is constantly arising as between the real and personal representatives, whether the two interests merged in the lifetime of the person entitled to both or were subsisting at the time of his death; and the question of merger or non-merger is held to be an open one up to the death of a testator (*e*), and for the purpose of collecting the intention parol evidence is admissible (*f*).

Rule where charge and inheritance become united.

14. Where a person is entitled to a charge and to the inheritance under the same instrument (*g*), *or* being first entitled to the charge subsequently acquires the inheritance as devisee (*h*), or heir (*i*), *or* being first entitled to the inheritance acquires the charge by bequest (*j*), or by succession as next of kin (*k*), in all

(*a*) See *Watts* v. *Symes*, 1 De G. M. & G. 244; and Dart. V. & P. 6th ed. p. 1040; [*Adams* v. *Angell*, 5 Ch. D. (C.A.) 634].

(*b*) See now *Hayden* v. *Kirkpatrick*, 34 Beav. 645; *Stevens* v. *Mid-Hants Railway Company*, 8 L. R. Ch. App. 1064; [*Gokuldoss Gopaldoss* v. *Rambux Seochand*, 11 L. R. Ind. App. 126; *Thorne* v. *Cann*, (1895) A. C. 11].

(*c*) See *Swabey* v. *Swabey*, 15 Sim. 502.

(*d*) *Belaney* v. *Belaney*, 2 L. R. Ch. App. 138; 35 Beav. 469. Lord Romilly, M.R., observed that "If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir." Is it meant by this that a charge cannot be kept up for the benefit of the next of kin, but only for the benefit of persons claiming under a will?

(*e*) *Swinfen* v. *Swinfen* (No. 3), 29 Beav. 199; and see *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

(*f*) *Astley* v. *Milles*, 1 Sim. 298.

(*g*) *Grice* v. *Shaw*, 10 Hare, 76; *Richards* v. *Richards*, Johns. 754.

(*h*) *Forbes* v. *Moffat*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Davis* v. *Barrett*, 14 Beav. 542.

(*i*) *Chester* v. *Willes*, Amb. 246; *Powell* v. *Morgan*, 2 Vern. 90; *Thomas* v. *Kemeys*, 2 Vern. 348.

(*j*) *Price* v. *Gibson*, 2 Eden, 115.

(*k*) *Donisthorpe* v. *Porter*, 2 Eden, 162; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 260; [*Re French-Brewster's Settlements*, (1904) 1 Ch. 713].

these cases, in the absence of anything said or done by the owner of the charge and of the estate to show what his intention was (*a*), the Court presumes the charge to be merged or not, according as merger would or not be for the owner's benefit. If, therefore, the owner would, as in the case of an infant previously to the Wills Act, have had a larger testamentary power over the charge than over the inheritance (*b*), or if the merger would let in subsequent or competing incumbrances (*c*) of substantial amount (*d*), or the debts of the testator or grantor (*e*), [or the right of a landlord to rent (*f*)], the Court presumes the intention to have been that the charge and the inheritance, though both vested in the same person, should be kept distinct. But if it clearly appear that to keep the charge on foot could in no way benefit the owner it will merge (*g*).

Rule where owner pays off a charge.

15. Where a charge is *paid off* by a person owning an interest in the property charged, the *quantum* of interest which he owns

(*a*) See *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244, in which case Sir John Romilly, M.R., observed: "The three tests usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time when he became entitled to the absolute interest in the charge are: 1. Any actual expression of that intention; 2. Where the form and character of the acts done are only consistent with the keeping the charge on foot; and 3. Such an intention may be presumed when, though a total silence in all other respects pervades the matter, it appears that it was for the interest of the owner of the charge that it should not merge in the inheritance;" [and see *Thorne* v. *Cann*, (1895) A. C. 11; and *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. 726, where it was said by Lindley, L.J., that having regard to the decision in *Thorne* v. *Cann*, "it is perhaps now safe to say that where a purchaser of a property pays off a charge on it, without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence," adding, with reference to the facts of the particular case, that he did not think that the opportunity of making a very doubtful claim against third parties was such a benefit as was meant in such an enunciation of the doctrine. The case was reversed in H. L. on other grounds, see (1898) A. C. 321. For a case in which, parties having dealt on the footing that a term of years was to be deemed to be in existence, it was held to be inequitable to allow the term to be treated as at an end, see *Thellusson* v. *Liddard*, (1900) 2 Ch. 635; and see *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. (C.A.) 631. See also *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Locking* v. *Parker*, 8 L. R. Ch. 30; *Re Godley's Estate*, (1896) 1 I. R. 45; *Smith* v. *Smith*, 19 L. R. Ir. 514, 522].

(*b*) *Powell* v. *Morgan*, 2 Vern. 90; *Thomas* v. *Kemeys*, Ib. 348; *Duke of Chandos* v. *Talbot*, 2 P. W. 601.

(*c*) *Forbes* v. *Moffat*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Grice* v. *Shaw*, 10 Hare, 76; *Richards* v. *Richards*, Johns. 754; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*d*) *Richards* v. *Richards*, Johns. 767.

(*e*) *Davis* v. *Barrett*, 14 Beav. 552; *Sing* v. *Leslie*, 2 H. & M. 68.

[(*f*) *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. (C.A.) 631.]

(*g*) *Price* v. *Gibson*, 2 Eden, 115; *Donisthorpe* v. *Porter*, Ib. 162; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 263; *Swinfen* v. *Swinfen*, (No. 3), 29 Beav. 199; [*Re Godley's Estate*, (1896) 1 I. R. 45; *Re French Brewster's Settlements*, (1904) 1 Ch. 713; *Re Hole*, (1906) 1 Ch. (C.A.) 673].

is, in the absence of direct evidence of intention, the chief guide in determining whether merger takes place. If he be *absolutely* entitled, the *presumption* is that he meant to free the property from the charge; if only *partially* interested, the *presumption* is that he intended to keep it on foot (*a*).

Tenant in fee-simple paying off a charge.

16. Thus, if the person paying off the charge be *tenant in fee simple*, the presumption will be that the charge was meant to be merged (*b*), unless the assignment of the charge was to a trustee in trust for the owner of the inheritance, his "*executors, administrators*, and assigns," instead of his "*heirs* and assigns" (*c*), or there were other circumstances in the transaction sufficient to exclude the presumption (*d*).

The mere fact of taking the assignment to a *trustee* for the person paying off, though a material ingredient in the question of intention, is not alone enough to keep the charge on foot (*e*).

[And where a person, claiming to be the absolute owner of an estate, borrows money to pay off a mortgage, there being no intermediate incumbrance, the presumption is that he means to extinguish the charge (*f*).]

Tenant for life paying off a charge.

17. If the person paying off the charge be *tenant for life*, the Court considers that as his interest ceases with his death, he could never have meant that the charge should be extinguished instead of enuring to the benefit of his representatives (*g*); [and effect was given to this principle, notwithstanding that the property had been reconveyed "absolutely discharged" from the mortgage debt, the solicitors who prepared the reconveyance being not fully cognisant of the facts (*h*)]. The same rule applies

[(*a*) *Adams* v. *Angell*, 5 Ch. D. (C.A.) 634, 645; *Re Pride*, (1891) 2 Ch. 135, where an owner of five-sixths paid off a charge on the entirety pending a suit to set aside the sale of one of such five-sixths to him, and took from the mortgagee a reconveyance as to the five-sixths, and a transfer as to the other sixth, and it was held that the charge was kept alive as to the disputed sixth; and see *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. (C.A.) 726, 733; *S. C.* reversed, (1898) A.C. 321.]

(*b*) *Hood* v. *Phillips*, 3 Beav. 513; *Pitt* v. *Pitt*, 22 Beav. 294; *Gunter* v. *Gunter*, 23 Beav. 571; *Swinfen* v. *Swinfen* (No. 3), 29 Beav. 199; [*Re Nunn's Estate*, 23 L. R. Ir. 286, 309; *Re Lloyd's Estate*, (1903) 1 I. R. 145].

(*c*) *Gunter* v. *Gunter*, 23 Beav. 571; and see *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

(*d*) *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*e*) *Pitt* v. *Pitt*, 22 Beav. 294; *Hood* v. *Phillips*, 3 Beav. 513.

[(*f*) *Mohesh Lal.* v. *Mohunt Bawan Das*, 10 L. R. Ind. App. 62.]

(*g*) *Pitt* v. *Pitt*, 22 Beav. 294; *Burrell* v. *Earl of Egremont*, 7 Beav. 205: *Redington* v. *Redington*, 1 B. & B. 131; *Faulkner* v. *Daniel*, 3 Hare, 217; *Lindsay* v. *Earl Wicklow*, 7 Ir. R. Eq. 192; [*Re Nepean's Settled Estate*, (1903) 1 Ir. R. 298, where successive tenants for life were recouped rateably, the earlier not being preferred].

[(*h*) *Lord Gifford* v. *Lord Fitzhardinge*, (1899) 2 Ch. 32; and see *Conolly* v. *Barter*, (1904) 1 I. R. 144.]

though the tenant for life be or become entitled (subject to remainders to his own issue which fail) to the ultimate reversion in fee (*a*); [and the fact that the tenant for life is the mother of the remainderman is not of itself sufficient to rebut the presumption (*b*)]. But even in the case of a tenant for life, positive evidence may be given by parol that he meant to merge the charge (*c*).

Tenant in tail in possession and of age paying off a charge.

18. As *tenant in tail in possession*, if of age, has an absolute power of disposition over the estate, subject to his compliance with certain forms, the presumption is, that if he pay off a charge he meant to merge it (*d*).

Special cases where charge has been kept on foot.

19. But if *tenant in fee simple*, subject to an *executory limitation* over, which he cannot destroy (*e*), or a *tenant in tail* under an *Act of Parliament*, who is incapable of acquiring the fee simple (*f*), or *tenant in tail in remainder* during the life of the tenant for life whose issue, if any, will be prior tenants in tail (*g*), pay off a charge, in all these cases, as the interest of the party required the charge to be kept on foot, the presumption is that such was the intention. And where a tenant in tail paid off a charge with the intention of extinguishing it, *believing* himself to be tenant in fee simple, and assuming that as the basis of the transaction, the Court considered, on the ground of *mistake*, that the tenant in tail had not merged the charge (*h*).

Payment of charge and subsequent acquisition of fee.

20. It seems to be settled that where a tenant for life or tenant in tail in remainder pays off a charge, and *afterwards the fee devolves* on the tenant for life, or the *remainder* of the tenant in tail *vests in possession*, this subsequent union of the charge and the inheritance is not *per se* sufficient to rebut the intention previously shown to keep the charge on foot (*i*); [and similarly, where a tenant for life in remainder takes a beneficial lease, and subsequently becomes tenant for life in possession, the presumption is against merger (*j*)].

[Lease taken by tenant for life in remainder.]

(*a*) *Wyndham* v. *Earl of Egremont*, Amb. 753; *Trevor* v. *Trevor*, 2 M. & K. 675.

[(*b*) *Re Harvey*, (1896) 1 Ch. (C.A.) 137.]

(*c*) *Astley* v. *Milles*, 1 Sim. 298.

(*d*) *St Paul* v. *Dudley*, 15 Ves. 173, *per* Lord Eldon; *Jones* v. *Morgan*, 1 B. C. C. 206; *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 199; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*e*) *Drinkwater* v. *Combe*, 2 S. & S. 340.

(*f*) *Shrewsbury* v. *Shrewsbury*, 3 B. C. C. 120; *S. C.*, 1 Ves. jun. 227; see *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 200.

(*g*) *Wigsell* v. *Wigsell*, 2 S. & S. 364; *Horton* v. *Smith*, 4 K. & J. 624.

(*h*) *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 186; *Kirkham* v. *Smith*, 1 Ves. 258.

(*i*) *Trevor* v. *Trevor*, 2 M. & K. 675; *Wigsell* v. *Wigsell*, 2 S. & S. 364; *Horton* v. *Smith*, 4 K. & J. 624.

[(*j*) *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368.]

Mortgage by person who has bought up a charge.

21. If a person having both a subsisting charge and the estate, mortgage or convey the latter, without mention of the charge, the security carries with it all the mortgagor's interest, and as between the mortgagor and mortgagee there is a merger (*a*). If tenant in fee of an estate mortgage it to the trustees of his settlement to secure a fund to which he is absolutely entitled, subject to a life interest limited to his wife, and then dies in the lifetime of the wife, there can be no merger, for during the existence of the wife's interest the trustees could not, without a breach of trust, release the charge to him (*b*).

[Declaration keeping mortgage on foot.]

[Where the owner of an equity of redemption takes a transfer of an existing mortgage, with a declaration that the mortgage is kept on foot as a subsisting charge for the benefit of himself, his heirs and assigns, the mortgage will pass, upon his death intestate, as personal estate to his next of kin (*c*).]

Whether charges can be made to attend the inheritance.

22. As charges are not unfrequently assigned like terms of years upon trust to *attend the inheritance*, it may be useful to add some cautionary remarks. So far as the author is aware, there is no authority for saying that charges can be made to wait upon the inheritance like terms of years. No doubt charges, like heirlooms and other personalty, can be settled to a certain extent to run in the channel of realty, but can they be impressed with the nature of realty itself? Thus A. buys an estate, and settles it by the purchase deed to the use of himself for life, with remainder to his first and other sons in tail, with remainder over to B., and, suspecting secret incumbrances, has a charge assigned to a trustee upon trust to attend the inheritance; A. dies leaving an only son, who shortly afterwards dies without issue, when the estate becomes vested in B. An incumbrancer now starts up, and the charge is raised. Who is to have the benefit of it? Not, it will be said, A.'s real or personal representative, for by the trust he has parted with the absolute interest in favour of others. Not B., for how can personal estate go after an entail to a remainderman? The practice of assignment of charges, however, is so prevalent that when the point comes to be decided, the Court *may* go the whole length of holding that charges can attend the devolution of real estate through all its changes, and that they are not barred, &c., and that though latent before, yet they resume their vitality when a secret incumbrance

(*a*) *Tyler* v. *Lake*, 4 Sim. 351; *Johnson* v. *Webster*, 4 De G. M. & G. 474; [and see *Price* v. *John*, (1905) 1 Ch. 744].

(*b*) *Wilkes* v. *Collin*, 8 L. R. Eq. 338.

[(*c*) *Re Gibbon*, (1909) 1 Ch. 367.]

is disclosed. The point must at present be considered an open one.

23. Now by the Supreme Court of Judicature Act, 1873, sect. 25, sub-sect. 4, there is not any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. [The effect of this enactment "seems to be that, if the circumstances are such that a Court of Equity would have held that there was no merger in equity, there is now no merger at law, and the rights of the parties must be dealt with on that footing" (*a*).] 36 & 37 Vict. c. 66, s. 25.

SECTION V

OF DOWER AND CURTESY

Dower and curtesy of a trust.

1. A trust or equitable interest (*b*) and equity of redemption (*c*), of *freeholds*, were until the Dower Act (*d*) exempt from the *lien* of dower; but were subject to the curtesy of the husband (*e*), unless the husband was an alien (*f*).

Freebench.

2. An equitable interest in *copyholds* (as the Dower Act does not apply to them (*g*)) remains as before not subject to freebench (*h*).

What seisin required to give curtesy.

3. With respect to *curtesy*, as at *law* the wife, to entitle her husband to curtesy, must have *seisin* in deed of the freehold (*i*),

[(*a*) *Capital and Counties Bank Limited* v. *Rhodes*, (1903) 1 Ch. (C.A.) 631, 653, 654, *per* Cozens-Hardy, L.J.]

(*b*) *Colt* v. *Colt*, 1 Ch. Rep. 254; *Bottomley* v. *Lord Fairfax*, Pr. Ch. 336; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 138; *Chaplin* v. *Chaplin*, 3 P. W. 229; *Shepherd* v. *Shepherd*, Id. 234, note (D); *Lady Radnor* v. *Rotherham*, Pr. Ch. 65, *per* Lord Somers; *Goodwin* v. *Winsmore*, 2 Atk. 525. The distinction taken by Sir Jos. Jekyll in *Banks* v. *Sutton*, 2 P. W. 700, between trusts created by the husband himself and trusts originating from a stranger, has been overruled by subsequent cases; *Curtis* v. *Curtis*, 2 B. C. C. 630; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 391; *Burgess* v. *Wheate*, 1 Eden, 197.

(*c*) *Dixon* v. *Saville*, 1 B. C. C. 326; *Reynolds* v. *Messing*, cited 1 Atk. 604; *Casborne* v. *Scarfe*, 2 J. & W. 194.

(*d*) 3 & 4 W. 4. c. 105.

(*e*) *Chaplin* v. *Chaplin*, 3 P. W. 234, *per* Lord Talbot; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139, *per eundem*; *Watts* v. *Ball*, 1 P. W. 108: *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. 174; *Casborne* v. *Scarfe*, 1 Atk. 603; *Dodson* v. *Hay*, 3 B. C. C. 405.

(*f*) See *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92. But see now the Naturalization Act, 1870 (33 Vict. c. 14), s. 2.

(*g*) See *post*, p. 950.

(*h*) *Forder* v. *Wade*, 4 B. C. C. 521.

[(*i*) The seisin in deed of the freehold is necessary only in the cases in which, in the language of Lord Coke, "it may be attained unto"; Co. upon Litt. 29a., but where there are no possible means by which the seisin in deed can be acquired, the husband will be entitled to curtesy notwithstanding its absence, for *impotentia excusat legem*. Thus in the case put by Lord Coke, "a man seised of an advowson or rent in fee hath issue a daughter, who is

the question arises whether in the instance of a *trust*, there must not be such a *seisin* of the equitable estate in the wife as is considered equivalent to legal *seisin*, as actual possession of the estate clothed with the receipt of the rents and profits.

No curtesy where there is adverse possession.

4. It seems to be admitted that if the equitable interest be in the possession of a stranger, *adversely to the right of the wife*, there is no such seisin in deed as to entitle the husband to his curtesy (*a*).

Executory trusts.

5. But if money be articled or directed by will to be laid out in a purchase of *land to be settled on a married woman* in fee or in tail, the husband is entitled to curtesy, though no rent or interest may have been actually paid during the coverture (*b*). This proceeds on the principle that the *laches* of the trustees shall not prejudice the right of a third person, and, therefore, the claim to curtesy arises in the same manner as if the trustees had actually laid out the money in land and put the parties in possession.

Parker *v.* Carter.

6. And it has been held, that in the case of an ordinary trust, *any seisin* of the wife, though she has not possession or receipt of rents, is sufficient to entitle the husband to curtesy. Thus an estate had been vested in trustees upon trust for Carter, during the *joint* lives of himself and Mary his wife, and upon the death of *either* of them, and in default of appointment, upon trust for the children in fee. There were two children, a son, and a daughter Elizabeth, and the daughter married Parker; Carter died in 1817, and on his decease the widow, although she had no life estate, held possession of the estate until her own death in 1839. Elizabeth Parker died in 1836, and the question was, whether Parker the husband was tenant by the curtesy, although his wife had never been in receipt of rents. The Vice-Chancellor ruled that the possession of Carter was the possession of his trustee, and gave to the trustee a seisin of the inheritance; that the death of Carter did not interrupt that seisin, but the trustee was still in actual possession, not by a new title then for the

married, and hath issue and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin," Co. upon Litt. 29a. So where a testator devised an estate to his daughter, her heirs and assigns, for her separate use, and the daughter died in the lifetime of the testator leaving a husband and an only child, it was held that under the operation of the Wills Act the husband was entitled to curtesy, and that, as there were no possible means by which the husband could have obtained seisin in the wife's lifetime, it was not required; *Eager* v. *Furnivall*, 17 Ch. D. 115.]

(*a*) *Parker* v. *Carter*, 4 Hare, 413.

(*b*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Dodson* v. *Hay*, 3 B. C. C. 405.

first time accruing, but by continuance of the seisin acquired during the coverture, that the trustee was in such possession for the benefit of the party lawfully entitled thereto, and that he continued in such possession until the entry of Mary, which might be supposed to be a month or more after the death of her husband, and that such interval, there being no adverse possession, would entitle the husband to his curtesy (*a*).

Curtesy where there is separate use.

7. If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favour of the curtesy (*b*); but in a subsequent case (without any allusion, however, to his former opinion), he decided against the claim of the husband (*c*). It has since been determined that the husband is entitled (*d*).

[Defeated by a disposition by the wife.]

[The right of the husband will, however, be defeated by a disposition by the wife of her inheritance by act *inter vivos* or by will (*e*).]

Opinion of Sir John Leach.

8. It was observed by Sir John Leach that at *law* the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in *equity* he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly, by a direction that upon the death of the wife the *inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant by the curtesy* (*f*); but this doctrine may admit of question, as there appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet* v. *Davis* (*g*), which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate, but whether an equitable estate arose. A testator had devised lands "to his daughter, the wife of Bennet, for her *separate use*, exclusive of her husband, to hold

(*a*) *Parker* v. *Carter*, 4 Hare, 400; see *Casborne* v. *Scarfe*, 1 Atk. 606.

(*b*) *Roberts* v. *Dixwell*, 1 Atk. 609.

(*c*) *Hearle* v. *Greenbank*, 3 Atk. 715, 716.

(*d*) *Morgan* v. *Morgan*, 5 Mad. 408; *Follett* v. *Tyrer*, 14 Sim. 125; *Appleton* v. *Rowley*, 8 L. R. Eq. 139; [*Cooper* v. *Macdonald*, 7 Ch. D. (C.A.) 288.] But see *contra*, *Moore* v. *Webster*, 3 L. R. Eq. 267.

[(*e*) *Cooper* v. *Macdonald*, 7 Ch. D. (C.A.) 288.]

(*f*) *Morgan* v. *Morgan*, 5 Mad. 411.

(*g*) 2 P. W. 316.

the same to her and her heirs," and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife's death go to her heirs. It was contended that the wife could not be a trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and, that consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the Court held that the husband was a trustee for the wife, and observed, "though the husband might be tenant by the curtesy (viz. of the legal estate), yet he should be but a trustee for the *heirs* of the wife." The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate, but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the Court. Even assuming the remark to have been made advisedly, the view of the Court may have been that the curtesy of the husband was excluded on the ground now overruled, viz. that the trust being not simply for the wife and her heirs, but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon (*a*).

[Effect of Married Women's Property Act, 1882.]

[9. Under the Married Women's Property Act, 1882 (*b*), a married woman is enabled to acquire, hold, and dispose of property as her separate estate as if she were a feme sole, without the intervention of any trustee, but the Act does not purport to interfere with the husband's right in case of intestacy, and accordingly he is entitled to his curtesy in the same manner as if the property had, independently of the Act, been settled for the separate use of the wife (*c*).]

Distinction between dower and curtesy.

10. It must be acknowledged, that as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower, or the admission of curtesy, was an anomaly. Some high authorities, as Lord Talbot (*d*), Sir T. Clark (*e*), and Lord Loughborough (*f*), regarded the allowance of *curtesy* as the exception; and the ground upon which they proceeded was that as trusts followed the likeness of the use, and there was no curtesy of the use, there could be none of the trust. On the

(*a*) See *Hearle* v. *Greenbank*, 3 Atk. 715, 716; *Morgan* v. *Morgan*, 5 Mad. 408.

[(*b*) 45 & 46 Vict. c. 75, sect. 1, sub-s. 1. See as to the effect of the Act, *post*, pp. 964, *et seq.*]

[(*c*) *Hope* v. *Hope*, (1892) 2 Ch. 336.]

(*d*) *Chaplin* v. *Chaplin*, 3 P. W. 234; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139.

(*e*) *Burgess* v. *Wheate*, 1 Eden, 196-198.

(*f*) *Dixon* v. *Saville*, 1 B. C. C. 327.

other hand, Sir J. Jekyll (*a*), Lord Hardwicke (*b*), Lord Cowper (*c*), Lord Mansfield (*d*), Lord Henley (*e*), and Lord Redesdale (*f*), thought that consistency would be restored by the admission of the title to *dower;* for, since the Statute of Frauds, they argued the system of trusts had undergone considerable alteration, and was conducted upon a much more liberal footing: the rule now was, that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate had a like right against the equitable. Thus either argument had a fair show of reason to support it; but the latter view was, no doubt, more in harmony with the system of trusts as eventually established.

How curtesy came to be allowed and not dower.

The Courts, according to Lord Redesdale, were led to refuse dower out of trust estates from a well-founded fear of affecting the titles to a large proportion of the estates in the country, because parties had been acting on the footing that dower did not attach to a trust; but the same objection did not apply to allowing *tenancy by the curtesy*, inasmuch as no person would purchase an estate without the concurrence of the husband (*g*).

Dower Act.

11. By the Dower Act, 1833 (*h*), the widow is entitled to dower *in equity* where the husband dies beneficially entitled to any interest (not conferring a title to dower at law) which whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy (*i*). But in either case the wife will not be entitled to dower out of any property absolutely disposed of by the husband in his lifetime or by will (*j*). And by the Act a widow is not entitled to dower out of any land, when in the deed of conveyance thereof to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower (*k*). And

(*a*) *Banks* v. *Sutton*, 2 P. W. 713, 714.

(*b*) *Casburne* v. *Inglis*, 2 J. & W. 200.

(*c*) *Watts* v. *Ball*, 1 P. W. 109.

(*d*) *Burgess* v. *Wheate*, 1 Eden, 224.

(*e*) Ib. 249-251.

(*f*) *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.

(*g*) *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.

(*h*) 3 & 4 W. 4. c. 105.

(*i*) Ib. s. 2. [Where the husband had a limited equitable estate in possession which was severed from his legal estate in remainder by the interposition of possible estates tail, it was held that the widow was not entitled to dower; *Re Mitchell*, (1892) 2 Ch. 87.]

(*j*) 3 & 4 W. 4. c. 105, s. 4. But whether the husband has devised his estate in such a way as to manifest an intention that the estate should be free from dower is a question often of great nicety. See *Gibson* v. *Gibson*, 1 Drew. 42; *Lacey* v. *Hill*, 19 L. R. Eq. 346, and Lord St Leonards on Real Property Statutes, p. 254.

(*k*) 3 & 4 W. 4. c. 105, s. 6.

the widow's right of dower may also be barred by declaration contained in the husband's will (*a*).

Exceptions from Act.

12. The Act does not extend to the dower of any widow married *on or before the 1st January*, 1834 (*b*), and does not apply to *copyholds* (*c*), though it does to lands of *gavelkind* tenure (*d*).

Dower out of equitable fee subject to executory devise.

13. And a widow married since the Act is dowable of an *equitable estate* limited to the husband in fee, but subject to a *limitation over* on his dying without issue living at his death, and which event has since occurred (*e*).

[Intestates' Estates Act, 1890.]

[14. The charge of 500*l.* on an intestate's real and personal estate in favour of his widow, under the Intestates' Estates Act, 1890 (*f*), has, to the extent to which such charge affects the real estate, priority over her right to dower (*g*).]

SECTION VI

OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST

Under the above title we propose, *First*, To advert shortly to the effect of marriage upon property, held upon trust for a *feme covert* simply, and not for her separate use, treating, in order, of pure personalty, chattels real, and real estate of freehold or inheritance; and, *Secondly*, To consider the nature of a wife's *separate estate* (*h*).

First. Of a *feme covert's* equitable interest generally.

[And here we may observe, that the mutual rights of husband and wife in the property of the wife have recently undergone such great changes, that it will be well, for the sake of simplicity, to deal separately with (A), the law as regards cases not affected by the Married Women's Property Act, 1882, and (B), the modifications introduced by that Act.

(*a*) 3 & 4 W. 4. c. 105, s. 7.

(*b*) Ib. s. 14.

(*c*) *Powdrell* v. *Jones*, 2 Sm. & G. 407; *Smith* v. *Adams*, 5 De G. M. & G. 712.

(*d*) *Farley* v. *Bonham*, 2 J. & H. 177.

(*e*) *Smith* v. *Spencer*, 2 Jur. N.S. 778.

[(*f*) 53 & 54 Vict. c. 29, ss. 2, 4. The Act does not apply to cases of partial intestacy: *Re Twigg*, (1892) 1 Ch. 579; but does apply where there is a complete failure by lapse of all beneficial interests under a will, and the person therein named as executor has predeceased the testator: *Re Cuffe*, (1908) 2 Ch. 500. As to the right to the £500 being barred by a provision in a marriage settlement executed before the Act, see *Re Hogan*, (1901) 1 I. R. 168.]

[(*g*) *Re Charriere*, (1896) 1 Ch. 912.]

(*h*) This section in the third and fourth editions was added to and much improved by the author's friend, the late Mr F. O. Haynes.

(A) As to cases not affected by the Married Women's Property Act.

The cases to be considered under this head will be confined to those in which property accrued before the 1st January, 1883, to women who were married before that date.]

Pure personal estate not settled to separate use.

1. As respects *pure personal estate* (by which expression is here meant personalty *exclusive of chattels real*, such as chattels personal, legacies, and other *choses in action*), not settled to the wife's separate use, the husband's power over the *equitable* estate is regulated by his power over the *legal* estate. A personal chattel, as furniture, held in trust for the wife, belongs in equity to the husband absolutely. But as to *choses in action*, as legacies, the right of the husband depends upon the fact of *reduction into possession* (*a*). If the wife's equitable interest be a present one, and the trustee is willing to facilitate the reduction into possession by payment, transfer, &c., to the husband, the trustee is at liberty to do so, and will not thereby incur any personal responsibility (*b*). On the other hand, the trustee, in whose hands the wife's *chose in action* is, may, in a proper case, insist on having it settled; and if for that purpose he pay it, by arrangement with the husband, to the trustees of an existing settlement, to be held by them upon the trusts thereof, such settlement will be as valid as if made by the Court (*c*). But a wife has no *equity to a settlement* until her *ante-nuptial debts* have been discharged (*d*); and she has no such equity against a *purchaser* where the fund has been aliened by the husband, and the alienation is binding on the wife from her having taken a *fraudulent* part in the alienation (*e*).

Reduction into possession.

An actual reduction into possession (*f*) is required for defeating the wife's rights (*g*); and in the absence of reduction into

(*a*) *Purdew* v. *Jackson*, 1 Russ. 45, 46. [Thus if a feme, joint tenant of a *chose in action*, marries, the joint tenancy is not thereby severed; *Re Butler's Trusts*, 38 Ch. D. (C.A.) 286, overruling *Bailie* v. *Treharne*, 17 Ch. D. 388.]

(*b*) See *Re Swan*, 2 H. & M. 37.

(*c*) *Montefiore* v. *Behrens*, 1 L. R. Eq. 171. In this case, M.R. speaks of the wife's right to have it settled as *she pleased*, but as to the wife's capacity, see *Re Swan*, 2 H. & M. 37; and see *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708.

(*d*) *Barnard* v. *Ford*, 4 L. R. Ch. App. 247; *Miller* v. *Campbell*, W. N. 1871, p. 210.

(*e*) *Re Lush's Trust*, 4 L. R. Ch. App. 591; [*Cahill* v. *Cahill*, 8 App. Cas. 427; *S. C. nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361].

[(*f*) As to the circumstances under which a lodgment in Court, of money representing a *chose in action* belonging to the wife, will amount to a reduction into possession, see *Donnelly* v. *Foss*, 7 L. R. Ir. 439.]

[(*g*) A release by the husband of a *chose in action* payable *in præsenti* is effectual to bar the wife's equity to a settlement, and if the release be of a legacy by deed poll it will be operative although there was no legal personal

possession by the husband during his life, the equitable interest passes to the wife by survivorship (*a*). It follows that where the wife's interest remains *reversionary* until after the husband's death, and the wife survives, she *necessarily* takes by survivorship (*b*). And so, if the marriage be dissolved, or a judicial separation be decreed (*c*), [or a protection order be obtained (*d*)] before the *chose in action* is got in, it belongs to the wife. A similar principle applies where the interest of the wife may be viewed as partly possessory and partly reversionary,—as where the wife is entitled during her own life; in which case, the husband cannot bind the interest of the wife beyond the duration of the coverture (*e*). So, even if the husband assign the wife's reversionary interest, and it subsequently, *during the husband's lifetime*, becomes possessory, the wife's right by survivorship remains, unless reduction into possession be actually effected by the husband in his lifetime (*f*).

representative in existence at the time of its execution; and the release is good although the husband was living apart from the wife and not contributing to her support; *M'Creery* v. *Searight*, 5 L. R. Ir. 206, 641; *Harrison* v. *Andrews*, 13 Sim. 595; see Roper on Husb. & Wife, Vol. I. pp. 240, *et seq.*]

[(*a*) If the husband and wife appoint an agent to receive a *chose in action* of the wife, and he receives it, but does not pay it over to either husband or wife, his receipt, nevertheless, operates as a reduction into possession by the husband; *Huntley* v. *Griffith*, F. Moore, 452, Goldsborough, 2nd ed. p. 159, pl. 91; and this will also be the case, where the *chose in action* is the distributive share of the wife in the estate of an intestate of which she is the adminstratrix; *Re Barber*, 11 Ch. D. 442. If the wife with the assent of her husband receives a *chose in action*, it operates as a reduction into possession by him; *Rogers* v. *Bolton*, 8 L. R. Ir. 69; but the payment to the wife without the husband's assent will not prevent the husband, if he survive her, from suing for the *chose in action* as her legal personal representative; *S. C.*]

(*b*) *Purdew* v. *Jackson*, 1 Russ. 1; *Honnor* v. *Morton*, 3 Russ. 65. [In *Widgery* v. *Tepper*, 5 Ch. D. 516, affirmed 7 Ch. D. 423, a husband sold his wife's share as one of the next of kin of an intestate in certain chattels, and received the purchase-money for her share. After the husband's death, which occurred in the wife's lifetime, it was discovered that the sale had taken place under circumstances which it was contended rendered it *voidable*, and on the question as to who was entitled to take proceedings to set the sale aside, it was held that the right of avoidance was in the husband's representatives, and did not survive to the wife.]

(*c*) *Wells* v. *Malbon*, 31 Beav. 48; *Re Insole*, 35 Beav. 92; *Prole* v. *Soady*, 3 L. R. Ch. App. 220; *Johnson* v. *Lander*, 7 L. R. Eq. 228: *Heath* v. *Lewis*, 4 Giff. 665; *Swift* v. *Wenman*, 10 L. R. Eq. 15; and see *Fussell* v. *Dowding*, 14 L. R. Eq. 421; 27 Ch. D. 237; *Jessop* v. *Blake*, 3 Giff. 639; *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; [and see *ante*, pp. 404, 405].

[(*d*) *Re Coward and Adam's Purchase*, 20 L. R. Eq. 159; *Nicholson* v. *Drury Buildings Estate Company*, 7 Ch. D. 48; *Re Emery's Trusts*, 58 L. T. N.S. 197; 32 W. R. 357; and see *Re Hughes*, (1898) 1 Ch. (C.A.) 529.]

(*e*) *Stiffe* v. *Everitt*, 1 M. & Cr. 37; *Harley* v. *Harley*, 10 Hare, 325.

(*f*) *Ellison* v. *Elwin*, 13 Sim. 309; *Ashby* v. *Ashby*, 1 Coll. 553; *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319; and see *Hamilton* v. *Mills*, 29 Beav. 193.

Equity to a settlement.

2. The *equity to a settlement* appears to have had its origin (*a*) in cases where the trustee, declining to pay, transfer, &c., the *wife's possessory interest* to the husband, and the husband filing a bill against the trustee to compel *payment, transfer*, &c., the Court held that those who seek equity must do equity; and declined to assist the husband in obtaining the wife's equitable interest, except upon the terms of some portion of it being settled for the benefit of the wife and her issue.

[But where property is given to husband and wife, inasmuch as by the unity of the persons in law they take by entireties, and the husband is entitled in his own right to the entirety during his life, the wife will have no equity to a settlement out of any part of the property (*b*).]

Feme may assert her equity to a settlement actively.

3. Whatever may have been the source of this equity, it is undoubtedly one which the wife has a right, according to the established practice of the Court, to assert *actively*, either by an action (*c*), or, in the case of an already existing suit, by petition (*d*) [or summons (*e*)], at any time before the husband has finally reduced the equitable interest into possession; and possession by the husband in the mere character of *executor*, or *administrator*, or *trustee*, and not as husband in his marital right, will not be deemed a reduction into possession to defeat the equity to a settlement (*f*). [And the equity may be enforced in

(*a*) See *Bosvil* v. *Brander*, 1 P. W. 458; *Browne* v. *Elton*, 3 P. W. 202; *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216; *Osborn* v. *Morgan*, 9 Hare, 432.

[(*b*) *Atcheson* v. *Atcheson*, 11 Beav. 485; *Ward* v. *Ward*, 14 Ch. D. 506; *Re Bryan*, 14 Ch. D. 516; and see *Chamier* v. *Tyrrell*, (1894) 1 I. R. 268; and the Married Women's Property Act, 1882, has not altered the law in this respect; see *Re March*, 27 Ch. D. (C.A.) 166; *Re Jupp*, 39 Ch. D. 148.]

(*c*) *Lady Elibank* v. *Montolieu*, 5 Ves. 737; *Duncombe* v. *Greenacre*, 28 Beav. 472; on appeal, 2 G. F. & J. 509. [The right is a personal one in the wife, and, on her death without having taken any steps to assert it, fails, and cannot be set up by her children. If, however, the wife has taken proceedings to enforce her equity, and has obtained a decree or order referring the matter to the judge in chambers to approve a proper settlement, the children are entitled to the benefit of that decree or order, and may bring an action to enforce the settlement. But if the wife dies after the institution of the action, but before a decree or order for a settlement has been made, the children, who have no equity except to enforce a judgment obtained in their favour, cannot compel a settlement; *Lloyd* v. *Williams*, 1 Mad. 450; *De la Garde* v. *Lemprière*, 6 Beav. 344; *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216, 234; and even after a decree for a settlement has been made, the wife may, while the settlement is still *in fieri* and unexecuted, come into Court and waive her right, and so disappoint the claims of the children; *Lloyd* v. *Williams*, *ubi sup.*; *Pemberton* v. *Marriott*, 47 L. T. N.S. 332.]

(*d*) *Greedy* v. *Lavender*, 13 Beav. 62; *Scott* v. *Spashett*, 3 Mac. & G. 599; [*Re Robinson's Settled Estate*, 12 Ch. D. 188].

[(*e*) See *Re Briant*, 39 Ch. D. 471.]

(*f*) *Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413; [*Re Birchall*, 44 L. T. N.S. 243].

respect of a fund which is possessory although not actually distributable, as in the case of a share of an estate which is being administered by the Court, but which will not be distributable until further consideration (*a*).

Where the husband and wife are not domiciled in England, and the law of the place of their domicile does not recognise any equity to a settlement in the wife, she cannot assert the right in the English Courts (*b*).]

Or waive it.

It is equally clear that the equity is one which the wife has a right to waive, by consenting in open Court (*c*) to the receipt of the equitable interest by the husband, [but an infant is not capable of giving such consent (*d*)]. The wife may revoke her consent at any time before the actual transfer (*e*), and she has no power of consenting *out of Court*, and therefore a trustee who thinks a settlement ought to be executed, which the husband rejects, is justified, notwithstanding the wife's wishes to the contrary, in paying the money into Court (*f*).

[But where a conveyance by husband and wife of the wife's real estate is duly acknowledged by her, she must be treated as having given up to her husband all claim on the purchase-money, even though part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate (*g*).]

As to fund under 200*l*.

4. In one case where the fund was under 200*l*., and therefore by the practice of the Court payable to the husband without the consent of the wife, the wife, though the husband had deserted her, had no equity to a settlement (*h*). But this case has since been overruled, and the Court has directed the whole fund, though it was under 200*l*., to be settled upon the wife and children (*i*).

[Equity to settlement prevails though husband indebted to estate.]

[5. The wife's equity to a settlement is paramount to the right of the representatives of the testator or intestate under whom

[(*a*) *Re Robinson's Settled Estate*, 12 Ch. D. 188.]

[(*b*) *Re Marsland*, 55 L. J. N.S. Ch. 581.]

(*c*) And as to interests acquired under an instrument made after 31st December, 1857, the wife may, after the fund has become possessory, release her equity to a settlement by deed acknowledged; Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), s. 1; see *ante*, p. 21.

[(*d*) *Shipway* v. *Ball*, 16 Ch. D. 376.]

(*e*) *Penfold* v. *Mould*, 4 L. R. Eq. 562.

(*f*) *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708, [where the trustees were saddled with costs for paying the money into Court].

[(*g*) *Tennent* v. *Welch*, 37 Ch. D. 622, *q.v.*, as to effect of acknowledgment generally.]

(*h*) *Foden* v. *Finney*, 4 Russ. 428.

(*i*) *Re Cutler*, 14 Beav. 220; [*Re Kincaid's Trusts*, 1 Drew. 326;] *Re Merriman's Trust*, 10 W. R. 334; [*Barker* v. *Vogan*, 17 L. R. Ir. 447].

her interest is derived, to retain a debt due from the husband to the testator or intestate (*a*).]

Where the husband, being himself an executor, was a defaulter to the estate, it was held that the wife, one of the residuary legatees, had no equity to a settlement as against the claims of other persons who suffered by the default (*b*); [but this decision has been doubted (*c*)].

Equity to settlement prevails against assignees in law or by deed.

6. The wife's equity to a settlement subsists not only against the husband himself, but also, *as a general rule*, against those claiming under him, as a trustee under his bankruptcy, or an assignee by deed, even for valuable consideration; in fact, the assertion of the equity most commonly takes place in cases where the husband has become bankrupt or has assigned the fund. Where, owing either to the trustee refusing to pay without suit, or to the wife's taking independent proceedings of her own, the fund comes under the control of the Court, the latter commonly considers that payment of *one half* to the husband or the assignees, and the settlement of the other half on the *wife and children*, is, in the absence of special circumstances, a reasonable apportionment (*d*). As the moiety paid to the husband or assignees represents the whole of the husband's interest, the entirety of the other moiety must be settled on the wife and children, to the exclusion of the husband (*e*), except on failure of issue (*f*), in which event the husband will take, whether he survive the wife or not (*g*). It would appear that in Lord Eldon's time a rule existed against giving the wife the *whole* fund (*h*). But subsequently, in a case (*i*) in the Exchequer, where the husband was *insolvent*, Baron Alderson directed a settlement of the *whole* fund, considering *insolvency* to afford ground for a special

Proportion to be settled.

[(*a*) *Re Batchelor*, 16 L. R. Eq. 481; *Re Cordwell's Estate*, 20 L. R. Eq. 644; *Re Briant*, 39 Ch. D. 471; and see *Carr* v. *Taylor*, 10 Ves. 574.]

(*b*) *Knight* v. *Knight*, 18 L. R. Eq. 487.

[(*c*) *Re Briant*, 39 Ch. D. 471.]

(*d*) *Spirett* v. *Willows*, 1 L. R. Ch. App. 520; *Napier* v. *Napier*, 1 Dru. & War. 407; *Vaughan* v. *Buck*, 1 Sim. N.S. 287; *Bagshaw* v. *Winter*, 5 De G. & Sm. 468; *Marshall* v. *Gibbings*, 4 Ir. Ch. Rep. 276; *Re Grove's Trusts*, 3 Giff. 582. In *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215, the L.JJ. gave the husband a third only; [and see *Callow* v. *Callow*, 55 L. T. N.S. 154].

(*e*) *Lloyd* v. *Williams*, 1 Mad. 450; *Barker* v. *Lea*, 6 Mad. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

(*f*) *Carter* v. *Taggart*, 5 De G. & Sm. 49; *Spirett* v. *Willows*, 12 Jur. N.S. 538; *Gent* v. *Harris*, 10 Hare, 383; *Bagshaw* v. *Winter*, 5 De G. & Sm. 468.

(*g*) *Croxton* v. *May*, 9 L. R. Eq. 404; *Walsh* v. *Wason*, 8 L. R. Ch. App. 482; but see *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215.

(*h*) *Dunkley* v. *Dunkley*, 2 De G. M. & G. 396.

(*i*) *Brett* v. *Greenwell*, 3 Y. & C. 230. [But Sir E. Sugden, when Lord Chancellor of Ireland, declined to follow this case. See *Napier* v. *Napier*, 1 Dru. & War. 407.]

exception. At the present day it is clear that the Court, wherever the special circumstances warrant the step (as, for instance, where the husband has abandoned the wife, or is not in a position to maintain her, and the fund is not more than sufficient for her maintenance), will settle the whole corpus, and, it seems, the arrears of income (*a*) on the wife and children (*b*). In every case the Court exercises a discretion as to the amount with reference to the particular circumstances (*c*)—namely, the conduct of the parties (*d*), the wife's means of livelihood (*e*), the settlement, if any, previously made upon her (*f*), and the sums before received by the husband in respect of the wife's fortune (*g*); [and the mere fact that the wife and children are in necessitous circumstances, and dependent on her for support, will not alone be sufficient to induce the Court to direct a settlement of more than a half (*h*)]. Where the wife has been amply provided for, and the husband has not misconducted himself, the Court has dismissed the wife's bill with costs, and left the husband at liberty to follow up his marital rights (*i*).

Discretion of Court.

[Form of settlement.]

[7. As regards the form of the settlement, the general rule is that the rights of the husband will not be interfered with further than is necessary to give effect to the equity in favour of the wife and children. Thus, the ultimate limitation, in default of children of the wife by any coverture will, in general,

(*a*) *Wilkinson* v. *Charlesworth*, 10 Beav. 324; but see *Newman* v. *Wilson*, 31 Beav. 34.

(*b*) *Smith* v. *Smith*, 3 Giff. 121; *Bowyer* v. *Woodman*, 3 L. R. Eq. 313; *Duncombe* v. *Greenacre* (No. 2), 29 Beav. 378; *Re Grove's Trust*, 3 Giff. 582; *Bray* v. *Laycock*, 2 Eq. Rep. 385; *Gardner* v. *Marshall*, 14 Sim. 575; *Koeber* v. *Sturgis*, 22 Beav. 589; *Re Kincaid*, 1 Drew. 326; *Watson* v. *Marshall*, 17 Beav. 363; *Ward* v. *Yates*, 1 Dr. & Sm. 80; *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *Carter* v. *Taggart*, 5 De G. & Sm. 49; *Duncombe* v. *Greenacre*, 28 Beav. 472; *Gent* v. *Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31; *Re Tutin's Trust*, W. N. 1869, p. 141; *Nicholson* v. *Carline*, 22 W. R. 819; *Re Cordwell's Estate*, 20 L. R. Eq. 644; [*Roberts* v. *Cooper*, (1891) 2 Ch. (C.A.) 335; and see *Taunton* v. *Morris*, 8 Ch. D. 453; 11 Ch. D. (C.A.) 779;] *Bonner* v. *Bonner*, 17 Beav. 86. In one case, where the wife had been abandoned by her husband for upwards of 20 years, the Court ordered the corpus of the fund to be paid to the wife as a *feme sole*; *Re Pope's Trust*, W. N. 1873, p. 79.

(*c*) *Re Suggitt's Trust*, 3 L. R. Ch. App. 215.

(*d*) *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; *Barrow* v. *Barrow*, 5 De G. M. & G. 782; [*Boxall* v. *Boxall*, 27 Ch. D. 220; *Reid* v. *Reid*, 31 Ch. D. 402].

(*e*) *Bagshaw* v. *Winter*, 5 De G. & Sm. 467; *Ex parte Pugh*, 1 Drew. 202.

(*f*) *Scott* v. *Spashett*, 3 Mac. & G. 599; *Spicer* v. *Spicer*, 24 Beav. 365; *Spirett* v. *Willows*, 12 Jur. N.S. 538.

(*g*) *Gardner* v. *Marshall*, 14 Sim. 575; *Vaughan* v. *Buck*, 1 Sim. N.S. 287.

[(*h*) *Roberts* v. *Cooper*, (1891) 2 Ch. (C.A.) 335; or, *semble*, of any portion of the fund, under special circumstances, see Ib. p. 348.]

(*i*) *Giacometti* v. *Prodgers*, 14 L. R. Eq. 253; 8 L. R. Ch. App. 338.

be for the husband whether he survives or not (*a*). But in special circumstances, as where the property is of small amount, the Court has not unfrequently secured to the wife the capital as well as the income (*b*). In a case where the wife, upon being examined, expressed a wish that part of the fund to which she was entitled should be retained in Court, and the income paid to her, with liberty for her to apply for payment of the capital at a future period, if she desired it, the Court made the order, settling the fund upon her for life, with remainder to her children, with liberty for her to apply to the judge at chambers for a transfer of all or any part of the capital to her, by way of revocation of the settlement (*c*). Where the wife and her infant children were in necessitous circumstances, and supported by her, and the husband had received a large proportion of the fund, which was of small amount, the Court ordered 20*l.* a year out of *income and capital* to be paid to the wife during her life for her separate use, and after her death the remainder to be paid to her children at twenty-one, and if there should be none, then to the representatives of the assignee of the fund (*d*).]

[Part of the fund retained in Court with liberty to apply.]

8. Upon principle it would seem that the wife's equity to a settlement ought *in all cases* to be the same, whether it be claimed against the husband, or his trustee in bankruptcy, or his assignee for value. There is, however, an exception where the subject-matter against which the equity is asserted is a *life interest* of the wife. In this case, so long as the husband maintains the wife, he is entitled to receive the income of her life estate, and there can be no equity to a settlement (*e*). If, however, he deserts her, or is divorced by reason of his misconduct, the Court will not allow him to receive the income without securing at least a portion of it for the maintenance of the wife (*f*); and *pari ratione*, where the husband becomes

How far life interest of wife is subject to equity to a settlement.

[(*a*) *Croxton* v. *May*, 9 Eq. 404; *Walsh* v. *Wason*, 8 Ch. 483; *Re Robinson's Settled Estates*, 12 Ch. D. 188; *Roberts* v. *Cooper*, (1891) 2 Ch. (C.A.) 335, 348.] For the details of the proper settlement, see *Spirett* v. *Willows*, 4 L. R. Ch. App. 407; [*Cogan* v. *Duffield*, 2 Ch. D. (C.A.) 44; *Re Gowan*, 17 Ch. D. 778; and as to giving the wife a power of appointment among the children, see *Oliver* v. *Oliver*, 10 Ch. D. 765; which case, however, was disapproved of in *Re Gowan*, *sup.*; cf. *Re Parrott*, 33 Ch. D. (C.A.) 274].

[(*b*) *Boxall* v. *Boxall*, 27 Ch. D. 220, 224; *Roberts* v. *Cooper*, (1891) 2 Ch. (C.A.) 335.]

[(*c*) *Re Craddock's Trust*, W. N. 1875, p. 187; see *Boxall* v. *Boxall*, 27 Ch. D. 220, 225.]

[(*d*) *Roberts* v. *Cooper*, (1891) 2 Ch. (C.A.) 335, 348.]

(*e*) *Bullock* v. *Menzies*, 4 Ves. 798; *Re Duffy's Trust*, 28 Beav. 386, and cases there cited. [But see the observations in *Taunton* v. *Morris*, 8 Ch. D. 453; 11 Ch. D. (C.A.) 779.]

(*f*) *Barrow* v. *Barrow*, 5 De G. M. & G. 782; *Tidd* v. *Lister*, 3 De G. M. & G. 870.

bankrupt, and the wife is left without the means of subsistence, the same equity will be enforced against the trustee in bankruptcy (*a*). But where the husband assigns the income for value while duly discharging the marital obligation of maintenance, and *subsequently* deserts his wife, the wife is held to have no equity against the particular assignee for value, for the very object of the husband in making the alienation may have been to find the means for better providing for his wife, and the purchaser cannot be involved in such an inquiry (*b*).

Right by survivorship.

9. It must be remembered that the wife's *equity to a settlement* and her *right by survivorship* are two entirely distinct things. The former does not apply where the fund is *reversionary* (*c*), but arises only when the fund is ready for *reduction into possession*, and may be waived by the wife as before stated; the latter the wife cannot, by any act during coverture, deprive herself of, except so far as the provisions of the Married Women's Reversionary Interests Act, 1857 (*d*), may enable her so to do. Occasionally resort has been had to certain ingenious devices for the purpose of bringing the wife's reversionary interest into possession. Thus, where a fund has been settled on A. for life, and after his decease on B., a married woman, absolutely, the husband of B., in order to reduce the wife's *chose in action* into possession, has purchased the prior life interest, and had it assigned to himself or his wife. But this scheme will not bear examination, for if the assignment be made to the *husband*, then, as the life interest was possessed by him in his *own right*, and the reversionary interest in *right of his wife*, the two will not coalesce; and if the assignment was made to the wife so that the husband would have both interests in the same right, then the *feme*, on the coverture ceasing, might disclaim the accession of interest, and so prevent the intended merger. The late Vice-Chancellor of England held in several cases that the *chose in action* could thus be reduced into possession (*e*), and on one occasion Lord Cottenham, on an application to take the wife's consent, seems to have assented

(*a*) *Vaughan* v. *Buck*, 1 Sim. N.S. 284; *Squires* v. *Ashford*, 23 Beav. 132; *Barnes* v. *Robinson*, 1 N. R. 257. [See *Taunton* v. *Morris*, 8 Ch. D. 453, affirmed 11 Ch. D. 779, where the Court in the case of an insolvent debtor who contributed nothing to the support of his wife, gave the *whole income* to the wife to the exclusion of the provisional assignee.]

(*b*) *Tidd* v. *Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386; [and see *Taunton* v. *Morris*, 11 Ch. D. 779].

(*c*) *Osborn* v. *Morgan*, 9 Hare, 432.

(*d*) 20 & 21 Vict. c. 57 (Malins' Act); see *ante*, p. 21.

(*e*) *Creed* v. *Perry*, 14 Sim. 592; *Bean* v. *Sykes*, Ib. 593; *Lachton* v. *Adams*, Ib. 594; *Hall* v. *Hugonin*, Ib. 595; *Bishop* v. *Colebrook*, 16 Sim. 39; *Wilson* v. *Oldham*, 5th March, 1841, MS.; see the opinion of the late Mr Jacob in 3rd ed. of this work, p. 371.

to the doctrine (*a*). But in a case before Lord Langdale, M.R., the question was considered to involve too much difficulty to be disposed of on petition (*b*); and the case of *Whittle* v. *Henning* (*c*) before Lord Cottenham, and other cases (*d*), have since decided that a reversionary *chose in action* of the wife cannot, by means of this machinery, be reduced into possession, so as to be made disposable. However, if a fund be settled on A. for life, and the remainder be appointed to the *feme covert* for her *separate use*, and her power of anticipation is not restrained, the tenant for life and *feme covert* in remainder can deal with the fund (*e*).

[10. If the husband assigns the reversionary interest of his wife in a *chose in action*, and survives her, and the interest is not reduced into possession during her life, administration to the wife's estate must be taken out before the assignee of the husband can compel payment of the interest assigned (*f*).] [Administration by surviving husband to wife's estate.]

11. As regards the wife's equitable *chattels real*, the effect of marriage being, as a general rule, the same upon equitable as upon legal interests, it follows, that as the husband may assign the *chattels real* of the wife at *law*, so he may assign her *trust* of a term in equity (*g*), though it be [reversionary (*h*) or] merely a contingent interest (*i*); and without the concurrence of either the wife or the trustee, and without consideration. And this doctrine is not interfered with by the case of *Purdew* v. *Jackson* (*j*); for a trust of chattels real is not a *chose in action*, but a present interest—an estate in possession (*k*). If, however, the equitable interest in the chattel be such that it could not by possibility vest in the wife during the coverture, then, inasmuch as the legal interest of a similar kind could not be disposed of Equitable chattels real of *feme covert*.

(*a*) *Lachton* v. *Adams*, 14 Sim. 594.

(*b*) *Story* v. *Tonge*, 7 Beav. 91; and see *Box* v. *Box*, 2 Conn. & Laws. 605.

(*c*) 2 Ph. 731; [and see *Re Davenport*, (1895) 1 Ch. 361].

(*d*) *Box* v. *Jackson*, 6 Ir. Eq. Rep. 174; *Williams* v. *Mayne*, 1 Ir. R. Eq. 519; [*Re Butler's Trusts*, 3 Ir. R. Eq. 138; 3 L. R. Ir. 89].

(*e*) See *Dudley* v. *Tanner*, W. N. 1873, p. 75.

[(*f*) *Re Butler's Trusts*, 3 L. R. Ir. 89.]

(*g*) *Roupe* v. *Atkinson*, Bunb. 162; *Mitford* v. *Mitford*, 9 Ves. 99, *per* Sir W. Grant; *Re Carr's Trusts*, 12 L. R. Eq. 609; *Packer* v. *Wyndham*, Pr. Ch. 418, 419, *per* Lord Cowper; *Franco* v. *Franco*, 4 Ves. 528, *per* Lord Alvanley; *Bullock* v. *Knight*, 1 Ch. Ca. 266, *per* Lord Nottingham; *Sanders* v. *Page*, 3 Ch. Rep. 223, *per Cur.*; *Macaulay* v. *Philips*, 4 Ves. 19, *per* Lord Alvanley; *Wikes' Case*, Lane, 54, *per* Barons Snig and Altham; *S. C.*, Roll. Ab. 343; *Jewson* v. *Moulson*, 2 Atk. 421, *per* Lord Hardwicke; *Incledon* v. *Northcote*, 3 Atk. 435, *per eundem*; *Clark* v. *Burgh*, 2 Coll. 221; [*Re Bellamy*, 25 Ch. D. 620].

[(*h*) *Re Bellamy*, 25 Ch. D. 620.]

(*i*) *Donne* v. *Hart*, 2 R. & M. 360.

(*j*) 1 Russ. 1.

(*k*) See *Mitford* v. *Mitford*, 9 Ves. 98, 99; *Holland's case*, Style, 21; *Burgess* v. *Wheate*, 1 Eden, 223, 224; *Box* v. *Jackson*, 1 Drury, 84.

by the husband, he cannot dispose of the equitable interest (*a*). If a husband mortgage his wife's chattel real, and the wife survives, she has the equity of redemption, though the mortgage deed recited falsely that the husband was absolutely entitled (*b*). If the equitable interest in the chattel be settled to the *separate use* of the *feme covert*, and she does not dispose of it, it survives to the husband (*c*).

Whether wife entitled to settlement out of equitable chattels real.

12. Whether the doctrine regarding the wife's *equity to a settlement* extends to the *equitable chattels real* of the wife, has been much doubted. It was held in one case, by Vice-Chancellor Wigram, as a result of the principles laid down by Lord Cottenham in *Sturgis* v. *Champneys* (*d*), that even where the husband could dispose of the equitable chattel, the wife was entitled to a provision out of the equitable interest, as against the assignee of the husband for valuable consideration (*e*). The opinion of the Vice-Chancellor himself was the other way, but he considered himself bound by the authority of the Chancellor in the case referred to.

Result of decisions.

13. The result of these decisions is remarkable. Thus, a mortgage by the husband of the wife's *legal* term bars her of all right, except in the equity of redemption (*f*); while under a similar mortgage of the *equitable* term, she would have an equity to a settlement as against the mortgagee. Again, the *legal* reversionary term of the wife, provided it be such as may by possibility vest during the coverture, is capable of absolute assignment by the husband, and the wife has no right by survivorship, such as exists in the case of her *chose in action*, while as respects the assignment of a similar *equitable* interest there would be an equity to a settlement in the wife. The difficulties of applying the doctrine of the *wife's equity* to the case of chattels real, must, undoubtedly, prove considerable; but it can hardly be expected that the steps, of which Lord Cottenham in *Sturgis* v. *Champneys* took the first, will be retraced.

Effect of getting in legal estate of wife's equitable term.

14. It is conceived that if the husband, or the assignee from him of the wife's *equitable term*, can procure an assignment of the *legal estate* from the trustee, the wife's equity to a settlement is at an end; but the point is not touched by authority.

Arrears of income.

15. The equitable interest of the wife in a *chattel real* is not a

(*a*) *Duberley* v. *Day*, 16 Beav. 33.

(*b*) *M'Cullagh* v. *Littledale*, 9 Ir. R. Eq. 465.

(*c*) *Archer* v. *Lavender*, 9 Ir. R. Eq. 220.

(*d*) 5 M. & Cr. 77; and see *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

(*e*) *Hanson* v. *Keating*, 4 Hare, 1.

(*f*) *Hill* v. *Edmonds*, 5 De G. & Sm. 603; *Clark* v. *Cook*, 3 De G. & Sm. 333.

chose in action, but an estate, and therefore, although, according to the principles laid down in *Sturgis* v. *Champneys*, the wife can claim an equity to a settlement out of such estate *prospectively*, yet until such claim is established, the right of the husband prevails. All arrears of income therefore which may have accrued before the claim, whether from an equitable estate in fee or for life, or a term of years, will be exempt from the equity to a settlement, and belong to the husband or his assignee (*a*).

Estate by *elegit* in trust for a *feme covert*.

16. If a judgment be acknowledged to A. in trust for a *feme sole*, and she marries, and the conusee of the judgment sues out an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the *extended interest*, as he might have assigned the trust of a term certain (*b*); and the law is the same where the *feme* is put in possession of lands by a decree of a Court of Equity until a certain sum is raised by way of *equitable elegit* (*c*). But a *mere judgment*, recovered by the wife before the coverture, is clearly a *chose in action*, and as such cannot be disposed of by the husband as against the wife surviving (*d*).

Mortgage term in trust for a *feme covert*.

17. And it has been held that a *mortgage term* in trust for the wife (*e*), or a term *in trustees for raising a portion for her* (*f*), may by assigned by the husband, so as to carry the beneficial interest. But in these cases a doubt arises whether the debt or portion may not be held to be the principal thing; and as the doctrine that a *chose in action* of the wife is not disposable by the husband is of far more recent date than the decisions referred to, the question cannot be considered as settled. The cases in which it has been held under the order and disposition clause in bankruptcy, that the land draws with it the debt, so as to exclude the operation of the clause, tend to support the old authorities (*g*), but they are hardly conclusive, and a decision of Sir John Romilly, M.R., which was affirmed on appeal, has shaken the authority of the older cases (*h*).

(*a*) *Re Carr's Trust*, 12 L. R. Eq. 609.

(*b*) *Lord Carteret* v. *Paschal*, 3 P. W. 201, *per* Lord King. But this was before the case of *Purdew* v. *Jackson*, 1 Russ. 1.

(*c*) *S. C.* Ib. 179.

(*d*) *Fitzgerald* v. *Fitzgerald*, 8 C. B. 611.

(*e*) *Bates* v. *Dandy*, 2 Atk. 207; *Packer* v. *Wyndham*, Pr. Ch. 412, see 418.

(*f*) *Walter* v. *Saunders*, 1 Eq. Ca. Ab. 58; *Incledon* v. *Northcote*, 3 Atk. 430, see 435; and see *Mitford* v. *Mitford*, 9 Ves. 99; *Hore* v. *Becher*, 12 Sim. 465.

(*g*) *Jones* v. *Gibbons*, 9 Ves. 407; and see *Rees* v. *Keith*, 11 Sim. 388; [*Re Richards*, 45 Ch. D. 589, 596].

(*h*) *Duncombe* v. *Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509.

Wife's equitable interest in lands of freehold or inheritance.

18. The case of the wife's equitable estate in lands of *freehold* or *inheritance*, presents in the main the same general similarity to the case of her *legal* estate in like lands, as has been noticed in respect of chattels real. Thus, the husband without the wife can, in the case of the equitable as in that of the legal interest, convey an estate for the *joint lives* of himself and of his wife (*a*), or for his *own life after issue born*. So, he and his wife conjointly can, by deed acknowledged by the latter under the Fines and Recoveries Act (*b*), dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed enrolled in Chancery.

19. But according to Lord Cottenham's decision in *Sturgis* v. *Champneys* (*c*), the acts of the *husband alone* cannot affect the wife's equity to a settlement, where the interest of the wife can only be recovered through the medium of a *Court of Equity* (*d*).

The propriety of the decision in this case was questioned by the late Lord Westbury (*e*). But after so long a lapse of time it is not likely that the principle of it will be shaken. It has accordingly been held that as regards an equitable *freehold*, that is, an estate to which a *feme covert* is entitled in equity *for her own life*, she may proceed actively, and institute a suit against the trustee of her bankrupt husband for a settlement of it upon herself (*f*). But she has no such equity against a *purchaser for value* from her husband, who at the time was *supporting her* (*g*). In short, the principles which cover the wife's equitable interest

(*a*) As to the legal estate, see *Robinson* v. *Norris*, 11 Q. B. 916.

[(*b*) A wide effect has been given to the expression "interest in land" in the Fines and Recoveries Act (3 & 4 Will. 4. c. 74), ss. 1, 77; thus, in *Miller* v. *Collins*, (1896) 1 Ch. (C.A.) 573, the expression was held (dissentiente Kay, L.J., and overruling *Re Newton's Trusts*, 23 Ch. D. 181) to extend to an equitable reversionary life interest in money properly invested by trustees for the *feme* upon a mortgage of land; and in *Re Durrant and Stonor*, 18 Ch. D. (C.A.) 106, to an equitable reversionary interest in freeholds, purchased by trustees in breach of trust, and still personal estate in equity. See, however, observations of Kay, L.J., in *Miller* v. *Collins*, *sup.*]

(*c*) 5 M. & Cr. 97.

(*d*) At law a husband during the coverture and before issue born has the estate for the joint lives of himself and his wife, but in her right only; and even after issue born he has no estate in his own right, for curtesy does not commence until the death of the wife; *Jones* v. *Davis*, 8 Jur. N.S. 592. Until the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6, a husband could not during the coverture have passed the legal estate for his own life, except by a conveyance which carried the fee tortiously, as by a feoffment; Co. Lit. 30, a.

(*e*) See *Gleaves* v. *Paine*, 1 De G. J. & S. 87.

(*f*) *Barnes* v. *Robinson*, 1 New Rep. 257; *Sturgis* v. *Champneys*, 5 M. & Cr. 97; [*Fowke* v. *Draycott*, 29 Ch. D. 996].

(*g*) *Tidd* v. *Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Stanton* v. *Hall*, 2 R. & M. 175.

for *life*, *in realty*, are the same as those which regulate the *like interest* of the wife in *personalty* (*a*).

[It has been suggested (*b*), that since the passing of the Judicature Act, 1873, it is immaterial whether the estate of the wife is legal or equitable, and that the equity to a settlement can be enforced against the husband even although his estate is legal; but this conclusion was not necessary for the decision of the case, and seems to be open to grave doubt.]

Equitable estates in fee simple or fee tail.

20. As to the case of *an equitable fee simple* or *fee tail* to which a *feme covert* is entitled, a distinction must be borne in mind between the husband's powers over a wife's *personal*, and over her *real* estate. The husband can get possession of the absolute interest of the former and make away with it; and therefore the Court settles the corpus or a competent part of it on the wife and her children; but as to realty, the husband has no power over the corpus, but can dispose only of the interest during the joint lives, or if there be issue, for his own life; and as this limited interest is all that the husband or those claiming under him can deal with, and the husband has the *curtesy* in his *own right*, it is only the interest during the *joint lives* that requires to be settled. As to any ulterior interest, the Court has properly nothing to do with it. If the wife be tenant in fee, why should the heir be disinherited in favour of the children? and if the wife be tenant in tail, why should the issue in tail and remainderman be defeated? "In the case of the wife's real estate," observed V. C. Wood, "she wants no protection out of the *corpus* of that estate, for she cannot be deprived of it without her own concurrence, which the law requires to be given in such a manner as will protect her from her husband" (*c*). Where, therefore, the wife is tenant in fee or in tail in equity, the claim of the wife stands on the same footing as where she is tenant for life in equity, and has been so dealt with accordingly (*d*).

(*a*) See *ante*, p. 957.

[(*b*) See *Fowke* v. *Draycott*, 29 Ch. D. 996.]

(*c*) *Durham* v. *Crackles*, 8 Jur. N.S. 1175.

(*d*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Durham* v. *Crackles*, 8 Jur. N.S. 1174. L. J. Knight Bruce on one occasion observed "We do not touch the husband's possible tenancy by the curtesy in the real estate of which we direct a settlement, and, so far as I am concerned, for this reason, that in my opinion we have not jurisdiction to order any settlement which shall interfere with it;" *Smith* v. *Matthews*, 3 De G. F. & J. 153. From which it might be inferred that a settlement subject to the curtesy might extend beyond the joint lives; but if the Court under special circumstances, has ever directed a settlement of the equitable fee on the wife and children, the settlement as regards the children must be viewed as the voluntary settlement of the wife, and not the judicial act of the Court. See *Gleaves* v. *Paine*, 1 De G. J. & S. 87; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

[Real estate held upon trust for sale.]

[21. Where real estate is held upon trust for sale and to pay the proceeds to a married woman, the husband can, after the land has actually been sold, give a good discharge for the purchase-money, but until the sale the husband cannot, by any act of his, bar the wife's right (*a*).

[Fund in Court representing realty.]

22. Where a fund in Court represents realty to which a married woman is absolutely entitled, she may elect to take it as personalty, and, upon her being separately examined and consenting, it may be paid out to her husband without any deed being executed (*b*).

[Alimony.]

23. A married woman, to whom permanent alimony has been allowed on a judicial separation from her husband, cannot alienate it, as it is not in the nature of property, but is simply an allowance to provide for the daily maintenance of the wife, and is by its very nature inalienable (*c*).]

Existence of an outstanding term.

24. The mere circumstance of the existence of a *jointure-term*, preceding the estate of a *feme covert*, tenant in tail in possession subject to the term, sufficiently renders the wife's estate equitable to entitle her to a settlement during the joint lives in a suit instituted by her (*d*). And, indeed, wherever a plaintiff is obliged to come into a *Court of Equity* he must submit to do *equity*, though the estate of the wife is *legal*, as if a husband make an equitable mortgage of land of which his wife is seised at law, the mortgagee cannot obtain a legal mortgage or enforce his security without providing for the wife, if deserted or not maintained at the time of the equitable mortgage (*e*).

Getting in the legal estate.

25. The effect of the husband, or the *husband's assignee*, procuring a conveyance of the *legal estate* so as to clothe his equitable interest therewith, must be the same as in the case of an equitable term of years before adverted to (*f*).

[(B) Of the modifications introduced by the Married Women's Property Act, 1882 (*g*).

[Married Women's Property Act, 1882.]

1. By sect. 1, sub-sect. 1 of the Act, it is enacted that "a married woman shall, *in accordance with the provisions of this Act*, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." This is a general section, "pointing

[(*a*) *Franks* v. *Bollans*, 3 L. R. Ch. App. 717.]

[(*b*) *Standering* v. *Hall*, 11 Ch. D. 652; *Re Robin's Estate*, 27 W. R. 705.]

[(*c*) *Re Robinson*, 27 Ch. D. (C.A.) 160.]

(*d*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

(*e*) *Durham* v. *Crackles*, 8 Jur. N.S. 1174.

(*f*) See *ante*, p. 960.

[(*g*) 45 & 46 Vict. c. 75.]

out the provisions the details of which are to be worked out in the subsequent sections" (*a*); it must therefore be construed together with sects. 2 and 5 (*b*).

By sect. 2, "every woman who marries *after* the commencement of this Act" (1st January, 1883), "shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

And by sect. 5, "every woman married *before* the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her *title* to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall *accrue* after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid (*c*)."

[General effect of Act.]

2. The result of this enactment is that as to women married since the 31st of December, 1882, and also as to property accruing after that date to women married before that date, the rights of the husband, during the life of the wife, are entirely excluded, and the wife is enabled to deal with, bind and dispose of her property, whether real or personal, in the same manner as if she were a *feme sole*. The authorities relating to the rights of the husband over the wife's property during the coverture, and to the equity to a settlement of the wife, and to the wife's right by survivorship have, therefore, no application where the marriage has taken place or the property has been acquired since the 31st of December, 1882.

[Property falling into possession after the commencement of the Act.]

3. It will be observed that the 5th section relates to the *accruer* of the married woman's *title*, which must, in order to bring the case within the section, take place after the commencement of the Act, and the section does not deal with the case of a change in the title such as occurs when a contingent interest becomes

[(*a*) *Re Cuno*, 43 Ch. D. (C.A.) 12, 15, *per* Cotton, L.J.]

[(*b*) *S. C.*, and see *Re Drummond and Davie*, (1891) 1 Ch. 524, 534.]

[(*c*) As to the protection extended to the trade or business from which the earnings arise, see *Ashworth* v. *Outram*, 5 Ch. D. (C.A.) 923.]

vested or a reversionary interest falls into possession. A contrary view was indeed for some time entertained, but the question has now been set at rest by the decision of the Court of Appeal (*a*).

[Conversion of land into money.]

If a woman married before the commencement of the Act, acquires a title in reversion to land, and after the commencement of the Act the land, while her title is still reversionary, is converted into money, the conversion gives her no new title, and the section does not apply (*b*).

[Mere expectancy.]

A mere *spes successionis* to property as one of a class of possible next of kin is not a "contingent *title*" within the section; but where property was given upon trust for such a class, and the class became ascertainable subsequently to the passing of the Act, the share, which thus accrued, of a woman (married in 1857) who was a member of the class, was held to belong to her for her separate use under the section, independently of the marital right (*c*).

[Damages recovered in action by husband and wife.]

Damages awarded to the wife in an action by her and her husband in respect of personal injury to her, even assuming that they are not her separate property under sect. 1, sub-sect. 2, are clearly so under this section (*d*).

[Rights of husband in property not disposed of by wife.]

4. Whether the rights of the husband after the wife's death in such parts of her property as have not been disposed of by her are affected by the Act, was a question upon which there was some difference of opinion, founded on the use of the words "feme sole" in the 1st section, but it has now been decided (*e*) that as the Act simply confers on married women the capacity to acquire, hold, and dispose by will or otherwise of property as if they were *femes sole*, and does not purport to deal with the devolution of property undisposed of, the rights in a married woman's property after her death, so far as such property is not disposed of or bound by her in her lifetime, are unaffected by the Act (*f*). The husband therefore will be entitled, as to personal chattels and cash by the marital right, and as to *choses in action* on taking out administration to her estate under

[(*a*) *Reid* v. *Reid*, 31 Ch. D. (C.A.) 402; overruling *Baynton* v. *Collins*, 27 Ch. D. 604; *Re Tucker*, 33 W. R. 932; 52 L. T. N.S. 23; 54 L. J. N.S. Ch. 874; *Re Adames' Trusts*, 54 L. J. N.S. Ch. 878; 33 W. R. 834; *Re Hobson's Settlement*, 55 L. J. N.S. Ch. 300; and see *Re Thompson and Curzon*, 29 Ch. D. 177; *Re Hughes's Trusts*, W. N. 1885, p. 62; *Re Dixon*, 54 L. J. N.S. Ch. 964; *Beckett* v. *Parker*, 19 Q. B. D. 7.]

[(*b*) *Re Bacon*, (1907) 1 Ch. 475.]

[(*c*) *Re Parsons*, 45 Ch. D. 51, dissenting from *Re Beaupre's Trusts*, 21 L. R. Ir. 397; and see *Molyneux* v. *Fletcher*, 67 L. J. Q. B. 392, 396.]

[(*d*) *Beasley* v. *Roney*, (1891) 1 Q. B. 509; and see *post*, p. 976.]

[(*e*) In accordance with the opinion expressed in the eighth edition of this work, p. 752.]

[(*f*) *Re Lambert's Estate*, 39 Ch. D. 627; and see *Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493.]

the Statute of Frauds (29 Car. 2. c. 3), sect. 2, to retain her undisposed of personal estate to the exclusion of her next of kin; and to his curtesy in her realty undisposed of (*a*). And the mere fact that the married woman has made a will appointing executors, to whom probate in general form has been granted under the Probate Rules of March, 1887, will not affect the right of the husband (*b*), as although such probate enables the executor to get in her assets (whether she had power to dispose of them by will or not), it does not affect the beneficial title (*c*).

[Extent of application of Act.]

5. The Act has no application where the marriage took place and the property was acquired, or the title to it accrued, before the commencement of the Act, 1st January, 1883, and in such cases the old law applies (*d*).

Where a testator dies after the Act, but his will was executed before the passing of the Act, the interest which a married woman takes under it will be governed by the Act. Thus, where a residuary estate was given by such a will to A. and B. and C., the wife of B., under which gift before the Act A. would have taken one moiety, and B. and C. the other moiety as if they had been one person, it was held by the Court of Appeal, reversing the decision of Chitty, J., that A. was still entitled to one moiety, but the other moiety belonged to B. and C. as joint tenants, as if she were unmarried. The Court of Appeal expressed no opinion as to what share A. would have taken if the will had been executed after the passing of the Act (*e*), but it has now been decided that the previous law has not been altered in this respect (*f*); and it has been observed that "the capacity of a married woman to take property is not altered" by the Act "as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The Act only enlarges her capacity to take such property as her separate property" (*g*).

[Status of married woman not altered as between her and grantor.]

[(*a*) *Hope* v. *Hope*, (1892) 2 Ch. 336.]

[(*b*) *Re Lambert's Estate*, 39 Ch. D. 627; and see *Re Atkinson*, (1898) 1 Ch. 637; (1899) 2 Ch. (C.A.) 1, where it was held by Stirling, J., and acquiesced in by the Court of Appeal, that the husband, taking out probate in general form, is no longer to be deemed to have assented to the will as a disposition of property, and that the doctrine to that effect in *Ex parte Fane*, 16 Sim. 406, is no longer applicable.]

[(*c*) *Smart* v. *Tranter*, 43 Ch. D. (C.A.) 587; and see *Re Atkinson*, (1898) 1 Ch. 637; (1899) 2 Ch. (C.A.) 1.]

[(*d*) *Re Harris' Settled Estates*, 28 Ch. D. 171, followed in *Re Batt's Settled Estates*, (1897) 2 Ch. 65.]

[(*e*) *Re March*, 27 Ch. D. (C.A.) 166; reversing *S. C.*, 24 Ch. D. 222.]

[(*f*) *Per* Kay, J., *Re Jupp*, 39 Ch. D. 148; but whether this case was rightly decided upon the construction of the particular will, *quære*; *Re Dixon*, 42 Ch. D. 306.]

[(*g*) *S. C.* per Kay, J., at p. 153.]

[Will of married woman.]

6. Under the power of testamentary disposition conferred on a married woman by sect. 1, sub-sect. 1 of the Act of 1882, "as if she were a *feme sole*," a will made by a *feme covert* before the Act will pass separate property which she subsequently acquires by virtue of the Act (*a*); but as sects. 2 and 5 of the Act of 1882 refer only to *separate property*, it was held that the will of a married woman was not effectual to pass property acquired by her after the determination of the coverture (*b*), so that the doctrine of *Willock* v. *Noble* (*c*), that, notwithstanding sect. 24 of the Wills Act, the will of a *feme covert* requires republication in order to render it effectual to dispose of such property, was still applicable; but now by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), sect. 3, it is enacted that "sect. 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband"; and this enactment applies to every will, whenever executed, of a testatrix who dies after the date of the Act (*d*).]

[*Secus*, under Act of 1893.]

Secondly. Of the separate use.

Trusts for separate use of a *feme covert.*

1. [Independently of the recent enactments affecting the property of married women] the principle at *common law* is that, as the husband undertakes the debts and liabilities of the wife, he is entitled absolutely or partially, according to the circumstances of the case, to the enjoyment of her property; but in *equity* a *feme* is allowed to contract with the husband before marriage, for the exclusive enjoyment of any specific property (*e*); or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and *unusquisque renuntiare potest juri pro se instituto;* but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture appears

[(*a*) *Re Bowen*, (1892) 2 Ch. 291.]

[(*b*) *Re Price*, 28 Ch. D. 709; *Re Taylor*, 57 L. J. Ch. 430; *Re Williams*, 59 L. T. N.S. 310; *Re Smith*, 35 Ch. D. 583, at p. 597; *Re Cuno*, 43 Ch. D. (C.A.) 12; *Re Smith*, 45 Ch. D. 632.]

[(*c*) L. R. 7 H. L. 580.]

[(*d*) *Re Wylie*, (1895) 2 Ch. 116; and see *Re James*, (1910) 1 Ch. 157.]

(*e*) See *Parkes* v. *White*, 11 Ves. 228.

a more questionable doctrine, though it may be said that, even in that case, there was no violation of the marital rights, for the property never vested in the *feme* herself, and the donor might limit any estate which the law did not refuse to recognise. The Court has also permitted the further anomaly of a restriction upon the *feme's anticipation* (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an appendage to the separate use for the purpose of more effectually excluding the influence of the husband (*a*). If the wife were not debarred from anticipating the proceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal.

Not necessary that there should be an express trustee.

2. At the first introduction of the settlement to the separate use it was doubted, whether, to accomplish the object, the interposition of an *express trustee* was not necessary (*b*), but it was afterwards determined that this precaution might be dispensed with, for, rather than the intention should be disappointed, the husband himself should be construed a trustee for the wife (*c*). But [as to cases not falling within the recent statute] whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, he has *primâ facie* a right to her property (*d*); but, provided the meaning be clear, the Court will execute the intention, though the settlor may not have expressed himself in technical language (*e*).

Gift by husband to wife.

The husband may himself during the coverture give any specific property to the wife for her separate use, without the intervention of a trustee (*f*); [and if a husband permit his wife

[(*a*) See *post*, p. 1007.]

(*b*) *Harvey* v. *Harvey*, 1 P. W. 125; *Burton* v. *Pierpont*, 2 P. W. 78.

(*c*) *Bennet* v. *Davis*, 2 P. W. 316; *Parker* v. *Brooke*, 9 Ves. 583; *Rolfe* v. *Budder*, Bunb. 187; *Prichard* v. *Ames*, T. & R. 222; *Newlands* v. *Paynter*, 10 Sim. 377; 4 M. & Cr. 408; *Turnley* v. *Kelly*, Wallis's Rep. by Lyne, 311; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*d*) *Ex parte Ray*, Mad. 207, *per* Sir T. Plumer; *Wills* v. *Sayers*, 4 Mad. 409, *per eundem*; *Massey* v. *Parker*, 2 M. & K. 181, *per* Sir C. Pepys; *Kensington* v. *Dolland*, 2 M. & K. 188, *per* Sir J. Leach; *Moore* v. *Morris*, 4 Drew. 37, *per* V. C. Kindersley; [*Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487; and see *Re Sibeth*, 14 Q. B. D. 417].

(*e*) *Darley* v. *Darley*, 3 Atk. 399, *per* Lord Hardwicke; *Stanton* v. *Hall*, 2 R. & M. 180, *per* Lord Brougham; [and see *Re Peacock's Trusts*, 10 Ch. D. 490].

(*f*) *Lady Cowper's case*, cited in *Graham* v. *Londonderry*, 3 Atk. 393; *Lucas* v. *Lucas*, 1 Atk. 270; *Walter* v. *Hodge*, 2 Sw. 92; [*Ex parte Whitehead*, 14 Q. B. D. (C.A.) 419].

to carry on a business for her own benefit, independently of him, it becomes her separate property, and the husband becomes, so far as is necessary, a trustee of everything employed in the business for the wife (*a*).

In the absence of proof of an unequivocal or final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not, after his death, upon her uncorroborated statement, treat the property as belonging to her for her separate use (*b*).

[Allowance to wife of lunatic.]

An allowance made under an order in lunacy to the wife of a lunatic, living apart from her husband, for her separate maintenance, belongs to her for her separate use (*c*).

[Married Women's Property Act, 1882.]

3. Now by the Married Women's Property Act, 1882, a married woman can acquire, hold, and dispose of property as her separate estate, in the same manner as if she were a *feme sole, without the intervention of any trustee* (*d*); and under the 2nd and 5th sections of the Act (*e*) all property acquired by any married woman since the 31st of December, 1882, irrespective of the date of her marriage, and also all property belonging to any woman married since that date, are made her separate estate (*f*).

[Intervention of trustee rendered wholly unnecessary.]

[Application of previous law.]

Notwithstanding the material change thus made in the principle on which the doctrine of the separate use is based, it is conceived that subject to the enlarged rights and liabilities introduced by the Act, many of the principles which regulate the administration of property held for the separate use, will apply equally to any property which by virtue of the Act belongs to a married woman as her separate estate; so that, while the old law has to some extent ceased to be applicable to cases governed by the Act, it will frequently be necessary to refer to it even in connection with property bound by the Act. Moreover, as to

[(*a*) *Ashworth* v. *Outram*, 5 Ch. D. (C.A.) 923; *Ex parte Whitehead*, 14 Q. B. D. (C.A.) 419; and see *Slanning* v. *Style*, 3 P. W. 334; *Calmady* v. *Calmady*, cited in *Slanning* v. *Style*, Ib. 338. As to gifts by strangers to the separate use of a married woman before the recent Act, and the distinction between such gifts and paraphernalia of the wife, see Macq., Husb. and Wife, 3rd ed., p. 115. For a case in which articles of wearing apparel, purchased for the wife out of the husband's money, were held, as between him and her execution creditor, to belong *primâ facie* to her as her separate property, see *Masson-Templier & Co.* v. *De Fries*, (1909) 2 K. B. (C.A.) 831.]

[(*b*) *Re Whittaker*, 21 Ch. D. 657; *Parker* v. *Lechmere*, 12 Ch. D. 256.]

[(*c*) *In the goods of Tharp*, 3 P. D. (C.A.) 76.]

[(*d*) 45 & 46 Vict. c. 75, s. 1.]

[(*e*) See *ante*, p. 965.]

[(*f*) However, the general power of disposition thus conferred is modified by the provision of s. 19, excepting settlements from the operation of the Act. See *post*, p. 1006.]

property acquired before the 1st January, 1883, by women married before that date, the law remains unaffected by the Act.

What words will create a trust for separate use.

4. In cases not falling within the recent Act], the marital claims are defeated if the gift be to the wife for her "separate use" (*a*), or "sole and separate use" (*b*), or "solely for her own use" (*c*) (which is construed as separate use), or "solely and entirely for her own use and benefit" (*d*), [or "for her sole use and disposal" (*e*), or "for her sole and absolute use and disposal" (*f*),] or for "her livelihood" (*g*), or "that she may receive and enjoy the profits" (*h*), or "to be at her disposal" (*i*), or "to be by her laid out in what she shall think fit" (*j*), or "for her own use, independent of her husband" (*k*), or "not subject to his control" (*l*), or "for her own use and benefit, independent of any *other person*" (*m*), or "to receive the rents from the tenants while she lives, whether married or single," with a direction that no sale or mortgage should be made during her life (*n*): for such expressions as these are considered inconsistent with the notion of any interference on the part of the husband. So, if the gift be accompanied with such expressions

(*a*) *Massy* v. *Rowen*, 4 L. R. H. L. 294, 299, and 300, *per Cur.*, where it was observed by Lords Colonsay and Cairns, that the word "separate" had acquired a "technical meaning," and that the word "sole" had not.

(*b*) *Parker* v. *Brooke*, 9 Ves. 583; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*c*) *Re Tarsey's Trust*, 1 L. R. Eq. 561; *Adamson* v. *Armitage*, 19 Ves. 416; G. Coop. 283; *Ex parte Ray*, 1 Mad. 199; *Ex parte Killick*, 3 Mont. D. & De G. 480; *Davis* v. *Prout*, 7 Beav. 288; *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511; *Lindsell* v. *Thacker*, 12 Sim. 178 (the marginal note in the last case is altogether erroneous); and see *Massey* v. *Parker*, 2 M. & K. 181; —— v. *Lyne*, Younge, 562; but as to the latter case, see *Tullett* v. *Armstrong*, 4 M. & Cr. 403; and see *Gilbert* v. *Lewis*, 1 De G. J. & S. 39; *Lewis* v. *Mathews*, 2 L. R. Eq. 177. The word "sole" by itself is a word of equivocal and ambiguous meaning, and takes its colour from the context. It has been held, in Ireland, in a recent case, affirmed on appeal by the House of Lords, not to create *per se* a separate use in a gift to a legatee, where at the date of the will the legatee was a *feme sole*; *Massy* v. *Hayes*, 1 Ir. Rep. Eq. 110. *S. C. nom. Massy* v. *Rowen*, 4 L. R. H. L. 288. But otherwise, where the legatee was known to the testator to be a married woman; *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204; [*Farrow* v. *Smith*, W. N. 1877, p. 21; *Re Amies' Estate*, W. N. 1880, p. 61].

(*d*) *Inglefield* v. *Coghlan*, 2 Coll. 247.

[(*e*) *Bland* v. *Dawes*, 17 Ch. D. 794.]

[(*f*) *Baker* v. *Ker*, 11 L. R. Ir. 3.]

(*g*) *Darley* v. *Darley*, 3 Atk. 399, *per* Lord Hardwicke; and see *Cape* v. *Cape*, 2 Y. & C. 543; *Ex parte Ray*, 1 Mad. 208; but see *Lee* v. *Prieaux*, 3 B. C. C. 383; *Wardle* v. *Claxton*, 9 Sim. 524, *sed. qu.*

(*h*) *Tyrrell* v. *Hope*, 2 Atk. 558. But this was in marriage articles, and under special circumstances, and must not be taken to establish any general rule.

(*i*) *Prichard* v. *Ames*, T. & R. 222; *Kirk* v. *Paulin*, 7 Vin. 96; *Secus*, probably, if these words had occurred in a gift to a *feme sole*.

(*j*) *Atcherley* v. *Vernon*, 10 Mod. 531.

(*k*) *Waystaff* v. *Smith*, 9 Ves. 520.

(*l*) *Bain* v. *Lescher*, 11 Sim. 397.

(*m*) *Margetts* v. *Barringer*, 7 Sim. 482.

(*n*) *Goulder* v. *Camm*, 6 Jur. N.S 113; 1 De G. F. & J. 146.

as "her receipt to be a sufficient discharge" (*a*), or "to be delivered to her on demand" (*b*); for in these cases the check put upon the husband's legal right to receive could only have been with the intention of giving the wife a particular benefit. So, if the gift be to the husband should he be living with his wife, but if separate then half to the husband and the other half to the wife "absolutely," for the context shows that by absolutely is meant for the separate use (*c*).

[Where trustees have a discretion to "*pay, apply, and dispose of*" the income of a trust fund for the maintenance and support of a married woman, they may pay the income to her for her *separate use* (*d*).]

What words not sufficient.

5. But if the trust be merely "to pay to her," or "to her and her assigns" (*e*), or the gift be "to her use" (*f*), or "her own use" (*g*), or "her absolute use" (*h*), or "in trust only for her, her executors, administrators, and assigns" (*i*), or "to her, her heirs, and assigns, for her or *their* own sole and absolute use" (*j*), or "to pay into her own proper hands for her own use" (*k*), or "to pay to her to be applied for the maintenance of herself and such child or children as the testator might happen to leave at his death" (*l*), there is no such unequivocal evidence of an intention to exclude the husband.

Husband made a trustee for the wife.

6. Where property was vested in the *husband jointly with another*, as general trustee of the will, upon trust (*inter alia*) for the wife, it was held not to be a gift to her separate use (*m*). Had the husband *alone* been appointed a trustee for the wife the decision might have been different (*n*).

[Resumption of cohabitation.]

[7. On the resumption of cohabitation in cases where there has

(*a*) *Lee* v. *Prieaux*, 3 B. C. C. 381; *Woodman* v. *Horsley*, cited Ib. 383; *Cooper* v. *Wells*, 11 Jur. N.S. 923; *Re Molyneux's Estate*, 6 I. R. Eq. 411; [*Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493;] and see *Stanton* v. *Hall*, 2 R. & M. 180.

(*b*) *Dixon* v. *Olmius*, 2 Cox, 414.

(*c*) *Shewell* v. *Dwarris*, Johns. 172.

[(*d*) *Austin* v. *Austin*, 4 Ch. D. 233.]

(*e*) *Dakins* v. *Berisford*, 1 Ch. Ca. 194; *Lumb* v. *Milnes*, 5 Ves. 517.

(*f*) *Jacobs* v. *Amyatt*, 1 Mad. 376, n.; *Wills* v. *Sayers*, 4 Mad. 411; *Anon. case*, cited 7 Vin. 96.

(*g*) *Johnes* v. *Lockhart*, in note to *Lee* v. *Prieaux*, 3 B. C. C. 383, ed. by Belt (this case is erroneously cited as an authority to the contrary in *Lumb* v. *Milnes*, 5 Ves. 520, and *Ex parte Ray*, 1 Mad. 207); *Wills* v. *Sayers*, 4 Mad. 409; *Roberts* v. *Spicer*, 5 Mad. 491; *Beales* v. *Spencer*, 2 Y. & C. C. C. 651; *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19.

(*h*) *Rycroft* v. *Christy*, 3 Beav. 238.

(*i*) *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*j*) *Lewis* v. *Mathews*, 2 L. R. Eq. 177.

(*k*) *Tyler* v. *Lake*, 2 R. & M. 183; *Kensington* v. *Dollond*, 2 M. & K. 184; *Blacklow* v. *Laws*, 2 Hare, 48; but see *Hartley* v. *Hurle*, 5 Ves. 545, *contra*.

(*l*) *Wardle* v. *Claxton*, 9 Sim. 524.

(*m*) *Ex parte Beilby*, 1 De G. & J. 167; and see *Kensington* v. *Dollond*, 2 M. & K. 184.

(*n*) *Ex parte Beilby*, 1 De G. & J. 167; and see *Darley* v. *Darley*, 3 Atk. 399.

been a judicial separation or a protection order, the property to which the wife is entitled when such cohabitation takes place belongs to her for her separate use (*a*).]

Effect after marriage of the trust for separate use.

8. If a *feme sole* marry without having disposed of the property settled to her separate use, the limitation to the separate use will on the marriage take effect. This doctrine is open to much observation upon principle (*b*), but Lord Cottenham, in the cases of *Tullet* v. *Armstrong*, and *Scarborough* v. *Borman* (*c*), anxious to prevent the consequences that would have flowed from a different decision, and not finding any other safe ground upon which to base his judgment, asserted an inherent power in the Court of Chancery to modify estates of its own creation, and in virtue of that jurisdiction established the validity of the separate use in case of the *feme's* marriage. If a fund be given to a *feme sole* for her separate use, without the intervention of a trustee, and she *sells out the fund and invests it in another form* and *then marries*, the separate use has been destroyed, and she is regarded as the owner of the new property in the ordinary way (*d*).

Effect of separate use on second marriage.

9. If property be settled, whether by deed or will, to the separate use of a *feme*, and the separate use was meant to be confined to a *particular marriage*, and the husband dies, and the widow marries again, the second husband will not be excluded [by the terms of the instrument] from his ordinary marital rights (*e*). The question simply is, What was the intention of the settlement or will? So, if real or personal estate be devised or bequeathed to A., a married woman, for her sole and separate use independent of her husband B., the separate use applies only to the existing and not to any future coverture (*f*); but if the exclusion of any *future husband* was also

[(*a*) Matrimonial Causes Acts, viz.: 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Re Emery's Trusts*, 50 L. T. N.S. 197; 32 W. R. 357.]

(*b*) Some observations upon this subject will be found in the 3rd ed. of this work, p. 124.

(*c*) 4 M. & C. 377; and see *Newlands* v. *Paynter*, 4 M. & C. 408; *Russell* v. *Dickson*, 2 Dru. & War. 138; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*d*) *Wright* v. *Wright*, 2 J. & H. 647.

(*e*) *Barton* v. *Briscoe*, Jac. 603; *Benson* v. *Benson*, 6 Sim. 126; *Knight* v. *Knight*, Ib. 121; *Jones* v. *Salter*, 2 R. & M. 208; *Moore* v. *Morris*, 4 Drew. 33; *Tudor* v. *Samyne*, 2 Vern. 270; *Sir E. Turner's case*, 1 Ch. Ca. 307; 1 Vern. 7. And see *Sanders* v. *Page*, 3 Ch. Rep. 224; *Pitt* v. *Hunt*, 1 Vern. 18; *Howard* v. *Hooker*, 2 Ch. Rep. 81; *Edmonds* v. *Dennington*, cited *Carleton* v. *Earl of Dorset*, 2 Vern. 17. [But see the Married Women's Property Act, 1882, when the marriage takes place after the 31st Dec. 1882.]

(*f*) *Moore* v. *Morris*, 4 Drew. 33.

in contemplation, it will be carried into effect (*a*); and if the separate use do extend to any marriage, *present or future*, even the *arrears* due to the *feme* at the time of a subsequent marriage are protected from the after-taken husband (*b*). And if a *jointure* or other interest to arise on the cesser of the present marriage be provided for a *feme covert*, it may be so limited as to enure to her separate use, and be inalienable during the *present coverture* (*c*).

[Separate use not arising until death of husband.]

[10. Where policies of assurance on the life of the husband were settled for the benefit of the wife during her life for her separate use, independently of any future husband with whom she might intermarry, it was held in an action by an alleged creditor of hers, claiming a charge on the policies, that the trust for the separate use did not arise during the life of the husband (*d*).]

The wife's power to dispose of her separate estate.

11. Where property is settled to the *separate use*, the *feme covert*, unless her power of anticipation be restrained, may, without the concurrence of her trustees, unless the terms of the settlement require it (*e*), deal with the property directly and expressly, precisely in the same manner as if she were a *feme sole*. But, at the same time, she will be protected against *fraud*, and, therefore, a settlement procured from her by her husband, upon a false representation, will be set aside (*f*); [but the mere absence of independent advice will not suffice (*g*).]

General rule.

12. The general principle that governs the law of separate use was laid down by Lord Thurlow, and has been recognised by the highest authorities, viz. that "a *feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole*" (*h*).

(*a*) *Ashton* v. *M'Dougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541; [*Stroud* v. *Edwards*, 77 L. T. N.S. 280;] *Hawkes* v. *Hubback*, 11 L. R. Eq. 5; *Re Molyneux's Estate*, 6 I. R. Eq. 411.

(*b*) *Ashton* v. *M'Dougall*, 5 Beav. 56; and see *Newlands* v. *Paynter*, 4 M. & Cr. 418; *England* v. *Downs*, 6 Beav. 269.

(*c*) *Re Molyneux's Estate*, 6 I. R. Eq. 411.

[(*d*) *King* v. *Lucas*, 23 Ch. D. (C.A.) 712.]

(*e*) *Grigby* v. *Cox*, 1 Ves. 518, *per* Lord Hardwicke; *Dowling* v. *Maguire*, Rep. *t.* Plunket, 19, *per* Lord Plunket.

(*f*) *Knight* v. *Knight*, 5 Giff. 26; 11 Jur. N.S. 618; and see *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35; [and *Chaplin & Co., Lim.* v. *Brammall*, (1908) 1 K.B. (C.A.) 233 (where a guarantee for payment of goods supplied on credit, signed by the wife at the instance of her husband, without her understanding it or having it explained to her, was held to be inoperative); and as to the effect of *lex loci* in invalidating a married woman's contract of suretyship in reference to immoveables, see *Bank of Africa* v. *Cohen*, (1909) 2 Ch. (C.A.) 129.]

[(*g*) *Howes* v. *Bishop*, (1909) 2 K.B. (C.A.) 390, where a promissory note by husband and wife for the debt of a third person was upheld, and it was said that there was no rule of equity imposing on the husband the onus of disproving undue influence by him.]

(*h*) *Hulme* v. *Tenant*, 1 B. C. C. 20.

Right of married woman to sue, &c., as to separate estate.

13. A *feme covert*, therefore, as regards her separate property, *sues* separately as plaintiff [and since the Married Women's Property Act, 1882, without a next friend, and defends separately (*a*)], and, if out of the jurisdiction, may be *served with process* by leave of the Court (*b*), may present a *petition* without a next friend and without her husband (*c*), and will be bound by a *submission in her pleadings* (*d*), or by a *settlement of accounts* (*e*), or by a *contract* for purchase (*f*), or sale (*g*), and may *give away* the chattels settled to her separate use by manual delivery (*h*), or may *lend* money to her husband (*i*), or may *demise* land settled to her separate use, when the lessee will be protected even at law, under the equitable plea, against intrusion by the holder of the legal estate (*j*), may *dispose of* her equitable interest in freehold estate settled to her separate use, *without acknowledgment* under the Fines and Recoveries Act (*k*), and will be bound as to her separate estate, if she agree verbally to accept a lease and take possession (which is part performance) under the agreement (*l*), and may be made a *contributory* under a winding-up order (*m*), and her *declarations* may be read in evidence against her (*n*), and she will be liable to an *attachment*

[(*a*) 45 & 46 Vict. c. 75, s. 1 (2): Rules of Supreme Court, Order 16, Rule 16; and it is not material whether the contract, in respect of which the action is, was entered into before or after the Act: *Gloucestershire Banking Company* v. *Phillipps*, 12 Q. B. D. 533.]

(*b*) *Copperthwaite* v. *Tuite*, 13 Ir. Eq. Rep. 68; [Rules of Supreme Court, Order 11].

[(*c*) 45 & 46 Vict. c. 75, s. 1 (2); *Re Outwin's Trusts*, 48 L. T. N.S. 410.]

(*d*) *Allen* v. *Papworth*, 1 Ves, 163; *Clerk* v. *Miller*, 2 Atk. 379; *Bailey* v. *Jackson*, C. P. Cooper's Rep. 1837-38, 495. Husband and wife put in a joint answer, and the wife admitted certain indentures to be in her possession, and claimed the estates to which the indentures related to her separate use for her life. The plaintiff moved for production, but it was argued that the answer was the husband's, and could not be read as an admission by the wife. However, the Court said though there was a logical difficulty, there was none in substance: that if the wife claimed the benefit of the separate use she must take it with its disadvantages; and ordered the production by the wife, and that the husband should permit her to produce; *Cowdery* v. *Way*, V.C.K.B. 2nd Nov., 1843. And see *Callow* v. *Howle*, 1 De G. & Sm. 531; *Beeching* v. *Morphew*, 8 Hare, 129; *Clive* v. *Carew*, 1 J. & H. 207.

(*e*) *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156.

(*f*) *Picard* v. *Hine*, 5 L. R. Ch. App. 274.

(*g*) *Davidson* v. *Gardner*, Sugd. Vend. & Purch. 891, 11th ed.; *Stead* v. *Nelson*, 2 Beav. 248; and see *Harris* v. *Mott*, 14 Beav. 169; *Vansittart* v. *Vansittart*, 4 K. & J. 70; *Milnes* v. *Busk*, 2 Ves. jun. 498.

(*h*) *Farington* v. *Parker*, 4 L. R. Eq. 116.

(*i*) *Woodward* v. *Woodward*, 3 De G. J. & S. 672.

(*j*) *Allen* v. *Walker*, 5 L. R. Ex. 187.

(*k*) *Pride* v. *Bubb*, 7 L. R. Ch. App. 64; [and see *Carter* v. *Carter*, (1896) 1 Ch. 62].

(*l*) *Gaston* v. *Frankum*, 2 De G. & Sm. 561; *S. C.* on appeal, 16 Jur. 507.

(*m*) *Re Leeds Banking Company*, 3 L. R. Eq. 781; and see *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

(*n*) *Peacock* v. *Monk*, 2 Ves. 193, *per* Lord Hardwicke.

for want of answer where she answers separately (*a*), and similarly for *disobeying the order* of the Court in a suit to which she is a party in respect to her separate estate (*b*), or her separate property may be ordered to be *sequestered* (*c*). [And it has been held that a married woman was bound in equity to make good a representation that she was entitled to property, which had been made on her behalf to the Court while she was an infant, and on the faith of which a marriage and settlement had been sanctioned (*d*).

[Right preserved and extended by Married Women's Property Act.]

14. Since the Married Women's Property Act, 1882, a married woman, by sect. 1, sub-sect. 2, is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in contract or in tort, *or otherwise*, in all respects as if she were a *feme sole*, and her husband need not be joined (*e*) with her as plaintiff or defendant, or be made a party to any action or proceeding, and any damages or costs recovered by her in any *such* action or proceeding are her separate property; and any damages or costs recovered against her are payable out of her separate property, and not otherwise (*f*). Under this enactment a married woman may sue without her husband in respect of a tort committed *before* the commencement of the Act, and the damages recovered belong to her as separate property (*g*); and it has been intimated that if the action were brought by the husband and wife jointly, the section, which applies only to "any *such* action," *i.e.* an action brought by the wife as if she were a *feme sole*, would not make the damages separate property (*h*). But in a later case (*i*) Charles, J., thought that sect. 1, sub-sect. 2, was not necessarily confined to actions brought solely by the

(*a*) *Graham* v. *Fitch*, 2 De G. & Sm. 246; *Taylor* v. *Taylor*, 12 Beav. 271; *Home* v. *Patrick* (No. 1), 30 Beav. 405, in which case M.R. observed that if the *feme* had not obtained or concurred in the order to answer separately, there might be a difficulty.

(*b*) *Ottway* v. *Wing*, 12 Sim. 90.

(*c*) *Keogh* v. *Cathcart*, 11 Ir. Eq. Rep. 280; and see cases cited Ib.

[(*d*) *Per* Stirling, J., *Mills* v. *Fox*, 37 Ch. D. 153.]

[(*e*) The meaning is that the joinder is no longer necessary if the plaintiff is seeking satisfaction out of the wife's separate estate alone: *Earle* v. *Kingscote*, (1900) 2 Ch. (C.A.) 585.]

[(*f*) A married woman cannot be compelled to give security for costs where she sues as sole plaintiff, even though she may have no separate estate, and there is nothing against which, if she fails, available execution can issue; *Re Isaac*, 30 Ch. D. (C.A.) 418; *Re Thompson*, 38 Ch. D. (C.A.) 317, 318; but she may be ordered to give security for costs of appeal in a proper case; *Whitaker* v. *Kershaw*, 44 Ch. D. (C.A.) 296.]

[(*g*) *Weldon* v. *Winslow*, 13 Q. B. D. (C.A.) 784; *Weldon* v. *De Bathe*, 14 Q. B. D. (C.A.) 339; *James* v. *Barrand*, 49 L. T. N.S. 300.]

[(*h*) *Weldon* v. *Winslow*, 13 Q. B. D. (C.A.) 784, 788.]

[(*i*) *Beasley* v. *Roney*, (1891) 1 Q. B. 509, 513.]

wife, and that even where in the same writ the husband was joined as a party, the money recovered by the wife might be her separate property within the meaning of that enactment; and in that case, the husband and wife having sued as co-plaintiffs in respect of injury to the wife, it was held that whatever might be the true construction of sect. 1, sub-sect. 2, the damages recovered were clearly her separate property under sect. 5. Under the sub-section the right to bring an action in respect of any cause of action within sect. 7 of the Statute of Limitations, 21 Jas. 1. c. 16, which accrued before the passing of the Act of 1882, commenced at the date of that Act coming into operation, as the married woman then became "discovert" within the meaning of the Statute of James, and time ran against her as from that date (*a*); and by force of the words "or otherwise" the *feme* may be sued in respect of an equitable liability not directly arising out of contract, or any other cause of action on which a *feme sole* might be sued (*b*). But the sub-section is limited to actions relating to the married woman personally; thus it does not remove her incapacity to act as next friend or guardian *ad litem* (*c*).

[Not retrospective.]

And the sub-section is not retrospective, and does not render a married woman liable in respect of a breach of trust or of implied contract committed previously to the Act (*d*); nor does it take away her personal liability upon her antenuptial contracts (*e*).

[Liability for costs.]

The liability of a married woman who is ordered to pay costs attaches when the order against her is made, and consequently affects arrears of income, as to which she was restrained from anticipation, which have become due and payable to her since the commencement of the action, and if the order is for payment of costs by her to the trustees in whose hands the arrears are, they may retain the money in discharge of the costs (*f*).

[Remedies for protection of separate property.]

By sect. 12 of the Act, every woman, whether married before or after the Act, has in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged

[(*a*) *Weldon* v. *Neal*, 51 L. T. N.S. 289; 32 W. R. 828; *Lowe* v. *Fox*, 15 Q. B. D. (C.A.) 667.]

[(*b*) *Re Kershaw*, 63 L. T. N.S. 203; and as to the right of a married woman to sue in respect of her interest in a partnership of which she is a member, see *Eddowes* v. *Argentine Loan Company*, 62 L. T. N.S. 602; *S. C.*, 63 L. T. N.S. 364.]

[(*c*) *Re Duke of Somerset*, 34 Ch. D. 465.]

[(*d*) *Davies* v. *Stanford*, 61 L. T. N.S. 234.]

[(*e*) *Robinson King & Co.* v. *Lynes*, (1894) 2 Q. B. 577.]

[(*f*) *Cox* v. *Bennett*, (1891) 1 Ch. (C.A.) 617, distinguishing *Re Glanvill*, 31 Ch. D. (C.A.) 532, and see *post*, p. 1009.]

to her as a *feme sole;* but no husband or wife is entitled to sue the other for a tort (*a*). Under this section an action will lie at the suit of a married woman against her husband for the return of her personal property (*b*), the operation of the section not being affected by sect. 17 (*c*).

General engagement of a *feme covert* in writing.

15. At a comparatively early period in the history of the law of the separate use, it was established that the separate property of the *feme covert* might be bound by her engagements. Thus] the Courts determined that if, without any *direct* or *express* reference to her separate property, a *feme covert,* who had property settled to her separate use (*d*), professed to bind herself by any *written* instrument, the implication of law was, that she meant to charge her separate estate; for, except with reference to that, the instrument was without meaning and nugatory. Thus, if a *feme covert* executed a *bond* (*e*), even to her husband (*f*), or joined in a bond with another, even with her husband (*g*), or signed a *promissory note* (*h*), or *bill of exchange* (*i*), [or gave a guarantee (*j*),] though she was not *personally* bound, yet her *separate estate,* if anticipation were not restrained (*k*), was liable. [But if, prior to the recent Act, her anticipation was restrained as to such separate

[(*a*) An application by a husband against his wife for damages under an undertaking given by her on an injunction which was subsequently dissolved, is not in the nature of an action for tort within this section; *Hunt* v. *Hunt,* W. N. 1884, p. 243. Since the Act, the sole undertaking of a married woman as to damages must be accepted where she as sole plaintiff is entitled to an injunction; *Re Prynne,* W. N. 1885, p. 144.]

[(*b*) *Larner* v. *Larner,* (1905) 2 K. B. 539.]

[(*c*) Making provision for the decision, in a summary way, of any question between husband and wife as to the title to or possession of property. Where the action by the wife was for an account of her husband's dealings with her property under a power of attorney, the Court had jurisdiction to direct at his instance an inquiry as to her competency to instruct solicitors: *Pomery* v. *P.,* (1909) W. N. 158.]

(*d*) As to the power of a married woman to *contract* under the Fines and Recoveries Act, 1833 (3 & 4 W. 4. c. 74), in respect of her real estate generally, see *Crofts* v. *Middleton,* 2 K. & J. 194; 8 De G. M. & G. 192; *Pride* v. *Bubb,* 7 L. R. Ch. App. 64; [and as to her power to make a valid disposition of copyholds by declaring herself a trustee, see *Carter* v. *Carter,* (1896) 1 Ch. 62].

(*e*) *Lillia* v. *Airey,* 1 Ves. jun. 277; *Norton* v. *Turvill,* 2 P. W. 144; *Peacock* v. *Monk,* 2 Ves. 193, *per* Lord Loughborough; *Tullett* v. *Armstong,* 4 Beav. 323, *per* Lord Langdale.

(*f*) *Heatley* v. *Thomas,* 15 Ves. 596.

(*g*) *Heatley* v. *Thomas,* 15 Ves. 596; *Standford* v. *Marshall,* 2 Atk. 68; *Hulme* v. *Tenant,* 1 B. C. C. 20.

(*h*) *Bullpin* v. *Clarke,* 17 Ves. 365; *Field* v. *Sowle,* 4 Russ. 112; *Tullett* v. *Armstrong,* 4 Beav. 323, *per* Lord Langdale; *Fitzgibbon* v. *Blake,* 3 Ir. Ch. Rep. 328; [*Davies* v. *Jenkins,* 6 Ch. D. 728; *Devitt* v. *Faussett,* 7 L. R. Ir. 511].

(*i*) *Stuart* v. *Kirkwall,* 3 Mad. 387; *Coppin* v. *Gray,* 1 Y. & C. C. C. 205; *Tullett* v. *Armstrong,* 4 Beav. 323, *per* Lord Langdale; *M'Henry* v. *Davies,* 10 L. R. Eq. 88; *Lancashire and Yorkshire Bank* v. *Tee,* W. N. 1875, p. 213.

[(*j*) *Morrell* v. *Cowan,* 6 Ch. D. 166, reversed on other grounds.]

(*k*) *Re Sykes's Trusts,* 2 J. & H. 415.

estate as she was entitled to at the time of entering into the engagement, such engagement had no effect either at law or in equity (*a*).] Again, if she gave a written retainer to a *solicitor*, it entitled him to have his costs out of her separate estate (*b*), though the circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate is not, *per se*, sufficient to make that estate directly liable for the amount of his costs (*c*). So, if she entered into a contract in writing for the purchase of an estate, she might enforce it against the vendor, as it created a valid obligation in respect of her property (*d*). And it was not necessary that the contract should expressly refer to the separate property, or that the vendor should know that the purchaser was a married woman (*e*).

Bond by *feme* before marriage.

In one case a *feme* executed a bond *before her marriage*, and her property having been settled upon her marriage to her separate use, the obligee filed his bill against the husband and wife to have the debt paid out of her separate estate, and the husband having absconded, the Court made the order (*f*).

[Costs of raising the charge.]

[The liability of the separate estate extended to the costs of an action to enforce the charge against the estate (*g*).]

General engagements not in writing.

16. Although it was thus established beyond question that a *feme covert* made her separate property liable by the execution of any *written* instrument, yet the principles upon which the liability was held to attach were for some time involved in much doubt. Thus it was considered by Lord Loughborough (*h*), Sir J. Leach (*i*), and the late Vice-Chancellor of England (*j*), that the separate estate of a *feme covert* was not subject to her *general engagements*, and this upon the notion that a *feme covert* could not contract, but that every dealing in respect of her estate was in the nature either of an *appointment* or of a *disposition* (*k*).

[(*a*) *Roberts* v. *Watkins*, 46 L. J. N.S. Q. B. 552.]

(*b*) *Murray* v. *Barlee*, 4 Sim. 82; 3 M. & K. 209.

(*c*) *Callow* v. *Howle*, 1 De G. & Sm. 531; and see *Re Pugh*, 17 Beav. 336.

(*d*) *Dowling* v. *Maguire*, Ll. & G. Rep. *t.* Plunkett, 1; but see *Chester* v. *Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(*e*) *Dowling* v. *Maguire*, Ll. & G. Rep. *t.* Plunkett, 1.

(*f*) *Briscoe* v. *Kennedy*, cited *Hulme* v. *Tenant*, 1 B. C. C. 17.

[(*g*) *Morrell* v. *Cowan*, 6 Ch. D. 166; and see now the Married Women's Property Act, 1882, s. 1 (2), *ante*, p. 976.]

(*h*) See *Bolton* v. *Williams*, 2 Ves. jun. 142, 150, 156; *Whistler* v. *Newman*, 4 Ves. 145.

(*i*) See *Greatley* v. *Noble*, 3 Mad. 94; *Stuart* v. *Kirkwall*, Ib. 389; *Aguilar* v. *Aguilar*, 5 Mad. 418; *Field* v. *Sowle*, 4 Russ. 114; *Chester* v. *Platt*, Sugd. Vend. & Purch. 207, 14th ed.

(*j*) See *Murray* v. *Barlee*, 4 Sim. 82; and see *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149.

(*k*) See *Bolton* v. *Williams*, 2 Ves. jun. 150; *Greatley* v. *Noble*, 3 Mad. 94; *Stuart* v. *Kirkwall*, Ib. 389; *Aguilar* v. *Aguilar*, 5 Mad. 418; *Field* v. *Sowle*, 4 Russ. 114.

However, it was clear that [irrespective of the recent Act] a *feme covert* could, in respect of her separate use, contract (*a*), and that her written obligations were not to be viewed as appointments, and did not operate merely by way of disposition. The principles that govern the liability of the *feme's* separate property have been very satisfactorily explained by Lord Brougham in *Murray* v. *Barlee* (*b*), and by Lord Cottenham in *Owens* v. *Dickenson* (*c*), and their judgments must be held to have clearly established that the dealings of a *feme covert* with her separate estate did not operate by way of *appointment* or *disposition*. This being so, it became difficult to see on what ground any valid distinction could be sustained between *written* and *verbal* engagements. If a written promise to pay, as a promissory note, referring neither to the instrument of trust nor to the property, were held to bind the separate estate, upon what ground could a verbal assumpsit be distinguished? So long as it could be maintained that the dealing of the married woman operated by way of *disposition* of the separate estate, there seemed room for contending that the disposition, as being an assignment of trust, must have been in writing (*d*); but so soon as it was admitted that the general engagement *in writing* was binding, it seemed impossible to resist the conclusion that a *verbal* general engagement must bind likewise. When it was attempted to imply a promise from mere *acts* of the *feme*, which might be construed as intended to bind either her husband or herself, there seemed room for a distinction, but an *express verbal* promise and an *express written* promise to pay must, it is conceived, stand on the same footing.

Observations of V. C. Kindersley respecting *feme's* verbal engagements.

The late Vice-Chancellor Kindersley upon this subject expressed himself as follows:—"It has not yet, indeed, been made the subject of positive decision, that the principle embraces a *feme's verbal* engagements or cases of common *assumpsit*. Considering, however, the opinions expressed and the reason of the thing, I

(*a*) See *Owens* v. *Dickenson*, Cr. & Ph. 53; *Dowling* v. *Maguire*, Rep. *t.* Plunkett, 19; *Master* v. *Fuller*, 4 B. C. C. 19; *Stead* v. *Nelson*, 2 Beav. 245; *Bailey* v. *Jackson*, C. P. Cooper's Rep. 1837-8, 495; *Francis* v. *Wigzell*, 1 Mad. 261; *Crosby* v. *Church*, 3 Beav. 489; *Tullett* v. *Armstrong*, 4 Beav. 323.

(*b*) 3 M. & K. 209, at pp. 223, 224. It may be observed that in this case the late V. C. of England, while expressing his opinion upon the hearing below, that the general engagements of the *feme covert* did not affect the separate estate, does not appear to have conceived that any distinction existed between a written and unwritten obligation; see 4 Sim. 94.

(*c*) Cr. & Ph. 48, at pp. 53, 54.

(*d*) See *ante*, p. 978.

think it very probable that when that question arises for decision, it will be decided in the affirmative" (*a*).

Cases where writing is required.

But a verbal engagement could not bind the wife where the Statute of Frauds required, in the case of a *feme sole*, an engagement in *writing*, as if the *feme covert* were to undertake verbally to pay the debt of a stranger, or of her husband, who, for this purpose, is a stranger (*b*). It was even held, in Ireland, that the general engagements of the wife *not in writing*, could not, by reason of the Statute of Frauds, be satisfied out of any interest in *land* settled to her separate use (*c*). But this doctrine seems to involve a confusion between special contracts, which, in the case of a *feme sole*, are required by the statute to be in writing, and general contracts, which, in the case of a *feme sole*, are not required to be in writing. In the latter case the remedy is against the *feme sole* personally, but where the *feme* is *covert*, is not against the *person*, but the *property*. The satisfaction, therefore, decreed against the separate estate is not the specific performance of a special contract, but an *equitable execution by way of legal process* for working out the liability created by the general contract.

Whether separate estate can be made liable by operation of law in clear contravention of the intention.

17. It was considered that there was still another distinction, viz. that, allowing the *general* engagements of the wife, whether written or unwritten, to bind her separate estate, yet, supposing the doctrine of these cases to be founded on the *intention* to charge the settled property, as implied by the circumstance that otherwise the act would be nugatory, the same result would not follow where it was clearly *not* the intention of the *feme* to create any charge—where, in short, there was no contract either expressed or implied. Thus it was decided that where an annuity, granted by a *feme covert* and charged upon her separate estate, had been set aside as void for want of compliance with the requisitions of the Annuity Acts, the separate estate was not liable to repay the consideration money (*d*); and the decisions to this effect were cited, without disapprobation, by L. J. Turner (*e*). And where a married woman received rents, claiming

(*a*) *Vaughan* v. *Vanderstegen*, 2 Drew. 183; and see *Wright* v. *Chard*, 4 Drew. 673; *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 274; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Shattock* v. *Shattock*, 2 L. R. Eq. 182; 53 Beav. 489.

(*b*) *Re Sykes's Trust*, 2 J. & H. 415.

(*c*) *Burke* v. *Tuite*, 10 Ir. Ch. Rep. 467; and see *Shattock* v. *Shattock*, 2 L. R. Eq. 192; *Johnson* v. *Gallagher*, 3 De G. F. & J. 514.

(*d*) *Jones* v. *Harris*, 9 Ves. 486; *Aguilar* v. *Aguilar*, 5 Mad. 414; and see *Bolton* v. *Williams*, 4 B. C. C. 297; *S. C.*, 2 Ves. jun. 138.

(*e*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 513; and see *Shattock* v. *Shattock*, 2 L. R. Eq. 182; 35 Beav. 489.

them as her separate property, but was in fact not entitled, Vice-Chancellor Kindersley held that the rents so received could not be recovered from her separate estate (*a*).

A *feme covert* having separate estate is a *feme sole* to all intents and purposes.

18. The Vice-Chancellor at the same time observed: "The doctrine (of the separate use) is now in a state of transition, and is not clearly established in all its points; but the modern tendency has been to establish the principle, that *if you put a married woman in the position of a feme sole in respect of her separate estate, that position must be carried to its full extent, short of making her personally liable*" (*b*).

[This, however, must be understood in respect only of the separate estate to which the married woman was actually entitled at the time of the engagement which it was sought to enforce against her separate estate; for a married woman did not, by *having separate estate*, acquire an equitable *status* of capacity to contract debts, so as to enable her to bind separate estate to which she might afterwards become entitled, but could only contract with reference to separate estate to which she was actually entitled, and so as to bind that estate (*c*). So where an infant *feme*, in contemplation of her marriage, covenanted to settle all her after-acquired property, and subsequently, after attaining her majority, but prior to the Married Women's Property Act, 1882, confirmed the settlement, it was held that this confirmation made the settlement absolutely binding only so far as related to property which she had already acquired at the time of confirmation, but that as to property which she might afterwards acquire for her separate use, the covenant would remain voidable, and the married woman might, on such subsequent property accruing, elect to avoid the settlement as to it, and take it for her separate use (*d*).]

True principle.

19. The principle to be deduced from the cases was thus laid down by L. J. Turner. "To affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not

(*a*) *Wright* v. *Chard*, 4 Drew. 673.

(*b*) Ib. 4 Drew. 685.

[(*c*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. D. 454; and see *Re Roper*, 39 Ch. D. 482, 488.]

[(*d*) *Smith* v. *Lucas*, 18 Ch. D. 531; and see *Buckmaster* v. *Buckmaster*, 35 Ch. D. (C.A.) 21; *S. C.*, *Seaton* v. *Seaton*, 13 App. Cas. 61; *Duncan* v. *Dixon*, 44 Ch. D. 211; *Harle* v. *Jarman*, (1895) 2 Ch. 419; *Greenhill* v. *North British and Mercantile Insurance Co.*, (1893) 3 Ch. 474, and see *ante*, p. 25.]

affect it in the case of a married woman living with her husband," &c. "In order," he continued, "to bind the separate estate by a *general* engagement, it should appear that the engagement was made *with reference to, and upon the faith or credit of that estate, and the question whether it was so or not is to be judged of by the Court upon all the circumstances of the case*" (*a*). These opinions have since been indorsed by the Court as a correct exposition of the law (*b*); and Lord Justice James, in further illustration of the subject, has observed: "The term *general engagement* is a misleading one. If it merely mean that goods sold to a married woman in the ordinary course of domestic life—that contracts expressed to be made by her in respect of property not her separate estate—*e.g.* for buying or selling, or letting or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent the proposition that her separate estate is not liable to her general engagements is quite correct. But that does not affect the rule, as laid down by Lord Justice Turner, as to general engagements, as to which it appears that they were made with reference to, and upon the faith or credit of, the separate estate. It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor or a surveyor, or a builder or tradesman, or hire labourers or servants, and very unjust if she did, that they should have no remedy against such separate property" (*c*).

[20. Thus, where a married woman was living separate from her husband, and moneys were advanced by a stranger in providing her with necessaries, such moneys were held to constitute a debt binding her separate estate (*d*). [Money advanced to woman living separate from husband.]

21. Now, by the Married Women's Property Act, 1882 (*e*), sect. 1, sub-s. 2, already adverted to (*f*), a married woman is made capable of "entering into and rendering herself liable in respect of and to the extent of her separate property on any contract"; and by the Married Women's Property Act, 1893, it is enacted [Married Women's Property Acts, 1882 and 1893.]

(*a*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 515; see the principle approved and expanded by Sir R. T. Kindersley, V. C., in *Re Leeds Banking Company*, 3 L. R. Eq. 787; and see the same principle approved by V. C. Malins in *Butler* v. *Cumpston*, 7 L. R. Eq. 20; and by V. C. in Ireland, in *Hartford* v. *Power*, 3 I. R. Eq. 602; and by Lord Hatherley in *Picard* v. *Hine*, 5 L. R. Ch. App. 274.

(*b*) See *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 591; and see preceding note.

(*c*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 593.

[(*d*) *Hodgson* v. *Williamson*, 15 Ch. D. 87.]

[(*e*) 45 & 46 Vict. c. 75.]

[(*f*) *Ante*, p. 976.]

as follows (*a*):—"Every contract (*b*) hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to; provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." The proviso at the end of the section is to be read as qualifying all the three preceding clauses, and the words in the proviso "at that time or thereafter" have the same meaning as the like words in clause (b) of the section (*c*), and accordingly the proviso protects income which accrues due to a divorced married woman, subsequently to the divorce, in respect of her separate property which was subject to a restraint against anticipation (*d*); and, in general, separate property as to which a married woman was restrained from anticipation at the date of a contract made by her, cannot be rendered available to satisfy a judgment obtained against her in

[(*a*) 56 & 57 Vict. c. 63 (passed 5th December, 1893) s. 1, amending and replacing sub-ss. 3 and 4 of sect. 1 of the Act of 1882, which sub-sections are repealed by s. 4 of the Act of 1893. Upon the construction of the repealed provisions, it was held that the Act does not enable a married woman who has no separate property to bind herself by a contract or engagement; *Stogdon* v. *Lee*, (1891) 1 Q. B. (C.A.) 661; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Re Shakespear*, 30 Ch. D. 169; and see *Pelton* v. *Harrison*, (1891) 2 Q. B. 422; and that a person suing a married woman on an alleged contract must prove that she had, at the time of entering into the contract, separate property free from any restriction on anticipation, as to which she might reasonably be deemed to have contracted; see *Tetley* v. *Griffith*, W. N. 1887, p. 218; *Branstein* v. *Lewis*, 64 L. T. N.S. 265; *Leak* v. *Driffield*, 24 Q. B. D. 98. Moreover, as the Act of 1882 referred to married women and not to widows, and to *separate* property and not to the property of women in general, the contract of the married woman would not affect property acquired by her after the coverture; or separate property as to which she was restrained from anticipation when she entered into the contract, but which afterwards became free from such restriction by the determination of the coverture; though it would affect separate property acquired by her during a subsequent coverture; see *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, (1891) 2 Q. B. 422; *Jay* v. *Robinson*, 25 Q. B. D. (C.A.) 467; but these anomalies are now removed.]

[(*b*) That is, a contract then entered into for the first time, not a mere acknowledgment of existing liability: *Re Wheeler*, (1904) 2 Ch. 66.]

[(*c*) *Barnett* v. *Howard*, (1900) 2 Q. B. (C.A.) 784; *Brown* v. *Dimbleby*, (1904) 1 K. B. (C.A.) 28.]

[(*d*) *Barnett* v. *Howard*, *sup.*]

an action upon the contract after the determination of the coverture (*a*).

It will be observed that by the Acts no distinction is made between written and verbal engagements of the married woman, and both, therefore, equally bind her separate property. [Verbal and written engagements equally binding.]

A general covenant not to sue will bind the free separate estate of a *feme* after her decease; and where the covenant was included in an ineffectual release by her of an annuity which she was restrained from anticipating, and her will contained a direction for payment of debts, arrears of the annuity, being free separate estate, were available to answer damages for breach of the covenant (*b*). [Covenant not to sue.]

22. The separate estate has been made to answer a debt of the wife contracted before marriage (*c*); and under the Married Women's Property Act, 1870 (*d*), property belonging to a *feme* and settled to her separate use without power of anticipation was liable to such a debt (*e*). [Antenuptial debts.]

Now, by the Married Women's Property Act, 1882 (*f*), sect. 13, it is provided that "a woman after her marriage shall continue to be liable, in respect and to the extent of her separate property, for all debts contracted, and all contracts entered into or wrongs committed by her *before her marriage*, including any sums for which she may be liable as a contributory" to any joint-stock company. The section contains provisions for working out the liability, but there is a proviso that nothing in the Act is to operate to increase or diminish the liability of any woman married before the commencement of the Act for any such debt, &c., except as to any separate property to which she may become entitled by virtue of the Act, and to which she would not have been entitled for her separate use if the Act had not passed. [Married Women's Property Act, 1882.]

It has been held that this section extends not only to debts, properly so called, contracted by the *feme* while *sole*, but to debts contracted by her under the powers of the Act, and for which judgment has been recovered, during a former coverture (*g*).]

23. The inquiry now under consideration involves the question how far a *feme covert* [could, before the Married Women's Liability of estate of *feme covert* to make good her breaches of trust.

[(*a*) *Brown* v. *Dimbleby*, (1904) 1 K.B. (C.A.) 28.]

[(*b*) *Sprange* v. *Lee*, (1908) 1 Ch. 424.]

[(*c*) *Chubb* v. *Stretch*, 9 L. R. Eq. 555.]

[(*d*) 33 & 34 Vict. c. 93.]

[(*e*) *Sanger* v. *Sanger*, 11 L. R. Eq. 470; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgeley*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. D. (C.A.) 548.]

[(*f*) 45 & 46 Vict. c. 75.]

[(*g*) *Jay* v. *Robinson*, 25 Q.B.D. (C.A.) 467; *Pelton* v. *Harrison*, (1891) 2 Q. B. 422.]

Property Act, 1882,] commit a *breach of trust* for which her separate estate would be made liable. Where the breach of trust resulted in the loss of the very fund in which the *feme* had an interest to her separate use, the Court treated her acts as amounting to a *disposition* of the separate interest which she had power to bind (*a*). So if a *feme covert* who was *executrix* or *trustee* had wasted the trust estate, the ordinary right of retainer might be exercised against her separate estate under the *same* instrument (*b*). And the separate estate of a married woman under a settlement was held liable to make good the loss occasioned by her wrongfully selling absolutely a valuable chattel in which, under the *same* settlement, she had only a limited interest (*c*). But where an annuity was devised to a *feme sole* in trust to apply it for the benefit of another, and the *feme* afterwards married, and property was settled to her separate use, and then there was a breach of trust in respect of the annuity, the M.R. held that the effect of the marriage was to vest the legal estate of the annuity in the husband, that she could only act as his agent, that she could not be made liable for general torts in reference to trusts any more than for general torts at law—that, strictly speaking, she could not commit torts, but that they were the torts of her husband, and her acts created a liability against her husband: that he acted for her although she remained trustee, just as the husband of an executrix acted for the executrix, that her receipts must be treated as his receipts, and he alone was liable, and on these grounds the M.R. refused all relief against the separate property of the wife (*d*).

[Where a married woman, having notice of assignment of a contract by her to convey land, conveyed to the assignor, it was held that she had not committed a tort, but a breach of trust or implied contract which would not have bound her separate property before the Married Women's Property Act, 1882 (*e*).

[Married Women's Property Act, 1882.]

24. Now, by the recent Act (*f*), sect. 24, it is provided as follows: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or adminis-

(*a*) *Crosby* v. *Church*, 3 Beav. 485; *Hanchett* v. *Briscoe*, 22 Beav. 496; [and see *Re Davenport*, (1895) 1 Ch. 361].

(*b*) *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266; and see *ante*, p. 893.

(*c*) *Clive* v. *Carew*, 1 J. & H. 199.

(*d*) *Wainford* v. *Heyl*, 20 L. R. Eq. 321. [As to the liability of a husband, notwithstanding the Married Women's Property Act, 1882, in respect of his wife's torts which are independent of contract, see *Earle* v. *Kingscote*, (1900) 2 Ch. (C.A.) 585; *Beaumont* v. *Kaye*, (1904) 1 K. B. (C.A.) 292; *Cuenod* v. *Leslie*, (1909) 1 K. B. (C.A.) 880.]

[(*e*) *Davies* v. *Stanford*, 61 L. T. N.S. 234.]

[(*f*) 45 & 46 Vict. c. 75.]

tratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any *breach of trust or devastavit* committed by any married woman, being a trustee or executrix or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration." This section must be read in connection with the provisions already referred to (*a*), with sect. 19, to be hereafter noticed (*b*), and with sect. 18, which provides that a married woman who is an executrix or administratrix alone or jointly with others, or a trustee alone or jointly of property subject to any trust, may sue or be sued, or transfer or join in transferring any public or other stocks, funds, or investments in that character, without her husband, as if she were a *feme sole* (*c*).

[Married woman administratrix.]

An order that a married woman administratrix should pay into court a sum of money, belonging to the intestate's estate and shown by her account of the personal estate to be in her hands, is a personal order against her in respect of the office accepted by her, and if she fails to comply with the order she is liable to attachment. Such an order, therefore, is rightly made in common form, and not confined to payment out of separate estate; but it would seem that if the object of the order were to compel her to make good a loss occasioned by her devastavit, as the liability would be proprietary and not personal, the order must be in the form prescribed in *Scott* v. *Morley* (*d*), and she would not be liable to attachment (*e*).]

Nature of the relief against the separate estate.

25. Supposing a person entitled to establish his claim against the separate estate, the limits of his remedy appear to be [as follows: Previously to the Act of 1882 he could] not bring an action against the *feme covert* as the sole defendant and as *personally* liable (*f*); but might have brought an action against her and

[(*a*) *Ante*, pp. 964, 965, 983, 984.]

[(*b*) *Post*, p. 1006].

[(*c*) The section, it will be observed, does not deal with land, and accordingly, although the Act enables a *feme covert* to convey, without the concurrence of her husband, land in fee simple, being her separate property, *Re Drummond and Davie's Contract*, (1891) 1 Ch. 524, 531; or land of which she is a mortgagee, *Re Brooke and Fremlin*, (1898) 1 Ch. 647; *Re West and Hardy's Contract*, (1904) 1 Ch. 145; or mortgagee in trust, *Re Howgate and Osborn's Contract*, (1902) 1 Ch. 451; it has been held that she has no power to convey land of which she is trustee, otherwise than by deed acknowledged under the Fines and Recoveries Act, 1833; *Re Harkness and Allsopp's Contract*, (1896) 2 Ch. 358, but see now the Married Women's Property Act, 1907, sect. 1, *ante*, p. 37.]

[(*d*) 20 Q. B. D. (C.A.) 120, see *post*, pp. 990, 991.]

[(*e*) *Re Turnbull*, (1900) 1 Ch. 180.]

[(*f*) Where a judgment had been obtained against a married woman, it was on her application set aside, after a considerable lapse of time, as

her trustees (and the death of her husband, which puts an end to the separate use, either after the commencement of the action (*a*), or even before it (*b*), would not have defeated the action), and might have prayed payment of his demand out of all *personal estate* in the hands of the trustees to which she was entitled absolutely (including *arrears* of rents), and also out of the *accruing* rents *of real estate*, if there were no clause against anticipation, until the claim and costs had been satisfied (*c*). "I know of no case," said Lord Thurlow, "where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale*, *mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife" (*d*). But it is conceived that if in any case the instrument were so specially worded as to place the *corpus* of real estate also at the *separate disposal* of the *feme covert*, the engagements of the wife would, upon principle, [independently of the Act of 1882,] have bound the whole interest settled to the separate use, whether *corpus* or income (*e*).

As against corpus of real estate.

[Where the property is acquired subsequently to the engagement.]

[A judgment recovered against the separate estate of a married woman in respect of an engagement not within the Act of 1882, binds only so much of the separate estate as the married woman was entitled to at the time when the engagement was entered into, and as remains undisposed of at the time of the judgment, and does not affect separate estate acquired subsequently to the engagement (*f*). In such a case, therefore, the proper inquiry to be inserted in a judgment against the separate estate is "what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court" (*g*).

being irregular and wrong; *Atwood* v. *Chichester*, 3 Q. B. D. (C.A.) 722; *Davies* v. *Ballenden*, 46 L. T. N.S. 797.]

(*a*) *Field* v. *Sowle*, 4 Russ. 112.

(*b*) *Heatley* v. *Thomas*, 15 Ves. 596; but see *Kenge* v. *Delavall*, 1 Vern. 326.

(*c*) *Hulme* v. *Tenant*, 1 B. C. C. 20, *per* Lord Thurlow; *Standford* v. *Marshall*, 2 Atk. 68; *Murray* v. *Barlee*, 4 Sim. 82; 3 M. & K. 209; *Field* v. *Sowle*, 4 Russ. 112; *Nantes* v. *Corrock*, 9 Ves. 182; *Bullpin* v. *Clarke*, 17 Ves. 365; *Jones* v. *Harris*, 9 Ves. 492, 493, 497; *Stuart* v. *Kirkwall*, 3 Mad. 387.

(*d*) *Hulme* v. *Tenant*, 1 B. C. C. 20, 21; and see *Boughton* v. *James*, 1 Coll. 26; *Nantes* v. *Corrock*, 9 Ves. 189.

(*e*) See *post*, p. 1003.

[(*f*) *Pike* v. *Fitzgibbon*, 17 Ch. D. (C.A.) 454; reversing *S. C.* 14 Ch. D. 837; Seton, 6th ed. pp. 893, 897; *Flower* v. *Buller*, 15 Ch. D. 665; *Chapman* v. *Biggs*, 11 Q. B. D. 27.]

[(*g*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. D. (C.A.) 454; *Durrant* v. *Ricketts*, 8 Q. B. D. 177; 30

If there be a clause against anticipation as to any part, the Court directs payment out of the *feme's* separate estate, except that part of which she has no power of anticipation (*a*); and separate estate as to which anticipation was restrained at the time the engagement was entered into, would not become available for the payment, by reason of the determination of the coverture before the date of the judgment (*b*). Where the married woman trades separately from her husband and becomes bankrupt, her separate property subject to restraint on anticipation vests under sect. 1, sub-sect. 5 of the Act of 1882 (*c*) in the trustee in bankruptcy, and on the death of her husband, the restraint, being in the nature of an incumbrance, is removed, and the property becomes assets available for her creditors (*d*). [Where clause against anticipation.]

The remedy against the separate estate is in the nature of equitable execution, which may be obtained either by the appointment of a receiver, or by a direction to the trustees to pay, and if any proceedings are pending between the married woman and her creditor, the order may be obtained in such proceedings without instituting a fresh action (*e*). [Equitable execution without new proceedings.]

26. The rule that the trustees of the property held for the separate use of a *feme covert*, must be parties to a suit for charging that property, has in recent cases been broken through. Thus, in *Picard* v. *Hine* (*f*), where the trustee of a particular property was a defendant, the Court made a decree in a general form declaring that the separate property of the *feme covert*, vested in her or in *any other person* in trust for her, was chargeable with the payment of the plaintiff's debt; and in a later case, V. C. Hall, on the authority of *Picard* v. *Hine*, held expressly that it was not necessary to make the trustees parties (*g*). But [Trustee not a necessary party.]

W. R. 428; *Gloucestershire Banking Company* v. *Phillips*, 12 Q. B. D. 533; and see *Gallagher* v. *Nugent*, 8 L. R. Ir. 353; *Re Roper*, 39 Ch. D. 482, 491.]

[(*a*) *Murray* v. *Barlee*, 4 Sim. 95.]

[(*b*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. D. (C.A.) 454, reversing *S. C.*, 14 Ch. D. 837; *Myles* v. *Burton*, 14 L. R. Ir. 258; *Pelton* v. *Harrison*, (1891) 2 Q. B. 422; *Brown* v. *Dimbleby*, (1904) 1 K. B. 28, *ante*, p. 984.]

[(*c*) See *post*, p. 1023.]

[(*d*) *Re Wheeler's Settlement*, (1899) 2 Ch. 717.]

[(*e*) *Re Peace and Waller*, 24 Ch. D. (C.A.) 405; *M'Garry* v. *White*, 16 L. R. Ir. 322. Sums of money ordered to be paid by a husband to a divorced wife are personal, and her creditor cannot take them in equitable execution: *Watkins* v. *Watkins*, (1896) P. 222; *Paquine* v. *Sneary*, (1909) 1 K. B. (C.A.) 688. If the *feme* has been ordered to pay costs, her separate estate may be reached under the general jurisdiction which the Court has to protect an equitable fund by the appointment of a receiver: *Cummins* v. *Perkins*, (1899) 1 Ch. (C.A.) 16.]

[(*f*) 5 L. R. Ch. App. 274.]

[(*g*) *Davies* v. *Jenkins*, 6 Ch. D. 728; *Flower* v. *Buller*, 15 Ch. D. 665; *Durrant* v. *Ricketts*, 8 Q. B. D. 177; but see *Atwood* v. *Chichester*, 3 Q. B. D. (C.A.) 722.]

any order made in the absence of the trustees must be without prejudice to any claims they may have against the trust estate (*a*).

[Nor the husband.]

By the Act of 1882, although the ultimate remedy is only against the separate estate, the action may be brought against the married woman as if she were a *feme sole*, without joining either her husband or any trustee as a party, and a judgment may be obtained against the married woman (*b*). This judgment could, however, only be enforced against the separate property, but it was available (in cases where the contract in respect of which it was obtained was made after the 31st of December, 1882) against any separate property of the married woman whether acquired before or after the date of the contract (*c*); and if the contract is subsequent to the Act of 1893, the judgment is enforceable (subject to a proviso as to property which she is restrained from anticipating) by process of law against all property which she may while discovert be possessed of or entitled to (*d*).

[Form and effect of judgment against separate estate.]

27. Under the recent Acts, judgment in default, or under Order 14 of the Rules of the Supreme Court, may be signed against a married woman, but execution can only issue against her separate property as to which her anticipation is not restrained (*e*), unless the restraint arises under a settlement made by the married woman herself of her own property (*f*). The judgment should be expressly limited so as not to extend to any property which is subject to any restriction on anticipation, "unless by reason of sect. 19 of the Married Women's Property Act, 1882 (*g*), the property be liable to execution notwithstanding such restriction" (*h*). Judgment in this form against the married

[(*a*) *Collett* v. *Dickenson*, 11 Ch. D. 687; *Re Peace and Waller*, 24 Ch. D. (C.A.) 405.]

[(*b*) *Brown* v. *Morgan*, 12 L. R. Ir. 122; *Robinson King & Co.* v. *Lynes*, (1894) 2 Q. B. 577.]

[(*c*) 45 & 46 Vict. c. 75, s. 1; *Bursill* v. *Tanner*, 13 Q. B. D. 691; but see *Moore* v. *Mulligan*, W. N. 1883, p. 34.]

[(*d*) 56 & 57 Vict. c. 63, s. 1, see *ante*, p. 983.]

[(*e*) *Perks* v. *Mylrea*, W. N. 1884, p. 64; and as to the practice before the Act, see *Ortner* v. *Fitzgibbon*, 50 L. J. N.S. Ch. 17; 43 L. T. N.S. 60. Where under an order for payment of costs by the *feme* and her husband, a writ of elegit issues by which execution against her is limited to her separate estate, real property over which she and her husband have a joint general power of appointment cannot be taken in execution: *Goatley* v. *Jones*, (1909) 1 Ch. 557.]

[(*f*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409.]

[(*g*) See *post*, p. 1006.]

[(*h*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Scott* v. *Morley*, 20 Q. B. D. (C.A.) 120, 132; Seton, 6th ed. p. 885; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409; and see *Johnstone* v. *Browne*, 18 L. R. Ir. 428. But a writ of sequestration need not be so limited, though it would not

woman is not a personal judgment (*a*), but only binds her property, and under such a judgment there is no "debt due from her" within the meaning of sect. 5 of the Debtor's Act, 1869, capable of being enforced by committal (*b*). But although the relief thus given against the married woman is different from that in the case of a *feme sole*, she is liable to be sued on any ground on which a *feme sole* could be sued, and this liability to be sued is entirely distinct from her power to contract. Thus, a liability to refund money overpaid in the capacity of residuary legatee may be enforced by an action against the *feme*, although she is restrained by the will from anticipation (*c*). Where judgment is recovered against a widow upon a contract entered into by her during coverture before the Married Women's Property Act, 1893, but after the Married Women's Property Act, 1882, the plaintiff is not entitled to judgment against her in the ordinary form as if she were a *feme sole*, but only to judgment in the form settled in *Scott* v. *Morley* (*d*), with requisite verbal alterations (*e*). [Judgment against widow.]

28. A person entitled to establish a claim against the separate estate of a *feme covert*, cannot obtain an interim injunction against her to restrain her from dealing with it until his right has been established by obtaining a judgment (*f*).] [No injunction to restrain dealing with separate estate until claimant's right established.]

29. It was formerly held, though not without a conflict of judicial opinion, that where the creditor proceeded not against the *feme covert* personally, but against her separate property as a trust fund, the Statute of Limitations did not apply and could not be pleaded (*g*). [But it was pointed out by the late Lord Justice Kay that the leading case upon the subject proceeded upon the view that the bond of a married woman Statute of Limitations.

be effectual against separate estate as to which the *feme* is restrained from anticipation; *Hyde* v. *Hyde*, 36 W. R. 708.]

[(*a*) *Scott* v. *Morley*, 20 Q. B. D. (C.A.) 120; *Draycott* v. *Harrison*, 17 Q. B. D. 417.]

[(*b*) *Scott* v. *Morley*, *ubi sup.*; and as the judgment is not personal, a bankruptcy notice against a *feme covert* trader cannot be founded on it; *Re Lynes*, (1893) 2 Q. B. (C.A.) 113; and see *Re Elliot*, (1900) 2 I. R. 439; though the judgment is against her in a firm name under which she trades separately: *Re Frances Handford & Co.*, (1899) 1 Q. B. (C.A.) 566; but as it is a "judgment" within Rules of Court, 1883, Order XLV., Rule 1, it may be enforced by garnishee proceedings; *Holtby* v. *Hodgson*, 24 Q. B. D. (C.A.) 103.]

[(*c*) *Whitaker* v. *Kershaw*, 45 Ch. D. (C.A.) 320, 327, 329.]

[(*d*) *Ante*, p. 990.]

[(*e*) *Softlaw* v. *Welch*, (1899) 2 Q. B. (C.A.) 419; and see *Brown* v. *Dimbleby*, (1904) 1 K. B. (C.A.) 28, *sup.* p. 984.]

[(*f*) *Robinson* v. *Pickering*, 16 Ch. D. (C.A.) 660, reversing *S. C.*, 16 Ch. D. 371.]

(*g*) *Norton* v. *Turvill*, 2 P. W. 144; [*Hodgson* v. *Williamson*, 15 Ch. D. 87;] *Vaughan* v. *Walker*, 6 Ir. Ch. Rep. 471; 8 Ir. Ch. Rep. 458.

operated as an appointment making her a trustee for the obligee—a view which is now exploded. And it has now been decided by the Court of Appeal that the Statute of Limitations applies by analogy to the liability of a *feme covert* in respect of her separate estate (*a*).]

Stock settled to the separate use.

30. In one case the Court refused to hold the *Bank Annuities* of a *feme covert* liable, as stock could not, in the case of a person *sui juris*, be taken in execution (*b*); but now that stock is available to the creditor (*c*), the distinction may be considered as obsolete.

Assignment good against creditor.

31. Process against the separate property of the wife in her lifetime being in the nature of an *equitable execution* may, like an execution at law, be defeated by a *bonâ fide* assignment to a purchaser or mortgagee (*d*).

Creditor's suit after death of *feme covert*.

32. After the death of the *feme covert* the creditor may bring an action for payment of his debt out of property which belonged to her as her separate estate (*e*); and Sir W. Grant ruled that all the creditors, whether by specialty or simple contract, should be paid *pari passu* (*f*). But Lord Romilly was of opinion that the debts should be paid in order of priority (*g*). Two conflicting principles were in fact then at work in different branches of the Court (*h*): one was, that the general engagements of the wife were charges on the separate property equivalent to so many assignments, and if so, the debts would be payable in order of date: the other was, that the general engagements were not charges, but created a liability, the remedy for which if the *feme* were *sole*, would be against the person, but as she was *covert*, there was no remedy against the person, but the law gave an equitable execution against the property; and in this view the separate estate would be applicable as assets *pari passu*. Of these two principles the latter is clearly the more correct one (*i*).

[Earnings.]

[33. The earnings of a *feme covert*, which under the Married Women's Property Acts belong to her for her separate use, are

[(*a*) *Re Lady Hastings*, 35 Ch. D. (C.A.) 94; and see *Re Roper*, 39 Ch. D. 482, 489; and as to the effect of an acknowledgment or payment by her, or of her suffering judgment, see *Beck* v. *Pierce*, 23 Q. B. D. (C.A.) 316, 322.]

(*b*) *Nantes* v. *Corrock*, 9 Ves. 182.

(*c*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14.

(*d*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 520, *per* L. J. Turner.

(*e*) See *Owens* v. *Dickenson*, Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Mad. 90.

(*f*) *Anon.* 18 Ves. 258; and see *Johnson* v. *Gallagher*, 3 De G. F. & J. 520.

(*g*) *Shattock* v. *Shattock*, 2 L. R. Eq. 182. The decision in this case involved a sum of 14*l.* 15*s.* only, so that of course there was no appeal.

(*h*) Compare *Johnson* v. *Gallagher*, 3 De G. F. & J. 494, and *Shattock* v. *Shattock*, 2 L. R. Eq. 182.

(*i*) See now the observations of the Court in *London Chartered Bank of Australia* v. *Lempriere*, 4 L. R. P. C. 594.

like her other separate estate, divisible upon her death amongst her creditors *pari passu* (*a*).]

Funeral expenses.

34. It has been doubted whether the *funeral* expenses of the wife should be thrown upon her separate estate (*b*). [But in a recent case where a married woman exercised a general power of appointment (*c*), it was held that the husband, who was one of her executors, was entitled to retain out of the appointed property the amount of the expenses of her funeral (*d*).]

Savings.

35. The *savings* by a *feme covert* out of her separate estate form part of it, and are equally at her exclusive disposal, or, according to the language of an early authority, "the sprout is to savour of the root and to go the same way" (*e*); and the same has been held with respect to savings out of a maintenance allowed on separation (*f*). Where a fund is settled to the separate use of a married woman and her *anticipation is restrained*, as the income when actually accrued is at her absolute disposal, any savings from the income, though invested by her in the names of the trustees of the original settlement, will not be subject to the fetter against anticipation which attached to the *corpus* whence the savings proceeded (*g*). Savings out of money given to the wife by her husband for *household purposes, dress, or the like*, belong to the husband (*h*).

[Savings whether bound by covenant to settle after acquired property.]

[In a recent case where a marriage settlement contained a covenant by the wife in general terms for the settlement of after acquired property, it was held by Kekewich, J., that property acquired out of savings of her separate income under the settlement was bound by the covenant (*i*); but in a still more recent case, in which the facts were substantially similar, a contrary conclusion was arrived at by Romer, J. (*j*); and this decision was subsequently followed (*k*), and has been approved by Lord Davey in the House of Lords (*l*); but there is no general rule that a gift

[(*a*) *Thompson* v. *Bennett*, 6 Ch. D. 739.]

(*b*) *Gregory* v. *Lockyer*, 6 Mad. 90.

[(*c*) As to the effect of such appointment, see *post*, p. 996.]

[(*d*) *Re McMyn*, 33 Ch. D. 575.]

(*e*) *Gore* v. *Knight*, 2 Vern. 535; *Molony* v. *Kennedy*, 10 Sim. 254; *Humphery* v. *Richards*, 2 Jur. N.S. 432; [*Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487].

(*f*) *Brooke* v. *Brooke*, 25 Beav. 347; and see *Messenger* v. *Clarke*, 5 Exch. 388.

(*g*) *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

(*h*) *Barrack* v. *M'Culloch*, 3 K. & J. 114; see *Mews* v. *Mews*, 15 Beav. 539.

[(*i*) *Re Bendy*, (1895) 1 Ch. 109.]

[(*j*) *Finlay* v. *Darling*, (1897) 1 Ch. 719, distinguishing *Lewis* v. *Madocks*, 8 Ves. 149; 17 Ves. 48; and see *Coles* v. *Coles*, (1901) 1 Ch. 711; *Kingan* v. *Matier*, (1905) 1 I. R. 272.]

[(*k*) *Re Clutterbuck's Settlement*, (1905) 1 Ch. 200, *per* Buckley, J.]

[(*l*) *Mackenzie* v. *Allardes*, (1905) A. C. (H. L. Sc.) 285, at p. 296.]

from the husband to the wife is to be excluded from the operation of such a covenant (*a*).]

Power of disposition by will of separate estate.

36. A *feme covert* has always possessed as incident to her separate estate, a power to dispose of it, whether it be real or personal, not only by act *inter vivos*, but also by *testamentary instrument* in the nature of a will (*b*). [And her after acquired separate property will pass by her will although she had no separate property at the time of making it (*c*),] and administration with the will annexed, where [no executors are appointed, or where] the executors die in her lifetime, will be granted not to her husband the survivor, but to her residuary legatees (*d*). And if a *feme* leave a will and make bequests, the usual course of administration will be observed. Thus, in the payment of her debts, the undisposed of interest will be first applied, then, general legacies, and, if there still be a deficiency, the specific legacies (*e*); and general legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death (*f*). And a general residue will sweep in all arrears of income due at the time of the death (*g*). [But as the separate property is in the nature of equitable assets distributable *pari passu* amongst the creditors, the executor has no right of retainer in respect of money due to him (*h*).]

Separate estate undisposed of survives to the husband.

37. If a *feme covert* having personal estate settled to her separate use die without disposing of it, the husband will be entitled to it; as to so much thereof as may consist of cash, furniture, or other *personal chattels*, in his marital right, and as

[(*a*) *Re Ellis' Settlement*, (1909) 1 Ch. 618; *Re Plumtre's Settlement*, (1910) 1 Ch. 609. In the construction of such a covenant the distinction between "property" and "power" is to be observed: *Tremayne* v. *Rashleigh*, (1908) 1 Ch. 681, and see *Vetch* v. *Elder*, (1908) W.N. 137.]

(*b*) *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; *Rich* v. *Cockell*, 9 Ves. 369; *Humphery* v. *Richards*, 2 Jur. N.S. 432; *Moore* v. *Morris*, 4 Drew. 38; *Pride* v. *Bubb*, 7 L. R. Ch. App. 64; *Noble* v. *Willock*, 8 L. R. Ch. App. 778; *S. C. nom. Willock* v. *Noble*, 7 L. R. H. L. 580; *Taylor* v. *Meads*, 4 De G. J. & S. 597; [*Bishop* v. *Wall*, 3 Ch. D. 194. But the Married Women's Property Act, 1882, sect. 1, has not the effect of extending the power to property of the *feme*, married before the commencement of the Act, which is not separate property; *Re Cuno*, 43 Ch. D. (C.A.) 12; and see *Re Drummond and Davie*, (1891) 1 Ch. 524, 534.]

[(*c*) *Charlemont* v. *Spencer*, 11 L. R. Ir. 347, 490; and see the Married Women's Property Act, 1893, s. 1, *ante*, p. 983.]

(*d*) *Brenchley* v. *Lynn*, 2 Rob. 441; *Re Goods of Maria Bailey*, 2 Sw. & Tr. 135; and see *Re Goods of Pine*, 1 L. R. P. & D. 388; *Re Goods of M. Fraser*, 2 L. R. P. & D. 183.

(*e*) *Norton* v. *Turvill*, 2 P. W. 144.

(*f*) See *Tatham* v. *Drummond*, 2 H. & M. 262; the case of a will executing a special power.

(*g*) See *Tatham* v. *Drummond*, 2 H. & M. 262.

[(*h*) *Thompson* v. *Bennett*, 6 Ch. D. 739].

to so much as may consist of *choses in action*, upon taking out administration to his wife (*a*).

Executors take as appointees.

38. If a *feme covert* [in a case not governed by the Married Women's Property Act, 1882, make a will in exercise of a power and] appoint *executors*, they do not take all the separate property *jure representationis*, but as appointees under the power to the extent of the fund appointed (*b*). And therefore if the will do not dispose of [the separate property not subject to the power], the executors take only the [property] disposed of, while the husband takes such chattels as are in possession, and as regards *choses in action* there must be letters of administration (*c*). [But if the *feme covert* being possessed of separate personal estate make a will, not under a power, but by virtue of her right as a married woman to dispose of her separate estate, and appoint executors, and direct them to pay legacies, they are entitled to probate, and all the separate estate vests in them *jure representationis* (*d*). And since the Married Women's Property Act, 1882, if a married woman make a will in execution of a power, and also appoint executors, they are entitled to probate in general form, and the right of the husband to administration *cæterorum* is excluded (*e*). And wherever there is evidence of the existence of separate property probate will be granted to the executor (*f*),

[*Secus*, where will not under a power, or made since the Married Women's Property Act, 1882.]

(*a*) *Proudley* v. *Fielder*, 2 M. & K. 57; *Molony* v. *Kennedy*, 10 Sim. 254; *Bird* v. *Peagrum*, 13 C. B. 639; *Johnstone* v. *Lumb*, 15 Sim. 308; *Drury* v. *Scott*, 4 Y. & C. 264; *Askew* v. *Rooth*, 17 L. R. Eq. 426; *Tugman* v. *Hopkins*, 4 Man. & G. 389; *Archer* v. *Lavender*, 9 I. R. Eq. 220; [and the law in this respect is not affected by the Married Women's Property Act, 1882; *Re Lambert's Estate*, 39 Ch. D. 626; and see *Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493; *Smart* v. *Tranter*, 43 Ch. D. (C.A.) 587; *inf.*, note (*f*)].

(*b*) If a married woman executes by will a power of appointing real estate, the instrument, though in form a will, is in fact a conveyance by means of the appointment exercised, and although an executor is appointed, he takes nothing in his character of personal representative; *per* Sir James Hannen, *Re Goods of Tomlinson*, 6 P. D. 209; [and see *Re Goods of Hornbuckle*, 59 L. J. P. D. 78; 63 L. T. N.S. 464; 39 W. R. 80; and on this principle probate has been refused of a will by a married woman appointing real estate under a power and constituting executors; *O'Dwyer* v. *Geare*, 1 Sw. & Tr. 465; *Re Goods of Barden*, 1 L. R. P. & D. 325; *Re Goods of Tomlinson*, 6 P. D. 209; but see now the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-ss. 1, 2, 3].

(*c*) *Tugman* v. *Hopkins*, 4 Man. & G. 389.

[(*d*) *Brownrigg* v. *Pike*, 7 P. D. 61.]

[(*e*) *Re Goods of Ievers*, 13 L. R. Ir. 1; *Re Lambert's Estate*, 39 Ch. D. 626; *q.v.* as to the effect of the Probate Rules of March, 1887, and see *ante*, p. 967.]

[(*f*) *Harding* v. *Sutton*, 59 L. T. N.S. 838; *Re Lambert's Estate*, 39 Ch. D. 627; and as to the effect of such probate, see *ante*, p. 967. It may be observed that in *Smart* v. *Tranter*, 40 Ch. D. 165; *S. C.*, 43 Ch. D. (C.A.) 587, the decision of Kay, J., to the effect that the husband, in order to establish his right to the *choses in action* there in question, ought to take proceedings in the Probate Division to revoke the probate, proceeded on the footing that the married woman had no separate property, and therefore no power to

although the will deals only with real estate (*a*). By sect. 23 of the Married Women's Property Act, 1882, for the purposes of the Act the legal personal representative of any married woman is, in respect of her separate estate, to have the same rights and liabilities and be subject to the same jurisdiction as if she were living; and the husband taking *jure mariti* is the legal personal representative of the wife within this section, and therefor liable to her debts to the extent to which the property was her separate estate (*b*).]

Separate property invested in land.

39. If a *feme covert*, having income settled to her separate use, lay out the savings in a *purchase of land* in the name of a trustee, [or in her own name,] the land on her dying intestate will descend to the heir, and not be personal estate in equity for the benefit of the administrator (*c*).

[Appointment not passing property accruing to *feme* after the termination of the coverture.]

[40. Where property was settled to the separate use of a *feme covert* for life, with a power of appointment by deed or will, and in default of appointment, in the event of her surviving her husband, for her, her executors, administrators, and assigns, and she exercised the power and survived her husband, investments which had been acquired by her after the determination of the coverture, from the sale and reinvestment of the settled property, and dividends arising after the determination of the coverture were held not to pass by the appointment, inasmuch as they were not separate property within the settlement (*d*).]

Whether property subject to power of appointment by *feme covert* becomes assets on exercise of the power.

41. The question whether (independently of the provision in sect. 4 of the Married Women's Property Act, 1882, to be hereafter noticed) property subject to a power of appointment in a married woman becomes, on her exercising the power, assets available for the satisfaction of her engagements, has been the subject of conflicting opinions. In *Johnson* v. *Gallagher* (*e*), the question was treated by Turner, L.J, as an open one upon the authorities, though a distinction was drawn where the *feme covert* was guilty of fraud. V. C. Kindersley, on the general question,

make a will, whereas in fact, as appears from the report of the case on appeal in 59 L. J. Ch. 363, 364, she had some separate property.]

[(*a*) *Re Goods of Cubbon*, 11 P. D. 169.]

[(*b*) *Surman* v. *Wharton*, (1891) 1 Q. B. 491.]

(*c*) *Steward* v. *Blakeway*, 6 L. R. Eq. 479; 4 L. R. Ch. App. 603.

[(*d*) *Mayd* v. *Field*, 3 Ch. D. 587; see *ante*, pp. 967, 968, 993. Where a married woman has power to appoint by will "during coverture," her appointment by will while covert is good, though she dies discovert: *Re Illingworth*, (1909) 2 Ch. 297.]

(*e*) 3 De G. F. & J. 494, 517; see *Hughes* v. *Wells*, 9 Hare, 749; *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Hobday* v. *Peters* (No. 2), 28 Beav. 354; *Shattock* v. *Shattock*, 2 L. R. Eq. 182; Sugd. on Powers, 8th ed. p. 476.

was of opinion that the appointed funds were not assets (*a*), but held that if an estate were settled to the separate use of a *feme covert* for life, with a general power of appointment by will, and in default of appointment to her in fee, and she suppressed her real name, and holding herself out as a *feme sole*, mortgaged the estate, the mortgagee had a *lien* upon the estate as against the heir or appointee (*b*).

[Modern decisions, however, seemed, until very recently, to have established the proposition that on the married woman exercising the power, the property becomes assets available for the discharge of her liabilities in the same manner as her separate estate is available. Thus in a case in the Privy Council], where there was no fraud, and the *feme covert* had a general power of appointment *either* by instrument *inter vivos* or by will, [and there was a gift in default of appointment to her executors or administrators, and she exercised the power by will, it was] held that her general engagements were payable out of the property (*c*), and the Court went so far as to say, in the broadest terms, that such a settlement amounts in effect to what in common sense, and to common apprehension it would be, viz., an absolute gift to the sole and separate use, and that such a form of settlement on a married woman, without restraint of anticipation, vests in equity the entire *corpus* in her for all purposes as fully as a similar gift to a man would vest it in him (*d*). The actual decision of the case in which this general doctrine was laid down was clearly supportable on the ground that there had been an imperfect execution of the power, and there being valuable consideration, equity would supply the defect; and the Court did not mean what the generality of the expressions would imply, that where the *power is not executed* the property is available for the *feme covert's* engagements, for the Court expressly approved the doctrine laid down by Sir G. Turner, that where there is a limitation over in default of appointment, and the power has not been exercised, the engagements of the married woman cannot prevail against the parties entitled in default of appointment (*e*). [In a later case (*f*), where personal property

(*a*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204.

(*b*) *Vaughan* v. *Vanderstegen*, 2 Drew. 363; and see *Hobday* v. *Peters*, (No. 2), 28 Beav. 354; [*Barrow* v. *Manning*, W. N. 1878, p. 122; *Re McIntyre's Trust*, 21 L. R. Ir. 42].

(*c*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 572, and see *Brewer* v. *Swirles*, 2 Sm. & G. 219.

(*d*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 595.

(*e*) *S. C.*, 592.

[(*f*) *Mayd* v. *Field*, 3 Ch. D. 587; see *Skinner* v. *Todd*, 51 L. J. N.S. Ch. 198.]

was settled upon such trusts as a *feme covert* should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (an event which happened) for her absolutely, and the *feme* appointed the property by will, Sir G. Jessel, M.R., held that the property was bound by her general engagements. Again, where property was settled on a *feme covert* for life for her separate use with a general power of appointing by will, with a gift over in default of appointment, V. C. Hall held that the property appointed by her will was assets for the payment of her debts in the same manner as if it had belonged to her for her separate use (*a*), and this decision has since been acted upon (*b*).

[Re Roper.] However, in a more recent case, in which the authorities were fully examined by Kay, J., a conclusion at variance with the previous decisions was arrived at, and it was held that the property appointed by the will of the *feme covert* was not liable to satisfy her obligations incurred before the Act of 1882, and that the exercise of the power did not make the appointed property available as assets to answer such obligations (*c*). The grounds upon which this decision was based were that as, according to the principle of *Pike* v. *Fitzgibbon* (*d*), the engagement of a married woman could only bind separate estate to which she was entitled at the time when the engagement was entered into, it followed that property which did not become part of the estate of the *feme* until the appointment took effect upon her death, could not be resorted to to answer an antecedent engagement, and that the previous decisions, including that in the Privy Council already referred to, were based on the exploded doctrine of *Norton* v. *Turvill* (*e*), that the bond of a married woman operated as an appointment. The law, therefore, upon this subject remains at the present time in a somewhat unsettled condition (*f*).

[(*a*) *Re Harvey's Estate*, 13 Ch. D. 216, and the V. C. observed that it might perhaps, even in the case of a man, be said to be a strong and arbitrary thing to decide that property which was not in the first instance his own, and which he could only appoint, was assets for the payment of his debts. But as to the decision in this case, see the observations by L. J. Cotton in *Pike* v. *Fitzgibbon*, 17 Ch. D. (C.A.) 466.]

[(*b*) *Hodgson* v. *Williamson*, 15 Ch. D. 87; *Hodges* v. *Hodges*, 20 Ch. D. 749; and see *Re De Burgh Lawson*, 41 Ch. D. 568.]

[(*c*) *Re Roper*, 39 Ch. D. 482.]

[(*d*) 17 Ch. D. (C.A.) 454, see *ante*, pp. 982, 988.]

[(*e*) 2 P. W. 144, see *ante*, pp. 991, 992.]

[(*f*) In the case of *Re De Burgh Lawson*, 41 Ch. D. 568, *Re Roper* was relied on as an authority before Stirling, J., and it was there held that under the will of a married woman, directing her executors to pay her

42. Now by the Married Women's Property Act, 1882, sect. 4, it is provided that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." [Married Women's Property Act, 1882, sect. 4.]

Independently of the Act of 1893 (*a*), already referred to, and notwithstanding the decision in *Palliser* v. *Gurney* (*b*), it was held that under this section property appointed by a *feme covert* in execution of a general power is liable for her debts and engagements, although she had no free separate property at the time when she contracted them (*c*); but this decision has been overruled, and where a married woman, having a general power of appointment over property, entered into a covenant in reference to such property, and afterwards by her will exercised the power, and thus, under the above section, made the property liable for her debts and other liabilities, it was held that, as she had no separate property in respect of which she could be supposed to have contracted at the time when she entered into the covenant, it did not constitute a contract with respect to her separate property, so as to render her estate liable for damages for breach of it (*d*); and where the *feme covert* has obtained a protection order under sect. 21 of the Matrimonial Causes Act, 1857 (*e*), the appointed property will be liable for her subsequent debts and liabilities, although incurred previously to the Married Women's Property Act, 1882 (*f*). [Effect of protection order.]

43. Where a married woman was tenant for life for her separate use without power of anticipation, and the trustees were "at her direction to direct repairs and do all such acts as should be proper for that purpose," and the tenant for life herself ordered the repairs, the Court gave effect to the particular engagement out of the particular power to direct repairs, and treated the power as being in effect exercised, and directed the trustees to raise the amount required for the repairs which had [Particular power and particular engagement.]

"debts," and appointing property to the persons named as executors, the principle of *Re Tanqueray-Willaume and Landau* (20 Ch. D. (C.A.) 465) applied, so that the so-called debts were a charge upon the appointed property, and his lordship based his judgment on the fact that there were, as found by the chief clerk's certificate, debts within the meaning of the direction in the will.]

[(*a*) See *ante*, p. 983.]

[(*b*) 19 L. R. Q. B. D. 519; *ante*, p. 984, note (*a*).]

[(*c*) *Re Ann*, (1894) 1 Ch. 549; *Re Hughes*, (1898) 1 Ch. 529, 534.]

[(*d*) *Re Fieldwick*, (1909) 1 Ch. (C.A.) 1.]

[(*e*) 20 & 21 Vict. c. 85.]

(*f*) *Re Hughes*, (1898) 1 Ch. 529, distinguishing *Re Roper*, 39 Ch. D. 482, *ante*, p. 998.]

been executed, and to pay the amount to the builder employed by the tenant for life (*a*).]

Arrears of separate estate.

44. If the husband receive the wife's separate income, it is clear that neither the wife nor those entitled under her can claim against the husband or his estate, or any one standing in his place (*b*), *more than one year's arrears* (*c*), but it is still *sub judice* whether the wife or representative can claim even so much. Lord Macclesfield (*d*), Lord Talbot (*e*), Lord Loughborough (*f*), Sir W. Grant (*g*), and Lord Chancellor Brady (*h*), held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell (*i*), Lord Camden (*j*), Lord King (*k*), Lord Hardwicke (*l*), Lord Eldon (*m*), Sir J. Leach (*n*), Sir J. Stuart (*o*), Lord St. Leonards (*p*), Smith M.R., in Ireland (*q*), and Dobbs, J., in the Landed Estate Court (*r*), the husband's estate is liable to an account for one year (*s*). Where there is such a conflict of authority it is hard to say which way the balance inclines. The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate. Should the husband die *insolvent*, could she recover anything from the trustees on the ground of misapplication? And if the payment by the trustees to the husband was a proper one, why should the amount be recoverable from the estate of the husband? The wife's assent must be deemed to continue until revoked by something either expressed or implied.

[(*a*) *Skinner* v. *Todd*, 51 L. J. N.S. Ch. 198.]

(*b*) *Payne* v. *Little*, 26 Beav. 1.

[(*c*) See *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 516.]

(*d*) *Powell* v. *Hankey*, 2 P. W. 82.

(*e*) *Fowler* v. *Fowler*, 3 P. W. 353. (*N.B.*—A case of pin-money.)

(*f*) *Squire* v. *Dean*, 4 B. C. C. 325; *Smith* v. *Camelford*, 2 Ves. jun. 716.

(*g*) *Dalbiac* v. *Dalbiac*, 16 Ves. 126.

(*h*) *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511.

(*i*) *Burdon* v. *Burdon*, 2 Mad. 286, note.

(*j*) Ib. p. 287, note.

(*k*) *Countess of Warwick* v. *Edwards*, 1 Eq. Ca. Ab. 140. In *Thomas* v. *Bennet*, 2 P. W. 341, his Lordship probably held only that *ten years'* arrears could not be given.

(*l*) *Townshend* v. *Windham*, 2 Ves. sen. 7; *Peacock* v. *Monk*, 2 Ves. sen. 190; *Aston* v. *Aston*, 1 Ves. sen. 267.

(*m*) *Parkes* v. *White*, 11 Ves. 225; *Brodie* v. *Barrie*, 2 V. & B. 36.

(*n*) *Thrupp* v. *Harman*, 3 M. & K. 513.

(*o*) *Lea* v. *Grundy*, 1 Jur. N.S. 953.

(*p*) Property as administered by D. P., p. 169.

(*q*) *Corbally* v. *Grainger*, 4 Ir. Ch. Rep. 173; *Mackey* v. *Maturin*, 15 Ir. Ch. Rep. 150.

(*r*) *Re Kirwan*, 1 Ir. Rep. Eq. 553.

(*s*) In *Howard* v. *Digby*, 2 Cl. & Fin. 643, 665, Lord Brougham thought that in *separate use*, as distinguished from *pin-money*, the wife or her representatives could recover the whole arrears, but this is clearly untenable; see *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 513. In the same case the V.C. of England, when the cause was before him, hesitated whether the general rule gave an account for a year or none at all; see *Digby* v. *Howard*, 4 Sim. 601.

Wife's acquiescence in receipt of her separate income by husband presumed.

45. The principle upon which the relief against the husband's estate is thus denied is, that the Court *presumes* the acquiescence of the wife in the husband's receipt *de anno in annum* (*a*). If, therefore, the wife did not in fact consent to the husband's receipt, but remonstrated, and required that the separate income should be paid to herself, the Court will carry back the account of the arrears to the time of the wife's assertion of her claim (*b*). But the Court requires very clear evidence that the demand was seriously pressed by the wife, and will not charge the husband's estate from any idle complaints against his receipt which the wife may have occasionally made (*c*). There can be no acquiescence by the wife, and, therefore, no waiver of her rights where the income has not actually come to the hands of the husband, as where it is still in the hands of a receiver (*d*).

Case of *feme covert* being *non compos.*

46. As the Court proceeds upon the notion of the wife's acquiescence, the question arises where she is *non compos*, and so *incapable* of waiving her right, whether the husband's estate shall not be liable for the entire arrears; and it would seem that in such a case the husband's estate must account for the whole, but will be entitled to an allowance for payments made for the wife's benefit, and which ought properly to have fallen on her separate estate (*e*).

Case of pin-money whether an exception.

47. In *Howard* v. *Digby* (*f*), a woman's *pin-money* was distinguished from ordinary *separate use*, and it was held as to *pin-money* that the wife's *representative* (*g*) could make no claim to any arrears. The ground upon which the House proceeded was that pin-money was for the personal use and ornament of the wife, and the husband had a right to see the fund properly applied, and that if the husband himself found the necessaries for which the pin-money was intended, the wife or her representative could have no claim against the husband's estate when the requirements for her personal use and ornament had

(*a*) *Caton* v. *Rideout*, 2 H. & Tw. 41; 1 M. & G. 599; [see *Dixon* v. *Dixon*, 9 Ch. D. 587; *Re Lulham*, 53 L. J. N.S. Ch. 928; *Edward* v. *Cheyne*, 13 App. Cas. 385, 398; *Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L. T. N.S. 663; *Hale* v. *Sheldrake*, 60 L. T. N.S. 292; *Alexander* v. *Barnhill*, 21 L. R. Ir. 511; *Re Dixon*, (1900) 2 Ch. (C.A.) 561].

(*b*) *Ridout* v. *Lewis*, 1 Atk. 269; *Moore* v. *Moore*, 1 Atk. 272; see *Moore* v. *Earl of Scarborough*, 2 Eq. Ca. Ab. 156; *Parker* v. *Brooke*, 9 Ves. 583; [*Dixon* v. *Dixon*, 9 Ch. D. 587].

(*c*) *Thrupp* v. *Harman*, 3 M. & K. 512; *Corbally* v. *Grainger*, 4 Ir. Ch. Rep. 173.

(*d*) *Foss* v. *Foss*, 15 Ir. Ch. Rep. 215.

(*e*) *Attorney-General* v. *Parnther*, 3 B. C. C. 441; 4 B. C. C. 409; *Howard* v. *Digby*, 2 Cl. & Fin. 671, 673.

(*f*) 2 Cl. & Fin. 634; 4 Sim. 588.

(*g*) Lord Brougham considered that the wife herself might in her lifetime have recovered one year's arrears; see 2 Cl. & Fin. 643, 653, 659.

ceased (*a*). Lord St Leonards has justly questioned these principles (*b*), and it remains to be seen whether any distinction between *pin-money* and *separate use* generally can be maintained.

Gift of *corpus* to husband not presumed.

48. As regards the *corpus of the separate estate*, no presumption arises in favour of a husband who has received it. He is *primâ facie* a trustee for his wife, and a gift from her to him will not be inferred without clear evidence [leading to the conclusion that she deliberately gave the property to him (*c*). Thus, where a legacy bequeathed to the separate use of a wife was paid by a banker's draft payable to her order, and she indorsed the draft and handed it over to her husband, who paid it into his own bank, and had the amount carried over to a deposit account in his name, it was held that this was not sufficient to deprive the wife of her right (*d*). So where shares in a company, which were appropriated to a married woman as part of her share of a residue bequeathed to her for her separate use, were transferred into the name of the husband, and he made an entry in his ledger that the shares were part of his wife's portion of the testator's estate, it was held that the separate use of the wife was not destroyed (*e*); and the husband's estate was held liable for the proceeds of new shares which had been allotted in respect of old shares, and had been sold by him (*f*); and it has been regarded as a material circumstance that the wife has concurred in the transfer to the husband without having previously had any independent advice (*g*).] But the employment of the money by the husband in his business and for his family expenditure with the knowledge and assent of his wife, will, in the absence of agreement to the contrary, amount to a gift by her (*h*). [And where a joint account was opened at a bank in the names of the husband and wife, and each of them had power to draw on the account, and each of them had also a separate account at other bankers, and the moneys credited to the joint account were chiefly derived from the wife's separate income, it was held that the moneys paid in had ceased to be part of the separate estate of the wife (*i*).

(*a*) See too *Aston* v. *Aston*, 1 Ves. sen. 267; *Fowler* v. *Fowler*, 3 P. W. 355; *Barrack* v. *M'Culloch*, 3 K. & J. 110.

(*b*) Law of Property as administered by D. P., p. 162; [and see Vaizey on Settlements, pp. 788, *et seq.*].

(*c*) *Rich* v. *Cockell*, 9 Ves. 369; [*Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L. T. N.S. 663; and see *Wassell* v. *Leggatt*, (1896) 1 Ch. 554].

[(*d*) *Green* v. *Carlill*, 4 Ch. D. 882.]

[(*e*) *Re Curtis*, W. N. 1885, p. 29; 52 L. T. N.S. 244.]

[(*f*) *Re Curtis* (No. 2), W. N. 1885, p. 55.]

[(*g*) *Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L. T. N.S. 663.]

(*h*) *Gardner* v. *Gardner*, 1 Giff. 126.

[(*i*) *Re Young*, 28 Ch. D. 705.]

[Purchase of land out of wife's income.]

Independently of the considerations above referred to, there is no distinction in principle between the presumption of a resulting trust in favour of the wife which arises when her income has been applied to a purchase in her husband's name, and that which arises when her capital has been so applied; and accordingly a husband was held to be a trustee for his wife of land which had been bought out of moneys standing to a joint banking account, but derived from the wife's income, and had been conveyed to him (*a*).]

Feme not bound to contribute to household expenses.

49. Occasionally a *feme covert* has a large income from property settled to her separate use, and being of penurious habits accumulates the whole, and yet looks to her much poorer husband for her support. This is a hard case, but it is said that the Court cannot advert to the question whether she accumulates or not (*b*).

[Trespass on wife's separate property.]

[50. Where the house in which the wife resides is settled to her separate use, and the husband has been guilty of improper conduct, and claims to use the house not for the purpose of consorting with his wife, but for his own purposes, the Court will grant an injunction to restrain him from entering the house (*c*).

And a married woman, in the sole occupation of a house bought out of her own earnings, can sue a stranger for a trespass in having entered the house without her leave, even though the entry was made under the authority of her husband (*d*).]

Separate use may extend to *corpus* or to income beyond coverture.

51. It has never been questioned that if *personal* estate be given to a *feme covert* for her separate use, her power of disposition extends over the *corpus;* and so, if the income of property be limited to a *feme covert* for her *life*, either in possession or reversion, for her separate use, or if the absolute interest be given to her in reversion for her separate use, if it appear that the separate use applies not only to the income accruing during the *coverture*, but to the life estate, or absolute reversionary interest, the *feme* may aliene the whole life estate, or absolute reversionary interest (*e*). The question in these

[(*a*) *Mercier* v. *Mercier*, (1903) 2 Ch. (C.A.) 98.]

(*b*) *Re Smith's Trusts*, W. N. 1867, p. 283.

[(*c*) *Symonds* v. *Hallett*, 24 Ch. D. (C.A.) 346; *Green* v. *Green*, 5 Hare, 400, n.; *Wood* v. *Wood*, 19 W. R. 1049; and see *Gaynor* v. *Gaynor*, (1901) 1 I. R. 217.]

[(*d*) *Weldon* v. *De Bathe*, 14 Q. B. D. (C.A.) 339; and see *Moore* v. *Robinson*, 48 L. J. N.S. Q. B. 156. So where separate goods of the wife were stolen from the husband's house, in which she was residing, it was not sufficient in the indictment to lay them as the property of the husband: *Rex* v. *Murray*, (1906) 2 K. B. (C.C.R.) 385.]

(*e*) *Sturgis* v. *Corp*, 13 Ves. 190; *Stead* v. *Nelson*, 2 Beav. 245; *Hanchett* v. *Briscoe*, 22 Beav. 503; *Stamford, Spalding and Boston Bank* v. *Ball*, 10 W. R. 196; 4 De G. F. & J. 310; *Dudley* v. *Tanner*, W. N. 1873, p. 75.

cases is one of construction only, and therefore where the fund was settled upon trust for a *feme covert* "absolutely," and "during her life for her separate use," her power was held not to extend beyond the life estate (*a*). But if personalty had been limited to the separate use upon a mere contingency (as on the insolvency of the husband, an event which had not yet occurred), it seems that the *feme covert* could not, *pending the contingency*, have aliened or otherwise disposed of her possible interest (*b*). [But since the Married Women's Property Act, 1882, as to cases falling within that Act, a married woman can dispose of a contingent interest (*c*); and since the Act a life interest to the separate use of a married woman will coalesce with a limitation over to her executors, administrators, and assigns (*d*).]

Separate use in reference to real estate.

52. As regards *realty* it was formerly held that the *feme covert* could not by virtue of the separate use, if there were no express power, dispose of the freehold, at least not for any larger interest than during her life (*e*), for between real and personal estate it was said there was this distinction, that on the death of the *feme* in her husband's lifetime, the absolute interest in the personal estate would devolve on the husband, but the inheritance of the real estate would descend upon the heir, who was not to be disinherited but in some formal mode. However, the favour shown anciently to the heir has in later times been disregarded; and at the present day, if lands be conveyed to a trustee and his heirs upon trust as to the *fee simple* for a *feme covert* "for her separate use," she may deal with the fee as if she were a *feme sole*. It is simply a question of intention. A married woman may have limited to her a power of disposition over a *fee simple* estate, and if it appear clearly that the separate use was meant to extend to the fee, she ought upon principle to be able to deal with the absolute property by virtue of the separate use, whether by act *inter vivos*, or by testamentary instrument, as fully as she might in the case of personal estate (*f*). And so

(*a*) *Hanchett* v. *Briscoe*, 22 Beav. 496; *Crosby* v. *Church*, 3 Beav. 485; [*Shute* v. *Hogge*, 58 L. T. N.S. 546; but see 45 & 46 Vict. c. 75].

(*b*) *Mara* v. *Manning*, 2 Jon. & Lat. 311; *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 549; *S. C.* Ib. 349; *Keays* v. *Lane*, 3 Ir. R. Eq. 1; and see *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; [*Re Shakespear*, 30 Ch. D. 169].

[(*c*) 45 & 46 Vict. c. 75, ss. 1, 2, 5.]

[(*d*) *Re Davenport*, (1895) 1 Ch. 361.]

(*e*) *Churchill* v. *Dibben*, 2 Lord Kenyon's Rep. 2nd Part, 68, p. 84; case cited in *Peacock* v. *Monk*, 2 Ves. 192; and see 2 Rop. Husb. & Wife, 182, 2nd ed.; 1 Sand. on Uses, 345, 4th ed.; *Lechmere* v. *Brotheridge*, 32 Beav. 353.

(*f*) *Stead* v. *Nelson*, 2 Beav. 245; *Wainwright* v. *Hardisty*, Ib. 363; *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627, see p. 628; *Major* v. *Lansley*, 2 R. & M. 355; [*Stogdon* v. *Lee*, (1891) 1 Q. B. (C.A.) 661]. But see *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 274; *Harris* v. *Mott*, 14 Beav. 169; *Moore* v. *Morris*, 4 Drew. 38.

it has been decided both in Ireland and England (*a*). But the *feme covert* has not been regarded as a *feme sole* in respect of the *fee simple*, unless it clearly appeared from the instrument itself that the *fee simple*, and not the mere life estate, was limited to the separate use (*b*).

[The mere renunciation by an intended husband of his marital rights in his wife's realty is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee (*c*).

Under the Act of 1882 (*d*), the whole interest in real estate given to a married woman belongs to her as her separate estate, and can be disposed of by her accordingly (*e*).

[*Feme covert* can bar an equitable entail.]

53. If a married woman be equitable tenant in tail in possession of real estate, which is settled to her separate use, she can, under the provisions of the Fines and Recoveries Act, 1833, bar the entail, with the concurrence of her husband (*f*), and the husband's power of concurring will not be affected by his bankruptcy (*g*); and in cases falling within the Married Women's Property Act, 1882, the concurrence of the husband is unnecessary (*h*).]

Feme covert as protector.

54. If a legal estate be limited to a married woman for her life for her *sole and separate use*, without the interposition of a trustee, with remainder in tail, the wife is the *sole protector* of the settlement, and the husband's consent in barring the entail is not necessary (*i*); [and by the Married Women's Property Act (*j*), 1907, sect. 3, it is enacted that when a married woman, if single, would be protector of a settlement in respect of a prior

(*a*) *Adams* v. *Gamble*, 11 Ir. Ch. Rep. 269; 12 Ir. Ch. Rep. 102; *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 549; *Hall* v. *Waterhouse*, 6 N. R. 20; *Atchison* v. *Lemann*, 23 L. T. 302; *Pride* v. *Bubb*, 7 L. R. Ch. App. 64; [*Cooper* v. *Macdonald*, 7 Ch. D. (C.A.) 288;] *Re Smallman*, 8 I. R. Eq. 249; *Taylor* v. *Meads*, 5 N. R. 348; *S. C.*, 4 De G. J. & S. 597; [*Bates* v. *Kesterton*, (1896) 1 Ch. 159]. See *Haymes* v. *Cooper*, 33 Beav. 431; *Bonser* v. *Bradshaw*, 4 Giff. 260; *Wilson* v. *Round*, 4 Giff. 416; and see also *Allen* v. *Walker*, 5 L. R. Ex. 187.

(*b*) *Troutbeck* v. *Boughey*, 2 L. R. Eq. 534.

[(*c*) *Dye* v. *Dye*, 13 Q. B. D. (C.A.) 147. But see *Rippon* v. *Dawding*, Amb. 565, in which case, however, the 7th section of the Statute of Frauds was not referred to; and see the observations of L. J. Turner in *Field* v. *Moore*, 7 De G. M. & G. 718, 719.]

[(*d*) 45 & 46 Vict. c. 75.]

[(*e*) As to the cases to which the Act applies, see *ante*, pp. 965, *et seq.*]

[(*f*) 3 & 4 Will. 4. c. 74, ss. 15, 40.]

[(*g*) *Cooper* v. *Macdonald*, 7 Ch. D. (C.A.) 288.]

[(*h*) See *Re Drummond and Davie's Contract*, (1891) 1 Ch. 524, where it was held that the concurrence of the husband was not necessary to a deed by the *feme* (married after the Act of 1882) converting a base fee (created under a disentailing assurance executed by her when a spinster) into a fee simple absolute.]

(*i*) *Kerr* v. *Brown*, Johns. 138; [and see 45 & 46 Vict. c. 75].

[(*j*) 7 Edw. 7. c. 18.]

estate, which by the Act of 1882 (*a*) is made her separate property, then she alone shall, in respect of that estate, be the protector. This enactment applies to disentailing assurances and surrenders made after 31st December, 1882, and as well before as after the Act of 1907.

[Exception of settlements from the operation of the Married Women's Property Act, 1882.]

55. A very important exception from the operation of the Married Women's Property Act, 1882, is contained in sect. 19, which controls the general powers of disposition conferred by the previous sections by providing that "nothing in this Act contained shall interfere with or affect (*b*) any settlement or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman." The construction of this enactment is attended with great difficulty; but the effect of it, so far as can be gathered from the decided cases, is that the operation of a settlement is to be determined just as it would have been under the pre-existing law, so that no one who under that law could have taken any interest is to be deprived thereof (*c*). The true construction of the section, so far as it affects property of the married woman falling within the operation of sect. 5 (*d*) has been said by Cotton, L.J., to be that "it prevents the previous enactment" (*i.e.* sect. 5) "from interfering with any settlement which would have bound the property if the Act had not passed" (*e*); and this is equally applicable to property of the *feme* within sect. 2 (*f*). This construction has led to somewhat remarkable results. Thus where a settlement contained a covenant for settlement of after-acquired property belonging to the wife, such covenant *though entered into by the husband only*, was held to bind all her property as fully as it would if the Act had never been passed (*g*), and she was obliged to bring into settlement property to which she would otherwise have been entitled as her separate property under the provisions of the Act. So an agreement, to which the future husband was a party, for settlement on marriage of an infant *feme's* legacy, not given to her for her separate use, was

[(*a*) 45 & 46 Vict. c. 75.]

[(*b*) *I.e.* "invalidate" or "render inoperative"; *Re Lumley*, (1896) 2 Ch. (C.A.) 690, *per* Lindley, L.J., referring to *Re Armstrong*, 21 Q. B. D. (C.A.) 264.]

[(*c*) *Re Onslow*, 39 Ch. D. 622, 625, *per* Stirling, J.]

[(*d*) See *ante*, p. 965.]

[(*e*) *Hancock* v. *Hancock*, 38 Ch. D. (C.A.) 78, 86.]

[(*f*) *Stevens* v. *Trevor-Garrick*, (1893) 2 Ch. 307.]

[(*g*) *Re Whitaker*, 34 Ch. D. (C.A.) 227; *Hancock* v. *Hancock*, 38 Ch. D. (C.A.) 78; *Stevens* v. *Trevor-Garrick*, (1893) 2 Ch. 307; and see *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Skelton*, 7 Times L. R. 638.]

by virtue of the marital right of the husband, binding on the fund, and incapable of repudiation by her (*a*).

[Married Women's Property Act, 1907.]

Now by the Married Women's Property Act, 1907 (*b*), it is enacted, that notwithstanding section 19 of the Act of 1882, a settlement or agreement for a settlement made after 1st January, 1908, by the husband, or intended husband, before or after marriage, respecting the property of the wife, shall not be valid unless executed by her, if she is of age, or confirmed by her, after twenty-one. If she dies an infant, any covenant or disposition by her husband in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if the Act had not been passed.

[Interference affecting settlement.]

When it has once been ascertained that a married woman takes an interest *under* a settlement, the incidents annexed by the Act of 1882 to the property of married women attach to the interest so taken by her, and on her becoming discovert, and then marrying again, she will hold such interest as her separate property in accordance with the Act (*c*); and an alienation, whether voluntary or involuntary, by the married woman is not an interference with or an act affecting the settlement, even though such an alienation would not have been practicable before the Act. Thus, where the *feme* carried on a trade separately from her husband and became bankrupt, her separate life interest under a settlement passed to her trustee in bankruptcy under sect. 1, sub-sect. 5 of the Act (*d*).]

Clause restraining anticipation.

56. It still remains to treat of *restraint of anticipation*.

The clause against the *feme's* anticipation is of comparatively modern growth. In *Hulme* v. *Tenant* (*e*) it was held that a limitation to the separate use simply did not prevent the *feme* from aliening. In *Pybus* v. *Smith* (*f*) great pains had been taken in framing the separate use, and the income was made payable as the *feme* should by writing *under her proper hand from time to time appoint*, but it was again decided that the *feme* could even then dispose of her interest. After this Lord Thurlow happened to be nominated a trustee of Miss

[(*a*) *Buckland* v. *Buckland*, (1900) 2 Ch. 534.]

[(*b*) 7 Edw. 7. c. 18, sect. 2. Nothing in the section is to invalidate any settlement or agreement for a settlement made under the Infants Settlement Act, 1855 (18 & 19 Vict. c. 43), see *ante* p. 25.]

[(*c*) *Re Onslow*, 39 Ch. D. 622, 625.]

[(*d*) *Re Armstrong*, 21 Q. B. D. (C.A.) 264; and see *Re Lumley*, (1896) 2 Ch. (C.A.) 690.]

(*e*) 1 B. C. C. 16.

(*f*) 3 B. C. C. 340.

Watson's settlement, and he directed the insertion of the words "*and not by anticipation*" (*a*), from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned.

No particular form of words required to restrain anticipation.

57. But although these words are now almost universally employed they are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument, it is sufficient (*b*); as if there be a direction to pay the income to such persons *as the feme shall after it has become due appoint* (*c*), or for her sole separate and *inalienable* use (*d*); [or her receipt to the trustees is to be given after the rents shall become due from time to time (*e*).] But if the limitation be merely to the sole and separate use, or to pay *from time to time* upon her receipt under her own proper hand (*f*), or if the trust be to pay her upon her *personal appearance* (*g*), the *feme* is left at liberty to part with her interest, for such expressions are, as Lord Eldon observed, "only an unfolding of all that is implied in the gift to the separate use" (*h*). Where a testator directs a daughter's share of his estate to be "so settled that she may enjoy the income during her life for her separate use," the trust is *executory*, and the Court will insert a clause against anticipation (*i*); and if upon marriage a fund be articled to be vested in the wife and a co-trustee in trust for herself, but not to be disposed of *without the consent of both parties*, the wife cannot anticipate without the consent of the co-trustee (*j*).

[Since the Act of 1882 a restraint on anticipation may be

(*a*) See *Jackson* v. *Hobhouse*, 2 Mer. 487; *Parkes* v. *White*, 11 Ves. 221.

(*b*) *Re Ross's Trust*, 1 Sim. N.S. 199; *Doolan* v. *Blake*, 3 Ir. Ch. Rep. 340; and cases cited Ib.; [and see *Re Lumley*, (1896) 2 Ch. (C.A.) 690, where it was held that the fact that the gift to the married woman was "without impeachment of waste" was not inconsistent with the existence of a restraint on anticipation.]

(*c*) *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Estate of H. H. Molyneux*, 6 I. R. Eq. 411.

(*d*) *D'Oechsner* v. *Scott*, 24 Beav. 239; *Spring* v. *Pride*, 10 Jur. N.S. 876; *S. C.*, 4 De G. J. & S. 395.

[(*e*) *Re Smith*; *Chapman* v. *Wood*, 51 L. T. N.S. 501.]

(*f*) *Ellis* v. *Atkinson*, 3 B. C. C. 565; *Clarke* v. *Pistor*, cited Ib. 568; *Brown* v. *Like*, 14 Ves. 302; *Acton* v. *White*, 1 S. & S. 429; *Witts* v. *Dawkins*, 12 Ves. 501; *Wagstaff* v. *Smith*, 9 Ves. 520; *Sturgis* v. *Corp*, 13 Ves. 190; and see *Scott* v. *Davis*, 4 M. & Cr. 87; *Hovey* v. *Blakeman*, cited 9 Ves. 524.

(*g*) *Re Ross's Trust*, 1 Sim. N.S. 196.

(*h*) *Parkes* v. *White*, 11 Ves. 222.

(*i*) *Re Dunnill's Trusts*, 6 I. R. Eq. 322.

(*j*) *Hastie* v. *Hastie*, 2 Ch. D. (C.A.) 304. [The existence of the restraint is not sufficient to exclude the life interest from consideration in reference to the right to sue in *formâ pauperis*; *Re Atkin's Trusts*, (1909) 1 Ch. 471, where the *feme* had an income of £52 a year subject to restraint.]

attached to the property of a married woman although the words "separate use," or their equivalent, are not used, an omission which would have been fatal before the Act (*a*).

58. Although the efficacy of the restraint was not questioned, doubts were entertained as to the point of time at which it ceased to attach to the income, and in one case it was held by the Court of Appeal that the restraint continued until the income came into the hands of the *feme* (*b*), but it has now been decided by the House of Lords that the restraint ceases to attach so soon as the income becomes due, and payable to the *feme* (*c*). Accordingly, a judgment recovered against a married woman may be enforced against arrears of income due to her at the date of the judgment (*d*), but not as to arrears which have accrued due subsequently, and were therefore subject to the restraint when the judgment was given (*e*).] [Restraint on anticipation when ceasing to attach.]

59. A widow may, after her husband's death (*f*), and a *feme sole* may, before marriage (*g*), dispose absolutely of a gift limited to her separate use, though coupled with words purporting to restrain her power of anticipation; and the principle is briefly this—that *wherever a person possessing an interest, however remote a possibility, is* sui juris, *that person cannot be prevented by any intention of the donor from exercising the ordinary rights of proprietorship.* The fund may be limited "in trust for the separate use of the *feme*," or, "in trust for her, and in the event of her marriage, for her separate use," or "in trust for her separate use in the event of her marriage," without the gift of any estate independently of that contingency; but in all these cases the interest, whether *vested* or *contingent*, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property to which she either now is, or may eventually become entitled. Effect before marriage of the clause against anticipation.

60. It was formerly held by Sir L. Shadwell, that while the The clause against anticipation will operate upon the marriage.

[(*a*) *Re Lumley*, (1896) 2 Ch. (C.A.) 690, referring to *Stogdon* v. *Lee*, (1891) 1 Q. B. (C.A.) 661; and see *Re Lavender's Policy*, (1898) 1 I. R. (C.A.) 175.]

[(*b*) *Hood-Barrs* v. *Cathcart*, (1894) 2 Q. B. (C.A.) 559.]

[(*c*) *Hood-Barrs* v. *Heriot*, (1896) A. C. 174.]

[(*d*) *Hood-Barrs* v. *Heriot*, *ubi sup.*]

[(*e*) *Whiteley* v. *Edwards*, (1896) 2 Q. B. (C.A.) 48; approved, *Bolitho & Co.* v. *Gridley*, (1905) A. C. (H.L.) 98; *Re Lumley*, (1896) 2 Ch. (C.A.) 690; 65 L. J. Ch. 837.]

(*f*) *Jones* v. *Salter*, 2 R. & M. 208.

(*g*) *Woodmeston* v. *Walker*, 2 R. & M. 197; *Brown* v. *Pocock*, Ib. 210; *S. C.*, 2 M. & K. 189; and see *Massey* v. *Parker*, 2 M. & K. 174. [In *Re Wood*, 61 L. T. N.S. 197, a covenant for the settlement of reversionary property entered into by a *feme sole* was held to remove the restraint on anticipation.]

separate use took effect upon marriage (*a*), a general *clause against anticipation* not made with reference to the marriage was nugatory (*b*). Lord Langdale, with more consistency, held that in the absence of alienation during discoverture, both the *separate use* and also the *clause against anticipation* came into operation upon marriage (*c*). And it was so finally decided by Lord Cottenham on appeal (*d*).

Brown *v.* Bamford.

61. It was also held in a case (*e*) before Sir L. Shadwell, that if a fund were vested in trustees upon trust to pay the proceeds to such persons and for such purposes as a *feme covert* should, when and as they became due, appoint, but so as not to *charge or anticipate* the same, and in default of appointment to pay the same into the hands of the *feme* for her *separate use* (without the addition of any words to restrain her *power of anticipation*), if the *feme covert* assigned the life estate limited to her *in default of appointment*, it destroyed the power, and the restriction upon the anticipation annexed to it was nugatory. Such a doctrine would have led to great inconvenience, as the precedents of the most approved conveyancers were known to have been frequently expressed in that form, and the decision, after failing to secure the assent of other judges (*f*), was ultimately reversed on appeal (*g*). The substantial intention was taken to be, that the *payment* into her hands, as well as the *power* to appoint, was not to operate until the annual proceeds had become actually due.

[Release of power of appointment.]

[62. Where property was held in trust for a married woman for life for her separate use, without power of anticipation, and after her death for such persons as she should by will appoint, it was held by the Court of Appeal in Ireland, reversing the decision of the judge of first instance, that she could, while under coverture, extinguish the power (*h*); and so under section 52 of the Conveyancing and Law of Property Act, 1881 (*i*), where the power was to appoint amongst her children (*j*).

[Gift over on anticipating income.]

63. Where by a will a life interest was given to a married woman

(*a*) *Davies* v. *Thornycroft*, 6 Sim. 420.
(*b*) *Brown* v. *Pocock*, 5 Sim. 663; *Johnson* v. *Freeth*, 6 Sim. 423 n.
(*c*) *Tullett* v. *Armstrong*, 1 Beav. 1.
(*d*) *S. C.*, 4 M. & Cr. 390; and see *Sanger* v. *Sanger*, 11 L. R. Eq. 470.
(*e*) *Brown* v. *Bamford*, 11 Sim. 127.
(*f*) *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Hare, 624; *Harnett* v. *Macdougall*, 8 Beav. 187.
(*g*) 1 Ph. 620. The case of *Medley* v. *Horton*, 14 Sim. 222, was decided before the decision of the Vice-Chancellor in *Brown* v. *Bamford* had been overruled, and cannot be considered as law.
[(*h*) *Heath* v. *Wickham*, 5 L. R. Ir. 285; 3 L. R. Ir. 376.]
[(*i*) 44 & 45 Vict. c. 41.]
[(*j*) *Re Chisholm's Settlement*, (1901) 2 Ch. 82.]

with a restraint on anticipation, and a gift over on her decease or on her anticipating the income, and she afterwards executed an assignment by way of mortgage, it was held that the assignment being wholly inoperative, no forfeiture had taken place, and that the word "anticipating" could not be read as equivalent to attempting to anticipate (*a*).]

Absolute gift followed by restraint of anticipation.

64. Where there is an absolute gift of bank annuities—*i.e.* of a perpetual annuity redeemable by the State, to a married woman followed by a restraint against anticipation, she cannot aliene during coverture (*b*); and generally, where property is given absolutely to a married woman, but clogged with a clause restraining anticipation, [and an intention is shown by the instrument giving the property that the income only is to be paid to her,] she cannot aliene either income or corpus during the coverture (*c*). [But where a testatrix gave the proceeds of a mixed fund of realty and personalty to trustees upon trust to invest *the residue* after payment of debts, funeral and testamentary expenses, and legacies, in specified securities, and to pay the income to A. for life, and after her death (which occurred in the testatrix's lifetime) *to divide and pay the said residue* between B. and C., one of whom was a married woman, and there was a declaration that every gift to a married woman was to be for her separate use without power of anticipation, V. C. Bacon drew a distinction between a gift of a sum of money and of a fund producing income, and held that in that case the gift was equivalent to a gift of a sum of money, and that the restraint against anticipation would not prevent the married woman from receiving her share of the residue (*d*).

But this distinction has been disapproved of, and cannot be supported upon principle; and the true test, as to whether a clause against anticipation is effectual to prevent a married woman from requiring the payment or transfer of property given absolutely to her subject to such a restraint, is whether upon

[(*a*) *Re Wormald*, 43 Ch. D. 630. The Court in ordering payment of dividends to a woman so restrained from anticipation, added a direction that they were not to be paid to any attorney "except upon an affidavit or statutory declaration by such attorney that he receives them on her behalf, and for her use, and not for any other person to whom she has assigned or purported to assign them"; *Stewart* v. *Fletcher*, 38 Ch. D. 627.]

(*b*) *Re Ellis' Trusts*, 17 L. R. Eq. 409; [*Re Bown*, 27 Ch. D. (C.A.) 411; *Re Currey*, 32 Ch. D. 361].

(*c*) *Re Ellis' Trusts*, 17 L. R. Eq. 412; [*Re Benton*, 19 Ch. D. 277; *Re Sarel*, 4 N. R. 321; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown*, *ubi sup.*; *Re Grey's Settlements*, 34 Ch. D. 85; 34 Ch. D. (C.A.) 712].

[(*d*) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber*, 51 L. J. N.S. Ch. 721; *Re Coombes*, W. N. 1883, p. 169.]

the construction of the whole document the intention is or is not shown that the trustees should retain the property and pay the income to the married woman (*a*). And the mere circumstance that the property given absolutely to the married woman is subject to a particular estate, is not a sufficient ground for confining the restraint to the continuance of that estate (*b*). But if the interest of the married woman is reversionary, a clause against anticipation will in general be an effectual restraint on her power of assigning it by way of anticipation so long as it is reversionary (*c*), but will cease to operate when the time for payment arrives (*d*).

[Where interest reversionary.]

[Enlarging equitable entail into an equitable fee.]

65. A married woman cannot, by a deed acknowledged under the Fines and Recoveries Act, 1833, dispose of an interest in land as to which her anticipation is restrained (*e*). But where an equitable estate tail was limited to a married woman for her separate use, and it was also provided that the rents and profits were to be paid to her without power of alienation or anticipation, it was held that this did not prevent her from barring the entail and limiting the equitable fee to herself. For that was not an alienation so as to deprive herself of anything; it was not, strictly speaking, an alienation at all, except in a very wide sense of the term. It was what was always called an enlargement of the estate (*f*).

[Enlarging long term into a fee.]

66. So a married woman entitled to a long term for her

[(*a*) *Re Bown*, 27 Ch. D. (C.A.) 411; *Re Spencer*, 30 Ch. D. 183; *Re Currey*, 32 Ch. D. 361; *Re Grey's Settlements*, 34 Ch. D. (C.A.) 85, 712; *Re Hutchings to Burt*, 58 L. T. N.S. 6; *Re Tippett and Newbould*, 37 Ch. D. (C.A.) 444; *Re Fearon*, W. N. (1896) p. 175; 45 W. R. 232; and see *Re Wood; Wood* v. *Hooper*, 61 L. T. N.S. 197, where the restraint was removed by the covenant of the *feme* while *sole* to settle, though her interest was then in reversion; and see *Russell* v. *Lawder*, (1904) 1 I. R. 328.]

[(*b*) *Re Tippett and Newbould*, 37 Ch. D. (C.A.) 444.]

[(*c*) *Re Bown*, *ubi sup.*; *Re Holmes*, 67 L. T. N.S. 335.]

[(*d*) *Re Bankes*, (1902) 2 Ch. 333, where it was held that a covenant by the *feme* for the settlement of after acquired property, entered into before the death of the testator, bound her reversionary interest under the will.]

[(*e*) *Baggett* v. *Meux*, 1 Ph. 627; *Heath* v. *Wickham*, 3 L. R. Ir. 376. The Irish statute 4 & 5 Will. 4. c. 92, s. 69, contains a clause which is not in the English Act, preventing alienation by a married woman where the settlement contains a valid restriction against anticipation. But this was considered by Lord Lyndhurst, L.C., in *Baggett* v. *Meux*, as an expression by the legislature of what was meant by the English Act.]

[(*f*) *Cooper* v. *Macdonald*, 7 Ch. D. (C.A.) 288; and a similar conclusion was arrived at in the case of a covenant by the *feme*, in usual terms, for the settlement of after acquired property; *Hilbers* v. *Parkinson*, 25 Ch. D. 200, followed in *Re Dunsany's Settlement*, (1906) 1 Ch. (C.A.) 578; and in *Re Pearse's Settlement*, (1909) 1 Ch. 304, where the law of Jersey practically rendered it impossible for the *feme* to perform the covenant strictly.]

separate use may, if the case falls within the Conveyancing and Law of Property Act, 1881, enlarge the term into a fee simple, notwithstanding her anticipation may be restrained (*a*).

[Restraint against anticipation not avoided by fraud.]

67. The clause against anticipation cannot be got over even in the case of deliberate fraud by the *feme covert*. Thus, where a *feme covert*, by fraudulently suppressing the restraint on anticipation, obtained an advance on the mortgage of property limited to her separate use, it was held, upon an application by her, that the property was protected against the mortgage by the clause restraining her anticipation (*b*).]

Court could not discharge the clause against anticipation.

68. Where the clause against anticipation had once attached, even a Court of Equity [could not, until a recent Act, have] discharged it, though alienation [might have been] for the *feme covert's* own advantage (*c*). An estate so settled may, however, be subject to *paramount equities*, as for raising costs of suit, [or for antenuptial debts (*d*),] which may enable the Court to direct a sale (*e*); and in the case of adultery by the wife may be dealt with by the Divorce Court under the provisions of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), sect. 5 (*f*); and as a married woman whose anticipation is restrained may still employ a *solicitor* to defend her right to the separate use, the solicitor so employed may acquire a lien on the separate estate for his costs thereby incurred (*g*).

[In a recent case where a married woman, entitled to the income of a trust fund for her life with a restraint upon anticipation, took proceedings for the execution of the trust, in the course of which an application by her was dismissed with costs, Pearson, J., gave the trustees liberty to retain their costs out of the plaintiff's income, and said "that the restraint on anticipation

[(*a*) 44 & 45 Vict. c. 41, ss. 2 (i), 65.]

[(*b*) *Thomas* v. *Price*, 46 L. J. N.S. Ch. 761; *Stanley* v. *Stanley*, 7 Ch. D. 589; *Re Glanvill*, 31 Ch. D. (C.A.) 532; *Cahill* v. *Cahill*, 8 App. Cas. 420, 427; see *S. C.*, *nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Lady Bateman* v. *Faber*, (1898) 1 Ch. (C.A.) 144, 151.]

(*c*) *Robinson* v. *Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; [*Lady Bateman* v. *Faber*, (1898) 1 Ch. (C.A.) 144, 150].

[(*d*) *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19; and see *post*, pp. 1022, 1026, and *ante*, p. 985.]

(*e*) *Fleming* v. *Armstrong*, 34 Beav. 109. [Where a *feme* while *sole* mortgaged her life interest, and afterwards became *covert*, and effected a second mortgage, which was inoperative to the extent of a part of her interest as to which she was restrained from anticipation, it was held that the securities must be marshalled, so that the interest due to the first mortgagee should be paid out of the portion of the income which was not available for the second mortgagee; *Re Loder's Trusts*, 56 L. J. Ch. 230; 35 W. R. 58.]

(*f*) *Pratt* v. *Jenner*, 1 L. R. Ch. App. 493.

(*g*) *Re Keane*, 12 L. R. Eq. 115.

was intended for the protection of a married woman outside the Court; it was not intended to enable her to do a wrong in the Court. It did not fetter the power of the Court in any case in which it thought that she was not entitled to that protection" (*a*). But this is inconsistent with principle and with the earlier authorities, and has since been overruled (*b*).

[May now, under 44 & 45 Vict. c. 41.]

69. Now, by the Conveyancing and Law of Property Act, 1881, sect. 39, "notwithstanding that a married woman (*c*) is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

Applications under this section may be made by summons as provided by sect. 69, sub-sect. 3 of the Act (*d*), but this provision is not obligatory (*e*).

The power of the Court is discretionary, and only to be exercised where a strong case is made out (*f*). The Court must be satisfied that it will be for the permanent benefit of the wife to accede to the application (*g*), and will not bind her interest where the object is to benefit the husband (*h*), or to raise money to pay debts incurred through the extravagance of her or of her husband (*i*), or to benefit herself by releasing a power conferred on her to appoint amongst her children (*j*); or merely to increase her income by changing investments from Court securities into others of a more speculative nature, though sanctioned by the settlement (*k*); but where a married woman, who was entitled

[(*a*) *Re Andrews*, 30 Ch. D. 159; *Re Jordan*, 55 L. J. N.S. Ch. 330; and see *Re Prynne*, W. N. 1885, p. 144.]

[(*b*) *Re Glanvill*, 31 Ch. D. (C.A.) 532.]

[(*c*) The powers of the section will not apply to the case of a divorced woman; *Thomson* v. *Thomson*, (1896) P. (C.A.) 263.]

[(*d*) *Re Lillwall's Settlement Trusts*, 30 W. R. 243; *Latham* v. *Latham*, W. N. 1889, p. 171. An order under the section enabling a married woman to mortgage her life interest was made without requiring the trustees to be served; *Re Little's Will*, 36 Ch. D. (C.A.) 701, *q.v.* also as to form of order. By 52 & 53 Vict. c. 47, s. 10, as regards land and estates in the county palatine of Durham, the Palatine Court of that county may exercise the power conferred by the Act; and as to the jurisdiction of the Lancaster Palatine Court, see 53 & 54 Vict. c. 23.]

[(*e*) *Re Blundell*, (1901) 2 Ch. (C.A.) 221.]

[(*f*) *Re Little*, 40 Ch. D. (C.A.) 418.]

[(*g*) *Re Flood's Trusts*, 11 L. R. Ir. 355; *Re Jordan*, 55 L. J. N.S. Ch. 330; *Re Currey* (No. 2), 56 L. J. N.S. Ch. 389; *Re Segrave's Trusts*, 17 L. R. Ir. 373; *Re Millar*, 25 L. R. Ir. 107; *Re Tennant's Estate*, 25 L. R. Ir. 522; *Re Pollard's Settlement*, (1896) 2 Ch. (C.A.) 552; *Re Blundell*, *sup.*]

[(*h*) *Tamplin* v. *Miller*, 30 W. R. 422; *Re S.'s Settlement*, W. N. (1893) p. 127.]

[(*i*) *Re Pollard's Settlement*, (1896) 2 Ch. (C.A.) 552; affirming Chitty, J., (1896) 1 Ch. 901.]

[(*j*) *Re Little*, 40 Ch. D. (C.A.) 418, following *Cunynghame* v. *Thurlow*, 1 Russ. & My. 436; and see *Re Radcliffe*, 39 W. R. 457.]

[(*k*) *Re Blundell*, (1901) 2 Ch. (C.A.) 221.]

to the income of a fund for her life for her separate use without power of anticipation, with remainder in the events which happened for her appointees by will, and in default of appointment for herself absolutely, had contracted debts and was being harassed by her creditors, the Court made an order binding the property (*a*). So in a case where the wife, who was entitled to a considerable income, was living with her husband who had been adjudged bankrupt, was being harassed by his creditors to whom she had given acceptances, and was suffering in health from pecuniary embarrassment, the Court made an order relieving part of the income from the restraint (*b*). And where two married women were tenants in common, and by reason of their being restrained from anticipation there was a difficulty in granting leases, the Court made an order (*c*). The restraint has also been removed for the purpose of enabling the retention of an unauthorised but beneficial investment (*d*), the carrying on of a trade by trustees for the benefit of a married woman separated from her husband (*e*), of paying premiums on policies on the life of the husband who was just able to support his family out of his practice as a medical man (*f*), and of preserving from eviction an estate to which the *feme* was entitled in reversion for life (*g*). The Court has no power simply to remove the restraint; it can only bind the married woman's interest in spite of the restraint, when a disposition is made of the property which the Court considers to be for her benefit (*h*).

Where the money is raised to pay off the husband's debts, the fact that the order does not indicate that he is liable to indemnify his wife cannot be taken as negativing the existence of such a liability (*i*).

Where the Court is satisfied by the evidence of the consent of the married woman, it will not require her separate examination (*j*).]

70. The restraint against alienation may also be *void for* Restraint on anticipation void for perpetuity.

[(*a*) *Hodges* v. *Hodges*, 20 Ch. D. 749; *Sedgwick* v. *Thomas*, 48 L. T. N.S. 100.]

[(*b*) *Re C.'s Settlement*, 56 L. J. N.S. Ch. 556.]

[(*c*) *Re Currey* (No. 2), 56 L. J. N.S. Ch. 389.]

[(*d*) *Re Wright*, 15 L. R. Ir. 331.]

[(*e*) *Re Thompson*, W. N. 1884, p. 28.]

[(*f*) *Re Milner's Settlement*, (1891) 3 Ch. 547.]

[(*g*) *Re Segrave's Trusts*, 17 L. R. Ir. 373, *q.v.* generally as to the circumstances under which the Court will discharge the restraint.]

[(*h*) *Per* Cotton, L.J., *Re Warren's Settlement*, 52 L. J. N.S. Ch. 928; 49 L. T. N.S. 696.]

[(*i*) *Paget* v. *Paget*, (1898) 1 Ch. 47; *Ib.* (C.A.) 470.]

[(*j*) *Hodges* v. *Hodges*, 20 Ch. D. 749; but see *Musgrave* v. *Sandeman*, 48 L. T. N.S. 215.]

perpetuity, as if a fund be settled on A.'s marriage upon himself for life, with a power to A. to appoint to his issue, A. cannot appoint to his daughters as the issue of the marriage for their sole and separate use *without power of anticipation*, for this would prevent alienation for more than a life in being, and twenty-one years, which the law does not allow (*a*).

[Where, in a post-nuptial settlement, the trusts were, after the death of the husband and wife and in default of appointment, for sons at twenty-one and daughters at twenty-one or marriage, but the daughter's shares were for their separate use without power of anticipation, it was held that as to the daughters *in esse* at the time of the settlement the restraint against anticipation was valid (*b*); and where a general clause in a will purported to impose a restraint on anticipation on all the shares of daughters of the testator's children, the clause was held good as to members of the class born in the testator's lifetime, but bad as to those subsequently born (*c*). In one case a restraint on anticipation attached to the interests of the children of a woman who, at the date of the will creating the interest, was past child-bearing, was held valid (*d*), but this decision has been questioned on the ground that evidence that a person is past child-bearing is not admissible for the purpose of depriving another person of a prospective benefit (*e*), by giving validity to a gift which would otherwise be void for remoteness (*f*).

[Election where property subject to the restraint.]

71. Opinions have differed as to whether a *feme covert* can be put to her election to give up, or make compensation out of property as to which her anticipation is restrained, and the authorities on the point were for some time about evenly balanced (*g*), but it has now been decided by the Court of

(*a*) See *Armitage* v. *Coates*, 35 Beav. 1, and the cases there cited; and *Re Teague's Settlement*, 10 L. R. Eq. 564; *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Michael's Trusts*, 46 L. J. N.S. Ch. 651; *Re Ridley*, 11 Ch. D. 645, in which case Sir G. Jessel, M.R., followed the previous decisions, though he at the same time expressed his disapproval of them; [*Re Errington*, W. N. 1887, p. 23; *Herbert* v. *Webster*, 15 Ch. D. 610, in which case V. C. Hall expressed dissatisfaction with his own decision in *Re Michael's Trusts*.]

[(*b*) *Herbert* v. *Webster*, 15 Ch. D. 610; and see *Wilson* v. *Wilson*, 4 Jur. N.S. 1076.]

[(*c*) *Re Ferneley's Trusts*, (1902) 1 Ch. 543, following *Herbert* v. *Webster*, *sup.*, and not following *Re Michael's Trusts*, *sup.*, and *Re Ridley*, *sup.*; and see *Re Game*, (1907) 1 Ch. 276, following *Re Ferneley's Trusts*, *sup.*, not following *Re Ridley*, *sup.*, and applying *Re Russell*, (1895) 2 Ch. 698, *vide sup.* p. 110.]

[(*d*) *Cooper* v. *Laroche*, 17 Ch. D. 368.]

[(*e*) *Re Hocking*, (1898) 2 Ch. (C.A.) 567.]

[(*f*) *Re Dawson*, 39 Ch. D. 155, following *Jee* v. *Audley*, 1 Cox, 324, and *Re Sayer's Trusts*, 17 Ch. D. 368; and see *Re Lowman*, (1895) 2 Ch. (C.A.) 348, 366.]

[(*g*) See *Willoughby* v. *Middleton*, 2 J. & H. 344; *Smith* v. *Lucas*, 18 Ch. D.

Appeal that she cannot be called upon to elect (*a*). The testator by imposing the restraint on anticipation has evinced an intention inconsistent with the application of the doctrine of election, and this intention prevails although she has become discovert before the time for election arrives (*b*). And no admission or estoppel can avail as against the protection afforded by the restraint (*c*).] [Admission or estoppel.]

72. It has been held that a clause against anticipation, though applicable to the fund when raised, does not prevent a *feme covert* from *adjusting the amount* of the fund with the trustees (*d*). Settlement of accounts.

73. Compensation for a breach of trust by a *feme covert* in respect of settled property cannot be enforced, even against a fund limited by the *same settlement* to her separate use without power of anticipation (*e*). Breach of trust.

74. Interest accrues due *de die in diem;* but if the interest, though *due*, be not *payable* under the contract before a particular day, which has not arrived, the interest so accrued is not regarded in the light of arrears, but of future income, and therefore the *feme covert*, if anticipation be restrained, has no power over it (*f*). Interest due but not payable.

75. The clause against anticipation does not prevent the operation of the rule, that if the husband be allowed to receive the wife's income, she or her personal representative cannot recover more than one year's income, if so much (*g*); and the contracts or other engagements of the wife, which would affect Arrears of income.

531; *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535; *Cahill* v. *Cahill*, 8 App. Cas. 420, 427; *S. C., nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. (C.A.) 124; *Re Queade's Trusts*, 54 L. J. N.S. Ch. 786; 53 L. T. N.S. 74; 33 W. R. 816; *Harle* v. *Jarman*, (1895) 2 Ch. 419.]

[(*a*) *Re Vardon's Trusts*, 28 Ch. D. (C.A.) 124; *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396; but a special condition in the will may put her to election; *Whitwell* v. *Wilson*, W. N. 1890, p. 171.]

[(*b*) *Haynes* v. *Foster*, (1901) 1 Ch. 361.]

[(*c*) *Lady Bateman* v. *Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. (C.A.) 144.]

(*d*) *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156; and in *Stroud* v. *Gwyer*, M.R., 27 April, 1865, it was ruled that Mrs Heath, whose share was settled by the will for her separate use without power of anticipation, was bound by a settlement of accounts which had been executed by her; M.S. And see *Derbyshire* v. *Home*, 3 De G. M. & G. 113.

(*e*) *Clive* v *Carew*, 1 J. & H. 199; *Pemberton* v. *M'Gill*, 8 W. R. 290; *Sheriff* v. *Butler*, 12 Jur. N.S. 329; *Arnold* v. *Woodhams*, 16 L. R. Eq. 29. See, however, the observations of M.R. (but which were extra-judicial) in *Davies* v. *Hodgson*, 25 Beav. 186. As to breaches of trust by *femes covert*, see further, *ante*, p. 985; [and as to the provision in s. 45 of the Trustee Act, 1893, whereby the whole or any part of the interest of a beneficiary, at whose instigation or request or with whose written consent a breach of trust has been committed by a trustee, may be (notwithstanding a restraint on anticipation) impounded by way of indemnity to the trustee, see *post*, Chap. XXXI., s. 3].

(*f*) *Re Brettle*, 2 De G. J. & S. 79; 10 Jur. N.S. 349.

(*g*) *Rowley* v. *Unwin*, 2 K. & J. 138; see *ante*, p. 1000.

her separate use generally, may be enforced against arrears already accrued, and which consequently have become emancipated from the clause against anticipation (*a*); [and the period of the restraint is determined by the instrument creating it, and will not be enlarged or its cesser arrested by an order of Court made for convenience of administration, and directing payment on specified days (*b*).

[Liability to costs.]

76. Where a married woman is suing under sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882 (*c*), damages or costs recovered against her are payable out of her separate property, and arrears of income as to which anticipation by her was restrained, which have accrued due to her, and which she could therefore validly charge in the hands of her trustees, are available for payment of costs which she is ordered to pay to them in proceedings instituted by her while the restraint was still subsisting (*d*).

[Married Women's Property Act, 1893.]

It is now provided by the Married Women's Property Act, 1893, that "in any action or proceeding (*e*) now or hereafter instituted by a married woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party (*f*) out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property, or otherwise as may be just."

An appeal by a *feme covert* from an order in an action brought against her is not a proceeding "instituted by her" within the meaning of this section (*g*), nor is a caveat by her against the probate of a will (*h*), nor an application by her in a divorce suit for the custody of her child (*i*); but a claim by her to goods taken in execution is such a proceeding (*j*); and so is an application for a new trial (*k*).

(*a*) *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 328; *Moore* v. *Moore*, 1 Coll. 54; [*Hood-Barrs* v. *Heriot*, (1896) A. C. 174, see *ante*, p. 1009].

[(*b*) *Cox* v. *Bennett*, (1891) 1 Ch. (C.A.) 617.]

[(*c*) 45 & 46 Vict. c. 75.]

[(*d*) *Cox* v. *Bennett*, (1891) 1 Ch. (C.A.) 617.]

[(*e*) 56 & 57 Vict. c. 63, s. 2. The section applies to actions commenced prior to and pending at the date of the Act; *Re Godfrey*, W. N. (1895) p. 12 (C.A.).]

[(*f*) Where an action by a married woman was dismissed with costs, the words "with liberty to apply for payment out of any property which is subject to a restraint on anticipation" were added to the order; *Davies* v. *Treharris Brewery Co.*, W. N. (1894) p. 198.]

[(*g*) *Hood-Barrs* v. *Heriot*, (1897) A. C. 177.]

[(*h*) *Moran* v. *Place*, (1896) P. (C.A.) 214.]

[(*i*) *Gordon* v. *Gordon*, (1904) P. (C.A.) 163.]

[(*j*) *Nunn* v. *Tyson*, (1901) 2 K. B. 487.]

[(*k*) *Dresel* v. *Ellis*, (1905) 1 K. B. (C.A.) 574.]

On an application for payment of the defendant's costs, where the action by the *feme* has been dismissed with costs, the onus is on her to show why the order should not be made (*a*). [Onus.]

The section applies to the case of an action by husband and wife in which the wife is the real plaintiff (*b*).

The Court has no jurisdiction under the section to vary an order for payment of costs made before the Act came into operation (*c*).

77. The 19th section of the Married Women's Property Act, 1882, after the provision already noticed protecting settlements and agreements for settlements from the operation of the Act (*d*), proceeds to enact further that nothing in the Act contained "shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a *woman's own property* to be made or entered into by herself shall have any validity against *debts contracted by her before marriage*, and no settlement or agreement for a settlement shall have any greater force or validity against *creditors* of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors" (*e*). [Restraint on anticipation unaffected by the Act of 1882.]

It follows from this enactment, that a judgment against the *feme* in respect of an antenuptial debt cannot be enforced against her separate property subject to restriction against anticipation, unless such restriction is contained in a settlement or agreement for a settlement of her own property made or entered into by herself (*f*).

A debt contracted by the *feme* during a previous coverture is a debt contracted by her before marriage within the meaning of the section (*g*).

The concluding clause of the section applies only to settlements made after the passing of the Act (*h*). It is to be read in connection with the first clause (*i*), and does not prevent a

[(*a*) *Pawley* v. *Pawley*, (1905) 1 Ch. 593.]

[(*b*) *Huntly* (*Marchioness of*) v. *Gaskell*, (1905) 2 Ch. (C.A.) 656.]

[(*c*) *Re Lumley*, (1894) 3 Ch. 135.]

[(*d*) *Ante*, p. 1006.]

[(*e*) See also the proviso to s. 1 of the Act of 1893, stated *ante*, p. 984.]

[(*f*) *Birmingham Excelsior Money Soc.* v. *Lane*, (1904) 1 K. B. (C.A.) 35.]

[(*g*) *Jay* v. *Robinson*, 25 Q. B. D. (C.A.) 467.]

[(*h*) *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Myles* v. *Burton*, 14 L. R. Ir. 258; *Smith* v. *Whitlock*, 55 L. J. Q. B. 286.]

[(*i*) *Hemingway* v. *Braithwaite*, 61 L. T. N.S. 224.]

married woman, as against creditors to whom she incurred debts *after her marriage*, from settling her separate property by a post-nuptial settlement on herself with a restraint on anticipation (*a*).

[Powers under Settled Land Act, 1882, not impaired by restraint on anticipation.]

78. A restraint on anticipation in a settlement will not prevent a married woman from exercising any power given to her as a tenant for life, or as a person having the powers of a tenant for life, by the Settled Land Act, 1882 (*b*).

79. It will be convenient to conclude this section by a reference to the principal provisions of the statutory enactments relating to married women.] By the Married Women's Property Act, 1870 (*c*), it was enacted:—

Married Women's Property Act, 1870.

Sect. 1. That the *wages* and *earnings* of any married woman acquired or gained after the passing of the Act, *9th August*, 1870, in any employment, occupation or *trade* in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed and taken to be property held and settled to her separate use (*d*).

Sect. 2. That any *deposit* made or *annuity* granted by the Commissioners for the Reduction of the National Debt after the passing of the Act, in the name of a married woman, or a woman who might marry after such deposit or grant, should be deemed to be her separate property.

Sect. 3. That any married woman, or any woman about to be married, might cause any sum in the *public stocks or funds*, and not being less than 20*l.*, to which she was entitled, or which she was about to acquire, to be transferred into the books of the Governor and Company of the Bank of England to, or made to stand in, her name or *intended name* to her separate use, which should thenceforth be deemed her separate property (*e*).

Sect. 4. That any married woman, or woman about to be married might cause any fully paid up *shares*, or any *debentures or debenture stock*, or any *stock* of an incorporated or joint stock company, *to the holding of which no liability was attached*, to be registered in the books of the company in her name or intended

[(*a*) *Hemingway* v. *Braithwaite*, 61 L. T. N.S. 224.]

[(*b*) 45 & 46 Vict. c. 38, s. 61 (6).]

(*c*) 33 & 34 Vict. c. 93.

[(*d*) See *Ashworth* v. *Outram*, 5 Ch. D. 923, 939; *Lovell* v. *Newton*, 4 C. P. D. 7; *Re Dearmer*, 53 L. T. N.S. 905.]

(*e*) See *Re Bartholomew's Estate*, 23 L. T. N.S. 433; 19 W. R. 95; *Re Tanner's Trust*, W. N. 1874, p. 198; *Howard* v. *Bank of England*, 19 L. R. Eq. 295.

name to her separate use, which should thenceforth be deemed her separate property (*a*).

Married Women's Property Act, 1870.

Sect. 5. That any married woman, or woman about to be married, might cause any share, benefit, debenture, right, or claim in, to, or upon the funds of any *industrial and provident society* or any *friendly society, benefit building society* or *loan society*, to the holding of which share, benefit, or debenture *no liability was attached*, to be entered in her name to her separate use, which should thereupon be deemed her separate property.

Sect. 7. That where any woman married after the date of the Act should during coverture become entitled to any *personal property as next of kin* (*b*), or any sum not exceeding 200*l.* under any *deed* or *will* (*c*), such property should belong to her for her separate use.

Sect. 8. That where any *freehold or copyhold property* should descend upon any woman married after the passing of the Act, the *rents and profits* (*d*) thereof should belong to her for her separate use.

Sect. 10. That a married woman might effect a *policy of insurance* upon her *own life*, or the *life of her husband* for her separate use, and that a policy of insurance effected by any *married* man on his *own life*, and expressed upon the face of it to be for the benefit of his wife or his wife and children, should be deemed a trust for the benefit of his wife for her separate use, and of the children; [and that when the sum secured by the policy should become payable, or at any time previously, a trustee (*e*) thereof might be appointed by the Court of Chancery, or the Judge of the County Court of the district in which the insurance office was situated, and that the receipt of such trustee should be a good discharge (*f*).]

(*a*) See *The Queen* v. *Carnatic Railway Company*, 8 L. R. Q. B. 299.

(*b*) The amount coming to her as next of kin appears to be without limit; [so now decided, see *Re Voss*, 13 Ch. D. 504].

[(*c*) Separate sums of money coming to the *feme* under one will but by different titles, are not to be aggregated so as to make up the 200*l.*; *Re Davies*, (1897) 2 Ch. 204; following *Re Middleton's Will*, 16 W. R. 1107.]

[(*d*) The object of this section has been held by Stirling, J., to be simply to remove and put aside the interest of the husband, and not to give the wife an enlarged dominion over her property; and accordingly the separate use created by the section does not authorise a dealing with the fee; *Johnson* v. *Johnson*, 35 Ch. D. 345.]

[(*e*) Where the fund was to be retained on behalf of infants, the Court declined to appoint a single trustee under this section; *Re Howson's Policy Trusts*, W. N. 1885, p. 213.]

[(*f*) Upon an application under this section the Court declared the rights and interests of the wife and children of the deceased, and directed a proper settlement of the fund; *Re Mellor's Policy Trusts*, 6 Ch. D. 127. In this case a husband effected a policy on his

Married Women's Property Act, 1870.

Sect. 12. That a husband should not by reason of any marriage after the passing of the Act be liable for the *debts of his wife contracted before marriage* (*a*), and that the wife should be liable to be sued for, and any property belonging to her for her separate

own life under the Married Women's Property Act, 1870, for the benefit of his wife and children, but the interests they were to take were not otherwise expressed on the face of the policy. On an application to the Chancery Division by the widow and children (who were two daughters), V. C. Malins at first appointed two trustees of the policy moneys, and declared that they were "to hold the moneys when received, upon trust to pay thereout the costs, and to invest the residue in securities authorised by the Court, and to pay the income to the widow for life for her separate use without power of anticipation, with remainder (as to both capital and income) for the children on attaining 21, or on marriage under that age, in equal shares, and if but one the whole for that one, with remainder (as to both capital and income) if neither child attained 21 or married under that age for the widow absolutely." But on a subsequent application in the same matter, 7 Ch. D. 200, the V. C. reconsidered this decision, and directed the policy moneys to be distributed in thirds between the widow and two children. This case was disapproved of in *Re Adam's Policy Trusts*, 23 Ch. D. 525, where Chitty, J., held that the Court had no jurisdiction under this section to do more than make an order appointing a trustee. An opinion was also intimated in that case that a policy by a husband under this section "for the benefit of his wife and children," should be read in conjunction with the section, and that the proper construction was, by virtue of the words "separate use" in the section, for the benefit of the wife for her life, with remainder to the children as joint tenants; but in *Re Seyton*, 34 Ch. D. 511, North, J., disapproved of this view, and held that under such a policy, whether it was to be considered alone (as he appears to have thought it ought to be), or jointly with the Act, the widow and children took as joint tenants; and this was followed by Chitty, J., in *Re Davies' Policy Trusts*, (1892) 1 Ch. 90. The question whether an after-taken wife can participate is one of construction: where the policy (effected under s. 11 of the Act of 1882, v. *post*, p. 1026) was simply "for the benefit of the wife and children" of the assured, an after-taken wife and her child shared jointly with the children of the first marriage; *Re Browne's Policy*, (1903) 1 Ch. 188; but where the policy (effected under the Act of 1870) was for the benefit of the wife of the assured, "or, if she were dead, between his children," an after-taken wife was excluded, though her children were let in; *Re Griffith's Policy*, (1903) 1 Ch. 739. An after-taken wife is within the Act of 1870, and for this purpose there is no difference between sect. 10 of the Act of 1870, and sect. 11 of the Act of 1882; *Re Parker's Policies*, (1906) 1 Ch. 526. The section remains in force as to policies effected under it, notwithstanding the provisions of s. 11 of the Act of 1882, (see *post*, p. 1026) and therefore a trustee must be appointed to give a discharge for the policy moneys whether they become payable before or after the Act of 1882, and the application for such appointment need not be entitled under the Act of 1882; *Re Turnbull*, (1897) 2 Ch. 415; (referring to *Re Adam's Policy Trusts*, 23 Ch. D 525, and distinguishing *Re Soutar's Policy Trusts*, 26 Ch. D. 236); *Re Kuyper's Policy*, (1899) 1 Ch. 38. The Court can under its general jurisdiction appoint two new trustees, *Schultze* v. *Schultze*, 56 L. J. Ch. 356; 56 L. T. N.S. 231.]

(*a*) See *Conlon* v. *Moore*, 9 I. R. C. L. 190. [If the husband survives the wife and takes out administration to her estate, he will, notwithstanding this section, be liable to the extent of her assets to the wife's antenuptial debts; *Turner* v. *Caulfield*, 7 L. R. Ir. 347; and these debts will be payable *pari passu* out of the wife's separate estate and her general personal estate; *S. C.*]

use should be liable to satisfy such debts, as if she had continued unmarried (*a*).

[80. By the Amendment Act of 1874 (*b*), as to marriages which took place after the 30th July, 1874, by the 1st section the liability of the husband was restored, but by the subsequent sections his liability was confined to the extent of the fortune of the wife received, or which ought to have been received, by him, if he pleaded that limit to his liability ; but it was in the option of the husband either to claim this limit to his liability or not, and if he did not so claim it, he was liable for the wife's debts in the same manner as the husband originally was at common law. Under this Act, therefore, in a statement of claim by a creditor of the wife against the husband and wife, it was not necessary for the plaintiff to allege that the husband had received or with reasonable diligence might have received assets of the wife, but the husband, intending to rely upon the Act, was put to claim the benefit of it in his defence (*c*). [Married Women's Property Act, 1874.]

81. The Married Women's Property Act, 1870, and the Amendment Act of 1874, have now been repealed by the Married Women's Property Act, 1882, but without prejudice to "any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the 1st January, 1883, to sue or be sued under the provisions of the repealed Acts, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued" before that date (*d*). It may therefore still be necessary in many cases to refer to the provisions of the repealed Acts. [Repeal of Acts of 1870 and 1874.]

82. By the Married Women's Property Act, 1882, it is in effect enacted :— [Married Women's Property Act, 1882.]

Sect. 1, sub-sect. (5). That every married woman carrying on a

(*a*) The separate property will be made available for payment of the debts [even although anticipation be restrained ; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773 ; *Re Hedgeley*, 34 Ch. D. 379 ; *Axford* v. *Reid*, 22 Q. B. D. (C.A.) 548 ; *secus*, under the Act of 1882, as s. 19 (see *ante*, p. 1019) preserves the restraint : *Birmingham Excelsior Money Soc.* v. *Lane*, (1904) 1 K. B. (C.A.) 35]. The *feme covert* herself cannot be made a bankrupt ; *Ex parte Holland*, 9 L. R. Ch. App. 307, [unless she be trading separately from her husband, 45 & 46 Vict. c. 75, s. 1 ; *Re Gardiner*, 20 Q. B. D. 249 ; though the petition in bankruptcy has come on for hearing and been adjourned at her instance before her marriage : *Re a Debtor*, (1898) 2 Ch. (C.A.) 576 ; and as to form of judgment, &c., see *Downe* v. *Fletcher*, 21 Q. B. D. 11.]

[(*b*) 37 & 38 Vict. c. 50.]

[(*c*) See *Matthews* v. *Whittle*, 13 Ch. D. 811. The liability of the husband ceases on the death of the wife ; *Bell* v. *Stocker*, 10 Q. B. D. 129.]

[(*d*) 45 & 46 Vict. c. 75, s. 22 : as to the effect of the section, see *Re Turnbull*, (1897) 2 Ch. 415.]

[45 & 46 Vict. c. 75.]

trade (*a*) separately from her husband shall, in respect of her separate property (*b*), be subject to the *bankruptcy laws* as if she were a *feme sole* (*c*).

Sect. 3. That any *money* or other estate *of the wife lent* or intrusted (*d*) by her *to her husband* for the purposes of any trade or business carried on by him or otherwise, shall be treated as assets of his estate *in case of his bankruptcy* (*e*), she being entitled to a dividend as a creditor for the amount or value of such money or estate after all claims of the other creditors for valuable consideration have been satisfied (*f*).

[(*a*) As to the meaning of this expression, see *Re Dagnall*, (1896) 2 Q. B. 407, where a married woman who had ceased actually to carry on business was made bankrupt in respect of trade debts of hers remaining unpaid; and see *Re Worsley*, (1901) 1 K. B. (C.A.) 309, approving *Re Dagnall*. In order to ground the jurisdiction in bankruptcy, it is sufficient that the *feme* is carrying on a trade separately from her husband; it is not necessary to prove the existence of separate property at the time when the receiving order was made, though that may be material in reference to the exercise of the jurisdiction: *Re Simon*, (1909) 1 K.B. (C.A.) 201.]

[(*b*) As to what is separate property within the section, and that it does not include property over which the married woman has only a general power of appointment (by deed or will), which she has not exercised, see *Ex parte Gilchrist*, 17 Q. B. D. (C.A.) 167, 521; but that it does include property which is subject to a restraint on anticipation, see *Re Wheeler's Settlement*, (1899) 2 Ch. 717; *ante*, p. 989.]

[(*c*) As to the position before the Act of a married woman in regard to the bankruptcy law, see *Ex parte Jones*, 12 Ch. D. (C.A.) 484; and that her trustee in bankruptcy claiming her life interest under a settlement is not "interfering with or affecting" the settlement within the meaning of s. 19, see *Re Armstrong*, 21 Q. B. D. (C.A.) 264, *ante*, p. 1007; and as to the effect of the death of the husband where she is restrained from anticipation, see *ante*, p. 989. As a judgment against a *feme covert* is not personal, a bankruptcy notice cannot be founded on it; *Re Lynes*, (1893) 2 Q. B. (C.A.) 113.]

[(*d*) Property of the wife mortgaged by her to secure a debt of her husband, which debt was afterwards discharged by realisation of the property so mortgaged, was held in *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, not to come within the words "lent or intrusted by her to her husband."]

[(*e*) By force of s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), this applies also where the husband is dead and his estate is insolvent; *Re Leng*, (1895) 1 Ch. (C.A.) 652; but the right of retainer of the executrix of her deceased husband, in respect of a loan made by her to him for the purposes of his business, is in no way affected: *Re Ambler*, (1905) 1 Ch. (C.A.) 697, and see *Simpson* v. *Simpson*, (1895) 1 I. R. 530.]

[(*f*) This section does not apply to a case where the husband is in partnership, and the money of the wife is lent not to him but to his firm; *Re Tuff*, 19 Q. B. D. 88. The section is not retrospective; *Re Home*, 54 L. T. N.S. 301.

Whatever be the meaning of the words "or otherwise," it is clear that the section has no application to a loan by the wife to the husband for purposes unconnected with his trade or business; *Re Clark*, (1898) 2 Q. B. (C.A.) 330; and see *Re Tidswell*, 56 L. J. Q. B. 548; 35 W. R. 669, followed in *Mackintosh* v. *Pogose*, (1895) 1 Ch. 505, notwithstanding *Alexander* v. *Barnhill*, 21 L. R. Ir. 511. And as the section refers only to the *bankruptcy* of the husband it does not preclude a widow as administratrix from retaining, out of the insolvent estate of her intestate husband, money advanced by her out of her separate property to him for the purposes of his business; *Re May*, 45 Ch. D. 499,

Sect. 6. That all *deposits* in any post office or other savings bank, or in any other bank, all *annuities* granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the *public stocks or funds*, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, at the commencement of the Act (1st January, 1883), are standing in the sole name of a married woman, and *all shares, stock, debentures, debenture stock*, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act are standing in her *name* (*a*), shall be deemed, unless and until the contrary be shown, to be the *separate property* of such married woman; and the fact that such property is standing in the sole name of a married woman shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify persons mentioned in the Act in respect thereof. [45 & 46 Vict c. 75.]

Sect. 7. That all such deposits, annuities, sums, shares, *stock*, debentures, debenture stock, and other interests as referred to in the last section, which after the commencement of the Act shall be allotted to or made to stand *in the sole name of a married woman* shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable.

But nothing in the Act is to require or authorise any corporation or company to admit any married woman to be a holder of any shares or stock therein, *to which any liability* may be *incident*, contrary to the provisions of the instrument regulating such corporation or company.

Sect. 8. That the provisions of sects. 6 and 7 shall apply, so far as relates to the estate, right, title, or interest of the married

and see *Re Ambler*, (1905) 1 Ch. (C.A.) 697. In the case of the bankruptcy of the husband the onus was held to lie on the wife, proving for such an amount, to show that it was not lent for the purposes of his trade or business; *Re Genese*, 16 Q. B. D. 700; but it is not in every case that this onus is thrown upon the wife; see *Re Cronmire*, (1901) 1 K. B. (C.A.) 480, where, under the circumstances, a mortgage of the wife's property for the husband's benefit was held not liable to postponement.]

[(*a*) This is apparently an error for "*sole* name."]

[45 & 46 Vict. c. 75.]

woman, to any deposits, &c., in the name of any married woman *jointly* with any persons or person other than her husband.

Sect. 9. That it shall not be necessary for the husband of any married woman in respect of her interest to join in the *transfer* of any deposit, &c., affected by the 6th, 7th, or 8th sections.

Sect. 11. That a married woman may effect a *policy* upon her own life or the life of her husband for her separate use.

And that a *policy* of assurance effected by any man on his own life, and expressed to be for the *benefit* of his *wife*, or of his children, or of his wife and children (*a*), or any of them; or by any woman on her own life, and expressed to be for the benefit of her *husband*, or of her children, or of her husband and *children*, or any of them, shall create a trust in favour of the objects therein named (*b*). And that the insured may by the policy, or by any memorandum, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the policy moneys; and that in default of any such appointment such policy shall vest in the insured in trust for the purposes aforesaid. If, at any time, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, the appointment may be made by any Court having jurisdiction under the Trustee Acts (*c*).

Sect. 13. That a woman after her marriage shall continue liable to the extent of her separate estate for her *antenuptial debts*, contracts, or wrongs, and may be sued accordingly, and all sums recovered against her shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be primarily liable (*d*).

[(*a*) Compare sect. 10 of the Act of 1870, *ante*, p. 1021, and note (*f*) as to the meaning of these words.]

[(*b*) Where an insurance is effected by a husband under the section for the benefit of his wife, a trust is created in her favour. But if the wife murders the husband, as it is against public policy that she should benefit by her own criminal act, the trust in her favour fails, and there is a resulting trust for the husband, enabling his executors to recover the money; *Cleaver* v. *Mutual Reserve Fund Life Association*, (1892) 1 Q. B. (C.A.) 147. The interest of a husband in the life of his wife is presumed, and therefore a husband having effected a policy under the section, can maintain an action upon it, without proving that he has any pecuniary interest in the life of his wife: *Griffiths* v. *Fleming*, (1909) 1 K. B. (C.A.) 805.]

[(*c*) On a motion in Ireland to appoint trustees under this section it was held that there was no jurisdiction upon such an application to adjudicate upon the rights of the widow and children *inter se*; *Re Graham's Policy*, 29 L. R. Ir. 498.]

[(*d*) Under this section a husband

Sect. 14. That a husband shall be liable for his wife's antenuptial debts, contracts, and wrongs, to the extent of her property which he shall have acquired or become entitled to, from or through his wife, after deducting payments made by him, and sums for which judgment may have been recovered against him, in respect of such debts, contracts, or wrongs (*a*).

Sect. 15. That a husband and wife may be jointly sued in respect of any such debt or liability if the plaintiff shall seek to establish his claim against both of them.

Sect. 21. That a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren (*b*) as the husband is now by law subject to for the maintenance of her children and grandchildren: provided that nothing in the Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren (*c*).

[Agricultural Holdings Act.]

83. The Agricultural Holdings (England) Act, 1883 (*d*), enacts in sect. 26, that "a woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she were unmarried." And that "where *any other woman* married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite," and she is to be separately examined by the County Court, or by the Judge of the County Court, for the place where she for the time being is.

The words "any other woman" here used are inaccurate, but

cannot maintain an action against his wife for money lent to her or money paid for her before their marriage at her request; *Butler* v. *Butler*, 14 Q. B. D. 831.]

[(*a*) It will be observed that the language of the 14th section, the effect of which is given shortly in the text, differs materially from that of the Act of 1874 (see *ante*, p. 1023), and *Matthews* v. *Whittle*, 13 Ch. D. 811, has no application to a case under the Act of 1882. Under this and the following section the husband can avail himself of the Statute of Limitations in respect of his wife's antenuptial debt as from the time when the debt accrued due against her; *Beck* v. *Pierce*, 33 Q. B. D. (C.A.) 316.]

[(*b*) The corresponding section in the Act of 1870 did not include grandchildren; *Coleman* v. *Overseers of Birmingham*, 6 Q. B. D. 615.]

[(*c*) Now by the Married Women's Property Act, 1908 (8 Edw. 7, c. 27) a married woman, having separate property, is made subject to all such liability for the maintenance of her parent or parents as a *feme sole* is by law subject to.]

[(*d*) 46 & 47 Vict. c. 61.]

are apparently intended to apply to a woman who does not, under the preceding clause, acquire the powers of an unmarried woman. It is, however, conceived that there is nothing in the section empowering a married woman whose anticipation is restrained to bind her interest.

By the same section the County Court is empowered to appoint, and change or remove any next friend of a married woman required for the purposes of the Act (*a*).]

SECTION VII

OF JUDGMENTS AGAINST THE CESTUI QUE TRUST

Writs of execution at common law.

Before entering upon this topic, it may be useful to notice briefly how *legal* interests stand affected by judgments.

1. At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant: the *fieri facias*, to levy the debt *de bonis et catallis;* and the *levari facias*, to levy it *de terris et catallis* (*b*). The execution under the latter writ, however, embraced no interest in *land* of a higher description than a mere chattel interest, and affected not the *possession* of the lands (*c*), but merely enabled the sheriff, besides taking the chattels, to levy the debt from the present profits, as from the rents payable by the tenants (*d*), and the emblements (*e*), that is, the corn and other crops at the time growing on the lands (*f*). If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in like manner (*g*).

Statute of Westminster.

2. In order to provide for the creditor a more effectual remedy, the Statute of Westminster (*h*) introduced the writ of *elegit*, and enacted that when the debt was recovered or knowledged, or damages awarded, the suitor should at his *choice* (whence the term *elegit*) have a writ of *fieri facias* (*i*) from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the

[(*a*) 46 & 47 Vict. c. 61, s. 26.]
(*b*) Finch's Law, 471.
(*c*) Ib.; *Sir E. Cooke's case*, Godb. 290.
(*d*) Finch's Law, 472; *Davy* v. *Pepys*, Plowd. 441.
(*e*) 4 Com. Ab. 118.
(*f*) *Harbert's case*, 3 Rep. 11 b.; 2 Inst. 304; 2 Bac. Ab. Execution (C) 4, note (*b*).
(*g*) Fitzh. N. B. 265.
(*h*) 13 Ed. 1. st. 1, c. 1, c. 18.
(*i*) This includes the writ of *levari facias;* 2 Inst. 395.

plough, and *one-half of his land until the debt should be levied upon a reasonable price or extent.* It was by virtue of this statute that judgment creditors were first enabled to sue execution of *one moiety* of the debtor's *lands,* whether vested in him at the time of the judgment or subsequently acquired.

[Now by the Bankruptcy Act, 1883 (*a*), it is enacted that (1), The sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods; and (2), No writ of *levari facias* shall hereafter be issued in any civil proceeding.] [*Levari facias* abolished in civil proceedings.]

We now come to the inquiry, what is the effect of judgments upon *equitable* interests.

1. With respect to the *fieri facias,* it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law, did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpœna.* During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced more liberal doctrines, and established the principle that a creditor, prevented from executing the legal process by the interposition of a trust, might come into Chancery, and prosecute an *equitable fieri facias* (*b*). *Fieri facias* as regards trusts.

2. But, as the analogy to law must be strictly pursued, the trust of a chattel could never have been attached in equity until the *writ of execution* was actually sued out; for till that time there was no *lien* upon the debtor's effects, which was the very ground of the application (*c*). Trusts not bound by it before execution sued out.

3. And as equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel of which the trust has been created is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of *Horn* v. *Horn* in Ambler (*d*), that a trust of *stock* might, before the Judgments Act, 1838 (*e*), have been taken by a judgment creditor in equitable execution; and *Taylor* v. *Jones* (*f*), before Sir W. Fortescue, M.R., was even a decision to the same Nor where the legal estate is not liable.

[(*a*) 46 & 47 Vict. c. 52, s. 146.]

(*b*) *Pit* v. *Hunt,* 2 Ch. Ca. 73; *Anon. case,* cited 1 P. W. 445; and see *Scott* v. *Scholey,* 8 East, 485; *Estwick* v. *Caillaud,* 5 T. R. 420; *Kirkby* v. *Dillon,* C. P. Cooper's Rep. 1837-38, 504; *Simpson* v. *Taylor,* 7 Ir. Eq. Rep. 182; *Bennett* v. *Powell,* 3 Drew. 326; *Gore* v. *Bowser,* 3 Sm. & G. 1; *Smith* v. *Hurst,* 1 Coll. 705; *Partridge* v. *Foster,* 34 Beav. 1; *Horsley* v. *Cox,* 4 L. R. Ch. App. 92.

(*c*) *Angell* v. *Draper,* 1 Vern. 399; *Shirley* v. *Watts,* 3 Atk. 200; *Smith* v. *Hurst,* 1 Coll. 705; *Partridge* v. *Foster* 34 Beav. 1.

(*d*) Amb. 79.

(*e*) 1 & 2 Vict. c. 110.

(*f*) 2 Atk. 600.

effect; but such a doctrine, inasmuch as stock could not have been reached at law, was clearly contrary to all principle, and afterwards incurred the express disapprobation of Lord Thurlow (*a*), Lord Manners (*b*), Sir W. MacMahon (*c*), Sir Archibald Macdonald (*d*), and Lord Eldon (*e*); Lord Thurlow observing, that the opinion in *Horn* v. *Horn* was so anomalous and unfounded, that forty such would not satisfy his mind (*f*). However, by the Judgments Act, 1838 (*g*), various descriptions of property, formerly exempt, are now liable to be taken in execution, and the remedy of the creditor in equity must be deemed to be enlarged accordingly (*h*); and the same statute provides a special procedure for reaching a judgment debtor's interest in *stock* whether legal or equitable (*i*).

Equity of redemption.

4. The judgment creditor is entitled to the like relief against the *equity of redemption of a chattel*, as against any other equitable interest in a chattel (*j*).

Whether equity can adopt the *elegit* by analogy.

5. The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a Court of Equity can, consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example, was by Act of Parliament made forfeitable without inquest for treason, and, as the Statute enumerated "*uses*," it was contended, and seems to be the better opinion, that *trusts* also under that expression became forfeitable to the Crown; but it was never suggested that, had "uses" not been inserted in the Act, a Court of Equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. But the Act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, admitted *entails* and remainders of trusts, why might it not, by analogy to another Act of the same statute, allow equitable interests to be affected by *judgments* (*k*)?

Trusts formerly not subject to *elegit*. *Secus* now.

6. It would seem that in Lord Keeper Bridgman's time a trust

(*a*) *Dundas* v. *Dutens*, 2 Cox, 240; and see a note of *S. C.* in *Grogan* v. *Cooke*, 2 B. & B. 233.
(*b*) *Grogan* v. *Cooke*, 2 B. & B. 233.
(*c*) *Plasket* v. *Dillon*, 1 Hog. 328.
(*d*) *Caillaud* v. *Estwick*, 2 Anst. 384.
(*e*) *Rider* v. *Kidder*, 10 Ves. 368.
(*f*) See *Grogan* v. *Cooke*, 2 B. & B. 233.
(*g*) 1 & 2 Vict. c. 110, sect. 12.
(*h*) See cases *ante*, p. 85, note (*c*.); and see *Stokoe* v. *Cowan*, 29 Beav. 637.
(*i*) See *post*, p. 1040.
(*j*) *King* v. *Marissal*, 3 Atk. 192; *Shirley* v. *Watts*, Ib. 200; *Burdon* v. *Kennedy*, Ib. 739; *Thornton* v. *Finch*, 4 Giff. 515; and see *King* v. *De la Motte*, Forr. 162.
(*k*) See *Ryall* v. *Rolle*, 1 Atk. 184.

was not subject to an *elegit* (*a*). But it was long ago established that a judgment creditor might redeem a mortgage in fee (*b*), and it is now equally well settled that he may prosecute his *elegit* against any other equitable interest (*c*).

Land to be converted into personalty not bound by a judgment.

7. An estate given by A. to trustees *upon trust to convert* into personalty for the benefit of B. has in equity all the properties of *personalty;* and therefore, even under the *old law*, a judgment against the person to whom the proceeds of the sale were directed to be paid conferred no lien upon the proceeds (*d*).

Judgment against vendor, after contract to sell.

8. Whether the same principle applied where a judgment was entered up against a person after he had *contracted to sell* real estate was much doubted.

Serjeant Hill's opinion.

Upon this subject we have the following opinion of Mr Serj. Hill:—H. A. S. seised in fee of an estate, subject to his mother's jointure and to younger children's portions, *contracted for the sale* of the property in lots to different purchasers. After the date of the contract, H. A. S. executed a conveyance to trustees, upon trust to convey to the different purchasers, and to invest part of the purchase-money in the funds as an indemnity against the jointure and portions, and to pay the residue to himself. *Subsequently to the deed of trust,* H. A. S. acknowledged a judgment. Mr Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they *had notice,* and also as against judgments, if any, of which they *had no notice.* The opinion was as follows: "As to the judgment of which the trustees had *notice,* though, to many purposes, the estate agreed

(*a*) See *Pratt* v. *Colt*, Freem. 139.

(*b*) *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Crisp* v. *Heath*, 7 Vin. Ab. 52. (The former case has been compared with Reg. Lib., A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found). *Plucknet* v. *Kirk*, 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184, see *post*, p. 1065; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538, and the cases cited Ib. 541; *Stileman* v. *Ashdown*, 2 Atk. 477; *Fothergill* v. *Kendrick*, 2 Vern. 234; and see *Steele* v. *Philips*, 1 Beat. 188; *Forth* v. *Duke of Norfolk*, 4 Mad. 503; *King* v. *De la Motte*, Forr. 162; *Freeman* v. *Taylor*, 3 Keb. 307; *Hatton* v. *Haywood*, 9 L. R. Ch. App. 229.

(*c*) *Tunstall* v. *Trappes*, 3 Sim. 286; *Forth* v. *Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach; Serj. Hill's opinion, Ib. 506, note (*a*); *Foster* v. *Blackstone*, 1 M. & K. 311, *per* Sir J. Leach; and see *Lodge* v. *Lyseley*, 4 Sim. 70; *Kirkby* v. *Dillon*, C. P. Cooper's Rep. 1837-38, 504; *Neate* v. *Duke of Marlborough*, 9 Sim. 60; 3 M. & Cr. 407; *Adams* v. *Paynter*, 1 Coll. 530; *Lewis* v. *Lord Zouche*, 2 Sim. 388. *Davidson* v. *Foley*, 2 B. C. C. 203; 3 B. C. C. 598; and *Plasket* v. *Dillon*, 1 Hog. 324 (commonly cited upon this subject), were cases of a *legal elegit*, and the judgment creditor was seeking to remove an impediment to the *legal execution* of it.

(*d*) *Foster* v. *Blackstone*, 1 M. & K. 297; and see *Browne* v. *Cavendish*, 1 Jon. & Lat. 633.

to be sold is from the time of the contract the estate of the purchaser; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase-money; and, therefore, the judgment creditor hath a right to so much of the purchase-money as is sufficient to satisfy the judgment; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have *no notice*, I think a Court of Equity will not make them pay the money over again, if they apply it according to the deed of trust, because I think equity in the case of a judgment creditor and a *bonâ fide* purchaser or a trustee without notice, will not interpose on either side, but will leave the law to take its course" (*a*).

Sir J. Leach's opinion.

And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract was bound by a judgment; for in *Forth* v. *the Duke of Norfolk* (*b*), where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said: "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he had notice of it before the consideration paid.* If A., before the actual conveyance to him, had received *notice* of the judgment, then, being a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase-money, he would have been equally affected with the judgment as the debtor himself; and if he had afterwards paid the whole purchase-money to the debtor, he would have still remained liable to the judgment creditor."

Dictum of Sir L. Shadwell.

But in a subsequent case Sir L. Shadwell said "he should not have given the opinion which the learned Serjeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him at that time, the purchasers had a right to file a bill against him and have the legal estate conveyed" (*c*). And it may be argued that if the vendor die after the contract, but before the conveyance, the purchase-money would go to the

(*a*) Cited *Forth* v. *Duke of Norfolk*, 4 Mad. 506, note (*a*).

(*b*) 4 Mad. 503.

(*c*) *Lodge* v. *Lyseley*, 4 Sim. 75; and see *Craddock* v. *Piper*, 14 Sim. 310, where, however, it does not appear whether the judgments were entered up before the actual sale or the decree for sale.

executor (*a*); and that if the contract work a notional conversion of the land into money in respect of the vendor's representatives, the same consequence ought to follow in respect of the vendor's judgment creditors.

Whether in case of conveyance upon trust to sell or mortgage, with power of sale, surplus proceeds are bound by a judgment.

9. The case became still more difficult where A. conveyed to trustees upon trust to sell for the discharge of incumbrances, and to pay the surplus to *himself*, and, before sale, a judgment was entered up against A. (*b*); or where a mortgage was given with power of sale to the mortgagee, and a judgment was entered up against the mortgagor before sale (*c*). It was clear that in either case the power of giving receipts was binding as against the judgment creditor, so that a purchaser from the trustee or mortgagee was not concerned to see that the judgments were satisfied (*d*); but this still left open the question whether the judgment was or was not a lien or charge on the proceeds in the hands of the mortgagee or trustee.

How much of the estate may be taken in execution.

10. The question whether under the old law the *lien* of the judgment creditor extended to the *whole* or a *moiety* of the trust estate was also one of considerable difficulty, and the authorities can only be reconciled by the aid of a somewhat subtle distinction.

On what grounds a judgment creditor may apply to a Court of Equity.

A judgment creditor might have come into a Court of Equity upon two grounds; *First*, upon a *legal* title, where he either sought to remove an impediment to the execution of his legal *elegit*, or, after the death of his conusor, sued for payment of his debt out of the conusor's personal assets, and, if they should be insufficient, then by sale (*e*) of the real estate; or, *Secondly*, upon an *equitable elegit*, on the ground that he had no legal *lien*, and therefore could have no legal process (*f*).

Execution of a moiety only of a trust estate.

As the extent of relief ought in both these cases to be the same, and the Court never attempted to make a difference,

(*a*) See *Farrar* v. *Winterton*, 5 Beav. 1; *Curre* v. *Bowyer*, Ib. 6, note.

(*b*) See *Bayden* v. *Watson*, 7 Jur. 245; *Re Underwood*, 3 K. & J. 745.

(*c*) See *Wright* v. *Rose*, 2 S. & S. 323, and *Clarke* v. *Franklin*, 4 K. & J. 260.

(*d*) *Lodge* v. *Lyseley*, 4 Sim. 75; *Alexander* v. *Crosbie*, 6 Ir. Eq. Rep. 513; *Drummond* v. *Tracy*, Johns. 608.

(*e*) An *elegit* would at law give the *possession* of the lands till the satisfaction of the debt, but equity assumed the jurisdiction of facilitating the remedy by a *sale*. See *Barnewall* v. *Barnewall*, 3 Ridg. 61; *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 19; *O'Gorman* v. *Comyn*, Ib. 139; *Stileman* v. *Ashdown*, 2 Atk. 610; but see *Bedford* v. *Leigh*, 2 Dick. 709; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 417.

(*f*) These grounds of suit still subsist, in addition to that conferred by the 13th section of the Judgments Act, 1838, giving the judgment creditor a charge in equity. [See *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275.]

the authorities determined upon either head may be relied upon as applicable to the other. The result of the cases upon this principle, notwithstanding an early authority to the contrary (*a*), appears to be that a judgment creditor could under the old law sue an equitable *elegit* of a *moiety* only of a trust estate (*b*).

Execution of the whole of an equity of redemption.

11. An *equity of redemption* was, however, governed by a different rule. If A., seised of an estate, mortgaged it to B. in fee, and then confessed a judgment to C., it was clear that C. had a *lien* which entitled him to redeem B. But should he redeem the whole or a moiety? So far as the judgment creditor had any claim of his own, a moiety only; but as B. could not be compelled to part with the smallest fraction of the estate until he had been satisfied his whole debt, C. was under the necessity of redeeming the entirety. Again when C. had taken a transfer of the security, it followed that, as mortgagee with a judgment against the mortgagor, he had a right to tack, and no one could redeem any part of the estate out of his hands until payment not only of the original mortgage debt but also of the judgment. Thus it arose from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor was paid by a sale of the *whole* estate (*c*) (1).

In *Stileman* v. *Ashdown* (*d*), Lord Hardwicke at the same time that he gave a judgment creditor a moiety only of the *trust estate*, ordered a sale of the *whole* of the lands in *mortgage* (*e*).

(*a*) *Compton* v. *Compton*, cited in *Stileman* v. *Ashdown*, Amb. 15; Reg. Lib. A. 1711, f. 134. The authority of this case cannot, however, have much weight, for, as was observed by Lord Hardwicke (*Stileman* v. *Ashdown*, Amb. 17), the point whether the whole or a moiety should be sold appears not to have been discussed.

(*b*) *Stileman* v. *Ashdown*, 2 Atk. 477, 608; *Rowe* v. *Bant*, Dick. 150; Reg. Lib. B. 1750, f. 427; *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 24; *O'Dowda* v. *O'Dowda*, 2 Moll. 483; *Anon. case*, Ib.; *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137; *Burroughs* v. *Elton*, 11 Ves. 33; *Williamson* v. *Park*, 2 Moll. 484; *Armstrong* v. *Walker*, Ib. In *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 13, the sale of the estate was *not* confined to a moiety; but there the creditor had entered up *two* judgments the *same term*, and then as both judgments were of the same date, the creditor might at *law* have taken both moieties in execution. See *Attorney-General* v. *Andrew*, Hard. 23.

(*c*) *Stonehewer* v. *Thomson*, 2 Atk. 440; *Sish* v. *Hopkins*, Blunt's Amb. 793.

(*d*) 2 Atk. 477.

(*e*) Sir A. Hart, not observing the ground of the distinction, has charged Lord Hardwicke with inconsistency; *Leahy* v. *Dancer*, 1 Moll. 322.

(1) It was ruled, upon a similar principle, that, where freeholds and copyholds were blended in one mortgage, the equity of redemption of the whole was liable as assets to a bond creditor, though copyholds by themselves were not assets; *Acton* v. *Pierce*, 2 Vern. 480.

So, where there were several incumbrancers by judgment upon an equity of redemption, and the Court decreed a sale, the first judgment creditor was not confined to a moiety of the estate, but the decree was, that the incumbrancers should be paid their full demands out of the proceeds of the sale, according to their priority (*a*).

Case of a trust by way of mortgage.

12. [The cases of a mortgage by way of trust or of an annuity deed, though the interests derived thereunder border closely upon the nature of an equity of redemption, yet present some features of distinction, for here the legal estate never becomes absolute in the mortgagee or grantee of the annuity, but is held in trust for the mortgagor or grantor, and, strictly speaking, there is nothing to be redeemed, but merely a trust to be executed. However, even in the case of a conveyance of land to ordinary uses to secure an annuity, where the grantor] confessed a judgment, and the question was whether it should affect the whole or only a moiety of the estate, Sir L. Shadwell, on the ground that a judgment creditor might redeem the entirety of the lands in mortgage, held that the lien should extend to the whole (*b*).

Execution of a trust estate by *elegit* at law, under Statute of Frauds.

13. We come next to the provision in the 10th section of the Statute of Frauds (*c*), which enables a judgment creditor in certain cases to sue a writ of execution at *law* against an equitable estate.

The 10th section enacts in substance that it shall be lawful for the sheriff to deliver execution unto the party suing of all such lands and hereditaments as any other person may be in any manner of wise *seised or possessed* in trust for the party against whom execution is so sued, like as the sheriff might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands and hereditaments of such estate as they are *seised* of in trust for him *at the time of the said execution sued.*

Construction of the Statute.

14. Upon the construction of this section the following points have been resolved :—

a. As the statute, though using in one case the words *seised or possessed,* speaks elsewhere only of lands, &c., of which others are *seised* in trust for the debtor, it does not extend to trusts of

(*a*) *Sharpe* v. *Earl of Scarborough,* 4 Ves. 538 ; and see the cases cited Ib. 541 ; and *Berrington* v. *Evans,* 3 Y. & C. 384.

(*b*) *Tunstall* v. *Trappes,* 3 Sim. 286, see 300. [The question is more fully discussed in the eighth edition of this work at pp. 801, 802.]

(*c*) 29 Car. 2. c. 3.

chattels real of which the legal proprietor is said not to be *seised*, but *possessed* (*a*).

β. An *equity of redemption* is not within the terms of the Act (*b*).

γ. A *bare* and *simple* trust only is intended—not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title (*c*).

δ. If after the judgment is entered up, but before actual execution, the estate has been disposed of to a purchaser, so that when execution is sued there is no trust for the debtor in *esse*, in that case the words of the statute fail to provide a remedy, and the judgment creditor cannot be put in possession (*d*).

Whether equitable *elegit* may be had where no legal *elegit* of a trust under the Statute.

The question has been much discussed whether in the last case, though the judgment creditor could not prosecute a *legal* execution, he might not subject the purchaser, if affected with notice, to an *equitable elegit* (*e*). It was said, that as there was no execution at law, and equity followed the law, the creditor was without redress; but in this argument the principle that equity followed the law seems to be wrongly applied. A judgment bound a *legal* estate, and, as equity followed the law, a judgment was therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an *additional remedy* by enabling the judgment creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law (*f*), and therefore the creation of a *legal* remedy in certain cases provided for by the Act could not preclude the judgment creditor from prosecuting his equitable *elegit* in other cases for which the statute had made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and convert it into a disabling statute. The difficulty in the way of the relief was said to be, that no instance of it could be found after the most diligent search. The reason probably was, that judgments had only in modern times been held to bind equitable interests at all; the doctrine was certainly not established before the

(*a*) *Lyster* v. *Dolland*, 3 B. C. C. 478; *S. C.*, 1 Ves. jun. 431; *Scott* v. *Scholey*, 8 East, 467; *Metcalf* v. *Scholey*, 2 Bos. & Pul. N. R. 461.

(*b*) *Lyster* v. *Dolland*, *Scott* v. *Scholey*, *Metcalf* v. *Scholey*, *ubi sup.*; *Burdon* v. *Kennedy*, 3 Atk. 739.

(*c*) *Doe* v. *Greenhill*, 4 B. & Ald. 684; *Harris* v. *Booker*, 4 Bing. 96; *Forth* v. *Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach.

(*d*) *Hunt* v. *Coles*, 1 Com. 226; *Harris* v. *Pugh*, 4 Bing. 335.

(*e*) See 2 Sugden's Vend. and Purch. 10th ed. 386; 14th ed. 535; Coote on Mortg. 3rd ed. p. 53; 6th ed. p. 670; 2 Powell, Mortg. 606; Fisher on Mortg. p. 366.

(*f*) *Attorney-General* v. *Andrew*, Hard. 27; 2 Inst. 472.

Statute of Frauds. But the system of trusts had from that period downwards been gradually maturing, and the principles which governed uses, and were thence transferred into trusts, had since, not indeed been abandoned, but received a much more enlarged and liberal application, and as judgments were acknowledged to be *liens* upon equitable interests, the consequence necessarily followed that a purchaser was bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

15. We now proceed to an examination of the more recent statutes.

By the Judgments Act, 1838 (1 & 2 Vict. c. 110), it is enacted— 1 & 2 Vict. c. 110. (I.) By sect. 11, That execution at *law* may be had under an *elegit* of all such lands, including copyholds, as the debtor or any person in trust for him was seised or possessed of, or over which he had a disposing power which he might without the assent of any other person exercise for his own benefit (*a*), *at the time of entering up the judgment or at any time afterwards.* (II.) By sect. 13, That in *equity* a judgment shall operate as a *charge* upon the whole of the lands, freehold and copyhold, of which the debtor was seised or possessed for any estate or interest whatever at law or in equity, or over which he had a disposing power, at or subsequently to the entering up of the judgment, with a proviso that the creditor shall not be entitled to proceed in equity to obtain the benefit of such charge until after the *expiration of a year* from the date of the judgment, and that the protection in equity of purchasers for valuable consideration without notice shall not be disturbed. (III.) By sect. 18, That *decrees and orders* of Courts of Equity, *rules* of Courts of Common Law, &c., whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments (*b*). But, (IV.) By sect. 19, That no *judgments, decrees, or orders,* shall affect real estate *by virtue of the Act,* unless and until they have

(*a*) A trust for the separate use of a married woman was held not to be an estate over which she had a disposing power within the meaning of the Act; *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149. Neither was the power of the settlor to defeat a voluntary settlement by means of the 27 Eliz. c. 4, see *ante*, p. 80, *a disposing power* within the Act of Vict.; *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507.

(*b*) A decree for an account merely is not within the section; *Chadwick* v. *Holt*, 2 Jur. N.S. 918; [*Widgery* v. *Tepper*, 6 Ch. D. (C.A.) 364]. Neither is a rule of a Court of Common Law which does not specify the sum to be paid; *Jones* v. *Williams*, 11 Ad. & Ell. 175; *Doe* v. *Amey*, 8 M. & W. 565; though, as respects costs, the case is different; *Jones* v. *Williams*, 8 M. & W. 349; *Doe* v. *Barrell*, 10 Q. B. 531.

been *registered* with the senior master of the Court of Common Pleas (*a*).

Remarks on the Statute.

16. It is observable upon these clauses, that an *equitable* estate, whether of freehold or copyhold tenure, and whether of freehold or leasehold interest, and without any restriction as *to the time of execution sued*, as in the 10th section of the Statute of Frauds, is subjected by the Act to execution at *law* by writ of *elegit* (sect. 11), and to *quasi* execution in *equity* by way of charge (sect. 13). In the latter case purchasers without notice are expressly protected (sect. 13), but in the former case not: a purchaser, therefore, even of an equitable interest, after the commencement of the Act, was obliged by this statute to search the registry for judgments entered up against the vendor, and that whether before or subsequently to the Act, for the time for entering up the judgments was immaterial, provided they had been registered. It may be thought anomalous and inconsistent that a purchaser should not be protected at *law* by want of notice, while he was in *equity;* but the intention of the legislature probably was, in giving a remedy both at law and in equity, not to disturb the principles upon which the respective Courts acted, and therefore if the trust was a *plain* one, and so amenable to a legal *elegit*, the judgment creditor might take the land in execution even against a purchaser without notice; but if the trust was so complicated as to oblige him to apply to a Court of Equity, and treat the judgment as a charge, the Court by the Act was not to disregard its established rules, but, as in all other cases, was to protect a purchaser without notice.

Estate or interest in land capable of being taken in execution.

17. The following cases have been decided upon this Act. A. was entitled to an *annuity* secured by a covenant and an assignment of leaseholds in *trust to sell*, and it was held that A.'s interest under the deed might, under the Act, be made available for payment of a judgment debt due from her (*b*). A testator gave real estate to trustees upon trust to levy and raise, during the life of A., an *annuity* of 400*l.*, and directed the annuity to be held upon trust for the support, clothing, and maintenance of A., and the Court, having previously decided that the trust was one for the benefit of A. generally (*c*), held that a judgment

[(*a*) The registration is now effected at the office of Land Registry, pursuant to s. 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), see *post*, p. 1056.]

(*b*) *Harris* v. *Davison*, 15 Sim. 128.

(*c*) *Younghusband* v. *Gisborne*, 1 Coll. 400.

creditor of A. was entitled to a charge on the annuity under the Act (*a*). A person covenanted to pay A. 5000*l.*, and that the sum should be a *charge* on certain land, and it was held that a judgment creditor of A. was entitled to a charge on the land in respect of A.'s interest therein (*b*). A mortgage was executed with a power of sale, and the surplus made payable to the mortgagor, his heirs, appointees, or assigns, and before a sale, judgment was entered up against the mortgagor, who was subsequently discharged under the Insolvent Act, and after such discharge the mortgagee sold under the power of sale, and it was held that the judgment creditor was entitled to the *surplus proceeds* of sale (*c*). A. was tenant for life of one-third of a trust fund, which at the time was invested on *real* securities, and it was held, though the trustees had a power of varying the securities, that A.'s interest was bound by the judgment (*d*). A *feme*, trustee for sale with a power of signing receipts, married, and then with the concurrence of her husband contracted to sell, and the purchaser objected that, as the *feme covert* was *beneficially entitled to one-third* of the produce, and judgments were entered up, but after the contract, against the husband, the wife could not make a title; however, the Court held that the judgments could not neutralise or prejudice the power of sale and signing receipts (*e*). Where a testator devised an estate to his wife for life, with remainder upon trust to sell and *divide the proceeds* amongst the testator's sons for life, of whom James was one, it was held by V. C. Kindersley that the share of James was not "any estate or interest in land" within the meaning of the statute (*f*). But it is observable that of the several previous decisions one only (*Harris* v. *Davison*) appears to have been brought to the attention of the Court.

Proviso against suing in equity until a year after judgment.

18. The object of the proviso in sect. 13, *restraining the creditor from suing for a year*, is not obvious; but most probably the framers of the Act considered, that since he would obtain, as incident to his charge, a right to a sale in equity, while under the *elegit* he could only hold the land and take the

(*a*) *S. C.*, 1 De G. & Sm. 209.

(*b*) *Russell* v. *M'Culloch*, 1 K. & J. 313; and see *Clare* v. *Wood*, 4 Hare, 81. But by the Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 11, when the mortgagee is paid off, the judgment against him ceases to bind the land.

(*c*) *Robinson* v. *Hedger*, 13 Jur. 846; 14 Jur. 784; 17 Sim. 183; and see *Thornton* v. *Finch*, 4 Giff. 515.

(*d*) *Avison* v. *Holmes*, 1 J. & H. 530.

(*e*) *Drummond* v. *Tracy*, Johns. 608.

(*f*) *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

rents and profits, some delay might reasonably be interposed before the exercise of the larger statutory remedy. And, notwithstanding the proviso, it has been held that the judgment creditor is entitled to have the interest of his debtor at once *secured* for the creditor's protection (*a*); and as between *two judgment creditors* the one who first obtains the charging order has priority (*b*).

Consideration of the *Charging Order* provisions.

19. The 14th section of the Act, which introduced a species of execution against *stocks* and *shares* in *public funds* and *public companies* (*c*), which before were not liable, deserves a separate consideration. By that section it is enacted that if any person against whom any judgment (*d*) shall have been entered up in any of Her Majesty's superior Courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any company in England, standing in his name in his own right (*e*), *or in the name of any person in trust for him*, it shall be lawful for the judge of one of the superior Courts, on the application of any judgment creditor, to order that such *stock, &c.*, shall stand charged with the payment of the amount for which judgment may have been recovered, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of *six calendar months* from the date of such order; and by the next following section of the Act it is provided that the order of the judge shall be *ex parte* in the first instance, and shall restrain the Bank or Company from permitting a transfer of the Government stock, funds, annuities,

(*a*) *Yescombe* v. *Landor*, 28 Beav. 80; *Partridge* v. *Foster*, 34 Beav. 1; *Tillett* v. *Pearson*, 43 L. J. N.S. Ch. 93. And see *Smith* v. *Hurst*, 1 Coll. 705, and *S. C.*, 10 Hare, 43; *Mackinnon* v. *Stewart*, 1 Sim. N.S. 76, 91.

(*b*) *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

[(*c*) Debentures of a company are not within these words, and therefore a charging order cannot be made on such debentures standing in the name of a trustee for the judgment debtor; *Sellar* v. *Bright & Co.*, (1904) 2 K. B. (C.A.) 446; nor does the section extend to cash, but by way of equitable execution and in aid of the power conferred by the Judgments Act, 1838, s. 12, of taking money, &c., under a *fieri facias*, a charging order on cash in court standing to the credit of a judgment debtor can be made under the general jurisdiction of the Court of Chancery now vested in the High Court of Justice; *Brereton* v. *Edwards*, 21 Q. B. D. (C.A.) 488.]

(*d*) Extended to *Decrees*, &c., by s. 18; and by the Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1, the property intended to be embraced by this section is further defined, so as to include any interest (as a life estate, [but not a mere *spes successionis*, *Re Ashton*, W. N. (1900) 109]) in stock or shares.

[(*e*) See *post*, p. 1041.]

stock, or shares affected by the order, and that no disposition of the judgment debtor in the meantime shall be valid as against the judgment creditor, [and that unless the judgment debtor shall within a time to be mentioned in the order, show cause, the order shall be made absolute; but the judge may, upon the application of the judgment debtor or any person interested, discharge or vary the order (*a*).]

20. The leading points ruled or decided with reference to this species of execution are the following:—

By whom charging order should be made.

a. [The charging order may be made by any Divisional Court or by any judge (*b*).] The charging order is made *ex parte* and *nisi* in the first instance, but when confirmed absolute it operates from the order *nisi* (*c*).

Charging order will be made at law without deciding the *quantum* of interest charged.

β. Where stocks or funds are *vested in trustees,* and a judgment debtor appears to be interested therein, the charging order will be made at law, so as to affect the *interest of the judgment debtor,* whatever it may be, leaving it to the trustees, if the precise amount of the debtor's interest is not sufficiently defined, to say they will not act except under the direction of the Court (*d*). [A charging order cannot be made affecting stocks and shares forming part of a residuary estate in which the debtor is interested, but which are subject to a direction for conversion and to prior trusts (*e*); but, in general, although conversion of securities is directed by a testator, a beneficiary entitled to a share of residue has nevertheless an interest in the existing securities which may be charged with the amount of a judgment debt (*f*); and a charging order on

[(*a*) For forms of orders, see Seton on Judgments, 6th ed., pp. 477, *et seq.*]

[(*b*) See Order 46, Rule 1 of the Rules of the Supreme Court. Under the old practice it was held that in the ordinary case of a judgment at law, the application for the charging order must be made to one of the Common Law Judges, even though the stock to be charged were standing in the name of the Paymaster-General; see *Hulkes* v. *Day*, 10 Sim. 41. But where a charging order was to be made in furtherance of a decree of the Court of Chancery, it could properly be made by a Judge of the Court of Chancery; see *Stanley* v. *Bond*, 7 Beav. 386; *Westby* v. *Westby*, 5 De G. & Sm. 516; *Wells* v. *Gibbs*, 22 Beav. 204.]

(*c*) *Haly* v. *Barry*, 3 L. R. Ch. App. 452; [*Burns* v. *Irving*, 3 Ch. D. 291; *Brereton* v. *Edwards*, 21 Q. B. D. (C.A.) 488, 495;] and see *Widgery* v. *Tepper*, 6 Ch. D. (C.A.) 364.

(*d*) *Fowler* v. *Churchill*, 11 M. & W. 57; *Rogers* v. *Holloway*, 5 M. & Gr. 292; *Cragg* v. *Taylor*, 12 Jur. N.S. 320; 1 L. R. Ex. 148; 2 L. R. Ex. 131; [*South Western Loan Company* v. *Robertson*, 8 Q. B. D. 17].

[(*e*) *Dixon* v. *Wrench*, 4 L. R. Ex. 154; *Re Marquis of Anglesey*, (1903) 2 Ch. 727, 732.]

[(*f*) *Bolland* v. *Young*, (1904) 2 K.B. (C.A.) 824 (where it was said by Stirling, L.J., that *Dixon* v. *Wrench* (*sup.*) seems to have proceeded on the ground that in that case there was an imperative obligation to convert the shares into money at a definite time, and that the interest of the judgment debtor was in the proceeds of that

a fund standing to the credit of a lunatic ought to be an unconditional order on a specified amount of the fund, and not an order directing that the amount to be charged should be determined by the Lords Justices (*a*).

[No charging order where debtor a trustee.]

γ. A charging order cannot be made on stock or shares standing in the name of the debtor in trust for others (*b*), even though they constitute his qualification as a director of a company, whose articles of association require that a director's qualifying shares shall be held by him "in his own right" (*c*).

[No charging order against executor.]

δ. A charging order cannot be made against the executor of the judgment debtor unless in some way judgment has been obtained against him, it being essential under sect. 15 that the person to show cause should be the person against whom the judgment was recovered (*d*).]

Bank or public company bound to pay dividends to trustee, notwithstanding charging order on interest of *cestui que trust*.

ε. Where a charging order is made upon the partial interest of a *cestui que trust in stock or shares* standing in the names of trustees, the Bank or public company whose stock or shares are affected by the charging order, is not concerned with questions arising between the judgment creditor and other persons interested in the trust fund, but is bound, in like manner as before the charging order, to pay the dividends to the trustees (*e*).

[Judgment for payment *in futuro* or for account.]

[ζ. A charging order may be made in respect of a judgment made payable on a future day (*f*), but not of a mere order for

conversion, and not in the shares); and see *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157, per Kekewich, J.]

[(*a*) *Horne* v. *Pountain*, 23 Q. B. D. 264.]

[(*b*) *Cooper* v. *Griffin*, (1892) 1 Q. B. (C.A.) 740; *Howard* v. *Sadler*, (1893) 1 Q. B. 1.]

[(*c*) See *Pulbrook* v. *Richmond Consolidated Mining Co.*, 6 Ch. D. 610; *Re Blakesley Ordnance Co.*, 46 L. J. N.S. Ch. 367; 35 L. T. N.S. 617. It is to be observed that the words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, have not the same meaning. The language of 1 & 2 Vict. c. 110, s. 14, is "standing in his name in his own right or in the name of any person in trust for him." The juxtaposition of these words shows that the shares to be charged are to be shares in which the judgment debtor has a beneficial interest. The same shares therefore may be held by the judgment debtor "in his own right" for purposes of qualification, but not so as to render them available for the purpose of a charging order: *Sutton* v. *English and Colonial Produce Company*, (1902) 2 Ch. 502, 507, 508, *per* Buckley, J. So where a shareholder was registered as "F., liquidator of the H. company," he was not qualified "in his own right" to be a director: *Re Boschoek Proprietary Company* v. *Fuke*, (1906) 1 Ch. 148.]

[(*d*) *Stewart* v. *Rhodes*, (1900) 1 Ch. (C.A.) 386, and *quære* whether such a judgment can be obtained under the present practice, Ib. Leave under O. XLII., r. 23, to issue execution against the executor does not operate as a judgment, Ib.]

(*e*) *Churchill* v. *Bank of England*, 11 M. & W. 323; [*South Western Loan Company* v. *Robertson*, 8 Q. B. D. 17.]

[(*f*) *Younghusband* v. *Gisborne*, 1 De G. & Sm. 209; *Bagnall* v. *Carlton*, 6 Ch. D. 130.]

an account of what is due in respect of an annuity and for payment, while the account is still pending (*a*), nor an order for payment of money to the credit of an action (*b*).]

Proviso at the end of sect. 14 does not forbid suit for protecting interest of judgment creditor.

η. The proviso at the end of the 14th section, forbidding proceedings until *after six calendar months*, applies only to proceedings for enforcing *immediate payment* of the debt by realising the security, and does not prevent the judgment creditor from taking steps to prevent the security given him by the statute from being in the meantime defeated or diminished. Thus, where the funds are standing in the name of the Paymaster-General, the judgment creditor may, *within the six months*, apply for a stop-order to restrain the debtor from receiving dividends accruing within the six months (*c*).

Effect of charging order.

θ. It must be considered as now settled, notwithstanding a decision of the Court of Queen's Bench to the contrary (*d*), that a judgment creditor who obtains a charging order against stock vested in a trustee is only entitled to such interest therein as the debtor has [and can honestly give (*e*)], and must therefore take subject to all *specific charges*, whether *notice* thereof may or not have been given to the trustee before he has notice of the charging order (*f*). And, as a charging order has no greater effect than an instrument of charge executed by the judgment debtor would have had, if the debt on which the judgment

Prior incumbrances.

[(*a*) *Widgery* v. *Tepper*, 6 Ch. D. (C.A.) 364 ; *Chadwick* v. *Holt*, 8 D. M. & G. 584.]

[(*b*) *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269.]

(*c*) *Watts* v. *Jefferyes*, 3 Mac. & G. 372 ; and see *Bristed* v. *Wilkins*, 3 Hare, 235. [Under the new practice it is not necessary, as a preliminary to obtaining a stop-order on a fund in Court in the Chancery Division, by a person who has a judgment in an action in another Division, that he should obtain a charging order in that Division ; *Hopewell* v. *Barnes*, 1 Ch. D. 630 ; *Shaw* v. *Hudson*, 48 L. J. N.S. Ch. 689 ; and under the Judicature Acts and Supreme Court Fund Rules, 1894, Rule 99, notice of the charging order given at the pay-office will operate as a stop-order to prevent a transfer ; *Brereton* v. *Edwards*, 21 Q. B. D. (C.A.) 488.]

(*d*) *Watts* v. *Porter*, 3 Ell. & Bl. 743 ; Erle, J., *diss.*

[(*e*) *Cooper* v. *Griffin*, (1892) 1 Q. B. (C.A.) 740, *per* Lord Herschell.]

(*f*) *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507 ; *Kinderley* v. *Jervis*, 22 Beav. 34 ; *Scott* v. *Hastings*, 4 K. & J. 633 ; [*Re Bell*, W.N. 1886, p. 46 ; 54 L. T. N.S. 370 ; *Re Leavesley*, (1891) 2 Ch. (C.A.) 1 ; *Punchard* v. *Tomkins*, 31 W. R. 286, in which case a prior unregistered specific charge on lands in Middlesex, was held to have priority over a subsequent general and roving charge ; *Re Marquis of Anglesey*, (1903) 2 Ch. 727. The case in the text is comparable to that of the lien of brokers on the Stock Exchange ; see *Peat* v. *Clayton*, (1906) 1 Ch. 159, where the owner of shares assigned them to trustees for his creditors, and afterwards sold them on the Stock Exchange, and it was held that as the lien of his brokers was only on his interest in the shares, the right of the trustees must prevail over it. See also *Jones* v. *Barker*, (1909) 1 Ch. 321, where a like effect was attributed to a deed of assignment to a trustee for creditors generally.]

[Where debtor lunatic.]

and charging order were founded was void, the charging order is inoperative (*a*); [but this limitation has reference to the extent and priority of the charge, and not to the *capacity* of the judgment debtor, so that a charging order on stock of a lunatic is binding as against his representatives (*b*). A charging order on the stock of a lunatic made after the Court in lunacy has assumed the control of the property of the lunatic, will not prevent that Court from disposing of the stock for the lunatic's benefit (*c*); but if the fund remains in the High Court, the balance only, after satisfying the charging order, will be transferred to lunacy (*d*).

[Remedies under charging order.]

ι. The judgment creditor is entitled under the charging order to such and the same remedies as he would have had if the charge had been created by contract between himself and the debtor; and must, therefore, to enforce the charge, institute fresh proceedings, without which the Court has no jurisdiction to order a sale of the shares (*e*). Leave cannot be given for service of a writ out of the jurisdiction under Order XI., Rule 1 (e), in an action to enforce such a charging order (*f*). The remedy is sale, not foreclosure (*g*).

[Correction of order.]

κ. Where the order *nisi* has been made on the interest of the deceased judgment debtor, and not of his executor, the Court will not correct the order under Order XXVIII., Rule 11, if judgment for the administration of the debtor's estate has been given in the interval between the date of the charging order and the time for showing cause against it (*h*).

[Order absolute cannot be discharged.]

λ. After the order has been made absolute, it cannot be discharged, even upon the application of a person who shows that the shares were standing in the name of the judgment debtor as a mere trustee for the applicant (*i*).

[Execution under Bankruptcy Act.]

μ. An order *nisi* is not "an execution against the goods of a debtor" within sect. 45 of the Bankruptcy Act of 1883 (*j*).

[Forfeiture on alienation.]

ν. A charging order, being an involuntary alienation, will not work a forfeiture under a forfeiture clause determining a life interest on attempt to assign, charge or incumber (*k*), but it will

(*a*) *Re Onslow's Trusts*, 20 L. R. Eq. 677.

[(*b*) *Re Leavesley*, (1891) 2 Ch. (C.A.) 1.]

[(*c*) *Re Plenderleith*, (1893) 3 Ch. (C.A.) 332.]

[(*d*) *Re Brown*, (1900) 1 Ch. 489.]

[(*e*) *Leggott* v. *Western*, 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, (1903) 1 K. B. (C.A.) 534.]

[(*f*) *Kolchmann* v. *Meurice*, (1903) 1 K. B. (C.A.) 534.]

[(*g*) *D'Auvergne* v. *Cooper*, W. N. (1899) 256.]

[(*h*) *Stewart* v. *Rhodes*, (1900) 1 Ch. (C.A.) 386.]

[(*i*) *Jeffryes* v. *Reynolds*, 52 L. J. N.S. C. L. 55; 48 L. T. N.S. 358; *Drew* v. *Lewis*, 60 L. J. Q. B. 264; 39 W. R. 310.]

[(*j*) *Re Hutchinson*, 16 Q. B. D. 515].

[(*k*) *Re Kelly's Settlement*, 59 L. T. N.S. 496, and see *ante*, pp. 112, *et seq.*]

determine a life interest which is only to endure until the tenant for life makes some assignment, or does or suffers some act, whereby the interest may be incumbered, or the dividends become payable to another person (*a*). In like manner a charging order is not a "contract, dealing or transaction" within sect. 49 of the Bankruptcy Act, 1883, and therefore is not protected against the trustee under a bankruptcy founded on an act of bankruptcy committed previously to the order (*b*). [Bankruptcy.]

[*c*. As a charging order is not a contract, a person desiring to enforce it cannot, under the Rules of Court, obtain leave for service out of the jurisdiction (*c*).] [Service out of jurisdiction.]

21. The 1 & 2 Vict. c. 110, was soon followed by the Judgments Act, 1839 (2 & 3 Vict. c. 11), by which it was enacted:—(I.) By sect. 2, that no *judgment* whatsoever should affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless previously *registered* accordingly to the provisions of the Act 1 & 2 Vict. c. 110 (*d*). (II.) By sect. 4, that all *judgments, decrees, rules, and orders* registered, or to be registered according to the provisions of the Act 1 & 2 Vict. c. 110, should, at the expiration of *five years*, be null and void against lands, tenements, and hereditaments, as to *purchasers, mortgagees, or creditors* (*e*), unless they should have again been registered within five years before the right, title, estate, or interest of such purchasers, mortgagees, or creditors accrued (*f*). (III.) By sect. 5, that as against purchasers and mortgagees *without* 2 & 3 Vict. c. 11.

[(*a*) *Montefiore* v. *Behrens*, 1 L. R. Eq. 171; *Roffey* v. *Bent*, 3 L. R. Eq. 759; and see *Hurst* v. *Hurst*, 21 Ch. D. 279.]

[(*b*) *Re O'Shea*, (1895) 1 Ch. (C.A.) 325.]

[(*c*) *Moritz* v. *Stephen*, 36 W. R. 779; *Kolchmann* v. *Meurice*, (1903) 1 K. B. (C.A.) 534.]

[(*d*) This section is now repealed by the Land Charges Act, 1900, see *post*, p. 1056.]

(*e*) These words mean *purchasers, mortgagees, or creditors* becoming such after the omission to re-register, so that, if A. and B. be respectively first and second judgment creditors who both duly register, A. does not, by subsequently omitting to re-register, lose his priority over B.; *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 492; *Shaw* v. *Neale*, 6 H. L. Cas. 581; and see *Simpson* v. *Morley*, 2 K. & J. 71; *Benham* v. *Keane*, 1 J. & H. 697. [Where A., B., and C. were successive judgment creditors, and A. registered his judgment on the 12th of March, 1840, but never re-registered; B. registered his judgment in April, 1842, and re-registered in March, 1848; C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850, it was held that though, by not re-registering, A. did not lose the priority which he had gained over B., nor B. the priority which he had gained over C., yet as A.'s judgment was bad as against C., the result was that C. was first entitled to take the amount due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment; *Re Lord Kensington*, 29 Ch. D. 527; and as to the effect of the Acts generally, see *ibid.*, pp. 531, 532.]

(*f*) And see the Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 6.

notice, no *judgment, decree, or order* should have a greater effect than a judgment would have had against such purchaser or mortgagee, before the passing of 1 & 2 Vict. c. 110. (IV.) By sect. 8, that judgments, statutes, and recognisances to the *Crown* (*a*) should not bind purchasers or mortgagees unless registered as Crown debts (*b*). By virtue of the above clauses the execution that might under the former statute have been taken out at *law* against an equitable interest in the hands of a *purchaser for value without notice* was, in common with every other advantage given by the former statute against such purchaser, recalled, and the purchaser was relieved from the necessity of carrying his search back beyond the period of five years; except as regarded Crown debts, to which the enactment requiring registration did not apply.

Old law still applicable in case of purchase for value *without notice.*

A singular result of the 5th section was, that in the occasional, though rarely occurring case of a purchase or mortgage *without notice* of a previously *registered* judgment, the old law, as it existed before 1 & 2 Vict. c. 110, was resorted to for guidance. Thus, by 1 & 2 Vict. c. 110, judgments were a lien upon leaseholds, but by 2 & 3 Vict. c. 11, sect. 5, if a purchaser or mortgagee thereof had no notice of a registered judgment (for registration is not notice *per se*), he was not bound by the judgment unless at the time of the purchase or mortgage an *elegit* had been issued, for by the old law a judgment did not become a lien upon chattels until the writ of execution was lodged in the hands of the sheriff (*c*).

3 & 4 Vict. c. 82. Notice ineffectual without registration.

22. This Act, however, still left open the question whether, by analogy to the cases under the Registry Acts, a purchaser, mortgagee, or creditor, if he had actual notice of an unregistered judgment, was not bound by it; and the Judgments Act, 1840, (3 & 4 Vict. c. 82), was passed to obviate this. It was thereby enacted, by the second section, that no *judgment, decree, order, or rule* (not mentioning Crown debts) should, *by virtue of the said Act* (1 & 2 Vict. c. 110), affect any lands at law or in equity

(*a*) The Act speaks only of recognisances to the *Crown*, and not of recognisances in general, as on receiverships, which are also liens on real property. The 27 and 28 Vict. c. 112, s. 1, [now repealed by the Land Charges Act, 1900] extended to recognisances *generally;* but the Act was not retrospective, and therefore did not apply to recognisances entered up before the passing of the Act, 29th July, 1864. Recognisances to the Crown were further provided for by the Crown Suits, &c., Act, 1865 (28 & 29 Vict. c. 104), s. 48, [which has now been repealed by the Land Charges Act, 1900, see *post*, p. 1056.]

[(*b*) These two sections (5 and 8) are now repealed by the Land Charges Act, 1900, see *post*, p. 1056.]

(*c*) *Westbrooke* v. *Blythe*, 3 Ell. & Bl. 737.

as to purchasers, mortgagees, or creditors, until registration (*a*) under the said Act, any notice of such judgment, decree, order, or rule to any purchaser, mortgagee, or creditor, in anywise notwithstanding.

18 & 19 Vict. c. 15.

23. It being, however, doubted whether this Act protected a purchaser, mortgagee, or creditor from the effect of notice as to any remedy against him which the judgment creditor had before, independently of 1 & 2 Vict. c. 110, or whether its effect was not limited to protection against the additional remedy given to the judgment creditor by that Act (*b*), it was, in order to obviate this inconvenience, enacted generally, by the Judgments Act, 1855 (18 & 19 Vict. c. 15), sect. 4 (*c*), that no *judgment, decree, order, or rule* (*d*) which might be registered under 1 & 2 Vict. c. 110, should affect any lands, &c., at law or in equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum, &c., should have been left with the proper officer, any notice of any such judgment, decree, &c., to any such purchaser, mortgagee, or creditor, in anywise notwithstanding.

22 & 23 Vict. c. 35. Crown Debts.

24. The Law of Property Amendment Act, 1859, sect. 22, put *Crown debts* on the same footing as judgments as regards the necessity of re-registration from time to time, thus reducing the period over which the search for Crown debts should extend to five years, as in the case of judgments, &c.

23 & 24 Vict. c. 38. Issue and registration of writ of execution required.

25. By the Law of Property Amendment Act, 1860, (*e*) sect. 1, freehold, copyhold, and leasehold estates were, in respect of *judgments* (*f*), *statutes, and recognisances,* as against purchasers and mortgagees placed upon the same footing, and no such judgments, &c., entered up after the date of the Act (*23rd July,* 1860), were to affect lands in the hands of purchasers or mortgagees, unless a *writ of execution should have been issued and registered* before the conveyance or mortgage, and unless execution should be put in force within three calendar months from the registration. A purchaser, therefore, was thus precluded from objecting to the title on the ground of his having

(*a*) The framer of this Act appears to have overlooked the intermediate Act of 2 & 3 Vict. c. 11, *ante,* p. 1045, and to have left it doubtful whether re-registration within five years was necessary to exclude the title of a purchaser with notice. This doubt was set at rest by s. 5 of 18 and 19 Vict. c. 15.

(*b*) See *Beere* v. *Head,* 3 Jon. & Lat. 340.

[(*c*) Now repealed by the Land Charges Act, 1900, see *post,* p. 1056.]

(*d*) *N.B.*—Not mentioning Crown debts.

[(*e*) Sections 1 to 5 of this Act are now repealed by the Land Charges Act, 1900.]

(*f*) This, by s. 5, includes decrees, orders in equity and bankruptcy, and other orders having the operation of a judgment.

notice of a judgment entered up after the Act, and registered at the Common Pleas, but upon which no execution had been issued (*a*).

Who are purchasers.

26. As to the meaning of the word *purchasers*, it has been held that a wife and children are purchasers under a marriage settlement of the interests limited to them out of the husband's estate, but the husband as to a life interest limited to himself out of his own estate is not a purchaser, and a judgment therefore would attach upon it just as if it were not the subject of settlement (*b*).

Construction of the Acts.

27. And the construction of the Acts extending the remedies of the judgment creditor, is that as to *equitable interests* they are to receive the same construction as the Statute of Frauds, and consequently that simple trusts only can be taken in execution at law (*c*).

27 & 28 Vict. c. 112.

28. We now come to the Judgments Act, 1864, (*d*), which enacted, by the first section, that no *judgment, statute, or recognisance* to be entered up after 29*th July*, 1864, should affect any land until *actual delivery of the land in execution by a writ of elegit or other lawful authority* (*e*). And by the third section, that every writ or other process of execution must be *registered* in the name of the *debtor*. And by the fourth section, that the creditor to whom any land shall have been actually delivered in execution (*f*), *and whose writ or other process of execution shall be duly registered* (*g*) is entitled forthwith to obtain from the Court of Chancery an order (*h*), to be served upon the debtor only, for the *sale of the debtor's interest* in the land (*i*), and thereupon inquiries are to be directed as to the nature and particulars of such debtor's interest (*j*). And by

(*a*) *Wallis* v. *Morris*, 10 Jur. 740; and see *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

(*b*) *Re Browne*, 13 Ir. Ch. Rep. 283.

(*c*) *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149.

[(*d*) Sections 1, 2, & 3 of this Act, and, in section 4, the words "and whose writ or other process of execution shall be duly registered," are repealed by the Land Charges Act, 1900, see *post*, p. 1056.]

(*e*) The provisions of this Act were by 28 & 29 Vict. c. 104, s. 48, extended, as from 1st November, 1865, to *Crown debts*.

(*f*) As to the effect of these words, see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413.

[(*g*) See *ante*, note (*d*).]

[(*h*) To be obtained now on summons; see R. S. C. Order LV., r. 9 B.; *Re Harrison and Bottomley*, (1899) 1 Ch. (C.A.) 465.]

[(*i*) Where the order is made under the erroneous supposition that the Court is dealing with an interest belonging to the judgment debtor, whereas it in fact belongs to a person not a party to or bound by the proceedings, the purchaser will not acquire a title by virtue of sect. 70, sub-s. 1 of the Conveyancing Act, 1881; *Jones* v. *Barnett*, (1900) 1 Ch. (C.A.) 370.]

(*j*) As to the inquiries which the Court directs, see *Re Ventnor Harbour Company*, W. N. 1866, p. 9; *Re Hull*

the 5th section, that if it be found that the land is charged with *any other debt* due on any judgment, statute, or recognisance, whether prior or subsequent to the charge of the petitioner, such other creditor is to be served with notice of the order for sale, and is to be at liberty to attend the proceedings; and the proceeds of sale are then to be distributed amongst the parties entitled according to their priorities.

The Act as affecting equitable interests.

29. This Act has a most important bearing upon *equitable* interests. The object of it, as expressed in the preamble, was "to assimilate the law affecting freehold, leasehold, and copyhold estates to that affecting pure personal estates," and it extends to land "or *any interests therein*," and therefore comprises all equitable interests. Judgments, therefore, will not affect any equitable interest "until actual delivery of the land in execution by a writ of *elegit* or *other lawful authority*." But the words "actual delivery" are to be construed in a liberal sense, for incorporeal hereditaments and equities are not capable of manual delivery, and yet are included in the Act. Indeed, as Lord Justice Mellish observed: "The sheriff (as to a *legal elegit*) does not give the creditor *actual possession* of the land itself, but the effect of his return is to vest the legal estate in the creditor, who can then bring an ejectment" (*a*). The Act speaks of delivery of possession, not only by writ of *elegit*, but "by *other lawful authority*," and this has been held to mean, "any lawful authority which could cause such a delivery in execution as the subject matter is capable of; and where a judgment creditor comes into equity to remove a legal impediment, the relief given is substantially a delivery in possession, whether in form it be a *writ of assistance* or of *sequestration*, or the *appointment of a receiver*" (*b*).

Present state of the law.

A judgment creditor, therefore, who comes under the operation of the Act, may still obtain equitable execution against an equitable interest, but the judgment forms no *lien* upon the equitable interest until the creditor has reached some process in equity corresponding to actual execution at law, such as sequestration, or the appointment of a receiver, or an order for sale. Thus a creditor having a judgment against a mortgagor

and Hornsea Railway Company, 2 L. R. Eq. 262; *Gardner* v. *London, Chatham and Dover Railway Company*, 2 L. R. Ch. App. 385.

(*a*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 236.

(*b*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 235, *per* Lord Selborne; [*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. (C.A.) 252; *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. (C.A.) 338;] and see *Re Bailey's Trust*, 38 L. J. N.S. Ch. 237; [*Thompson* v. *Gill*, (1903) 1 K. B. (C.A.) 760, 766, 768].

may obtain equitable execution against him by the appointment of a receiver of rents and profits, subject to the right of the mortgagee (*a*), or he may take proceedings against the mortgagor and mortgagee for redemption of the mortgage and foreclosure of the mortgagor (*b*).

Proceedings before equitable execution, when premature.

Should a judgment creditor, without taking proceedings for equitable execution, make an application *in a summary way under the Act for sale of the equitable interest*, the application would be dismissed, as the creditor has no *lien* by virtue of the *judgment itself*, and the Court has not yet awarded any *equitable execution* (*c*); and so, if a creditor having a judgment against a mortgagor bring an action for execution against the equity of redemption, and, *before the Court has made any order amounting to equitable execution*, the mortgagor becomes bankrupt, the action must be dismissed, for previously to the bankruptcy, which vested the property in the trustee for the benefit of all the creditors equally, no *lien* had attached (*d*).

Property not capable of actual delivery.

Where the subject matter is *not in possession*, and therefore is in its nature not capable of *actual delivery* by the sheriff, as in the case of a remainder expectant on a particular estate, there, although the sheriff may have made a *return of actual delivery*, yet, as such return is false in law, and therefore null, an application for sale under the Act founded upon such return cannot be sustained (*e*).

An *elegit* need not be actually sued out.

30. If the creditor seeks to remove some impediment to the *legal* execution of the judgment, he must lay a foundation for the interference of equity [by showing that the legal remedies have been exhausted. For this purpose it was, prior to the Judicature Act, necessary for the creditor to sue] out an *elegit* at law (*f*); and the same rule prevailed where the judgment was merely an *equitable lien* (*g*); but the *elegit* need not have been

(*a*) *Wells* v. *Kilpin*, 18 L. R. Eq. 298; [*Kidd* v. *Tallentire*, W. N. 1877, p. 21; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275; *Re Pope*, 17 Q. B. D. (C.A.) 743; *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. (C.A.) 338, *q.v.* as to form of order where the property consists of a theatre.]

(*b*) *Beckett* v. *Buckley*, 17 L. R. Eq. 435; and see *Ford* v. *Wastell*, 6 Ha 229; *Messer* v. *Boyle*, 21 Beav. 559.

(*c*) *Re Duke of Newcastle*, 8 L. R. Eq. 700; and see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413; *Re South*, 9 L. R. Ch. App. 369.

(*d*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 229.

(*e*) *Re South*, 9 L. R. Ch. App. 369.

(*f*) See *Dillon* v. *Plasket*, 2 Bligh, N.S. 239; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 407; Mitford on Plead. 126, 4th ed.

(*g*) *Neate* v. *Duke of Marlborough*, 9 Sim. 60; 3 M. & Cr. 407; *Godfrey* v. *Tucker*, 33 Beav. 280; *Imperial Mercantile Credit Association* v. *Newry and Armagh Railway Company*, 2 Ir. Rep. Eq. 23, *per Cur.*; but see *Tunstall* v. *Trappes*, 3 Sim. 286; *Rolleston* v. *Morton*, 1 Conn. & Laws. 257.

returned (*a*); and where the trust estates were in three counties, an *elegit* in one was held to be sufficient (*b*). [But since the Judicature Act it is not necessary to sue out an *elegit* if it can be otherwise shown that there is no property of the debtor against which the *elegit* could be issued for the purpose of satisfying the judgment, and where an affidavit to that effect was made by the creditor, a receiver was appointed although no *elegit* had issued (*c*); and a judgment creditor may in the same action establish a charge and enforce it (*d*).

[Registration not necessary to give priority where land actually delivered in execution.]

[But necessary before sale.]

31. If land has been actually delivered in execution to a creditor it is not necessary to register the judgment, writ, or other process of execution in order to give the creditor a charge on the land in priority to persons claiming under the debtor, including a purchaser for value without notice (*e*). But the writ or other process of execution must be registered before a summary order for sale can be obtained under sect. 4 of 27 & 28 Vict. c. 112 (*f*).]

Fi. fa. sufficient in case of equitable chattel real.

32. When the interest sought to be affected is an *equitable chattel real*, it is sufficient to sue out a writ of *fieri facias* (*g*). And when the assistance of the Court is sought in favour of a County Court judgment against an equitable chattel real, it is sufficient to pursue the analogous step of placing a writ of execution in the hands of the high bailiff, pursuant to the County Court Act (*h*).

Redemption of a mortgage.

33. A judgment creditor may *redeem a mortgage* without suing out an *elegit*; for inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out a writ, it gives to the party the right to come in and redeem other incumbrancers upon the property (*i*).

Proceedings in equity of judgment creditor after death of conusor.

34. Whether a judgment be *legal* or *equitable*, if the creditor take proceedings in equity *after the death of the conusor* for

(*a*) *Dillon* v. *Plasket*, 2 Bligh, N.S. 239; and see *Campbell* v. *Ferrall*, Rep. *t.* Plunket, 388; [*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275].

(*b*) *Dillon* v. *Plasket*, 2 Bligh, N.S. 239.

[(*c*) *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. (C.A.) 252; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275; *Re Whiteley*, 56 L. T. N.S. 846, 848; *Harris* v. *Beauchamp*, (1894) 1 Q. B. (C.A.) 801; *Flegg* v. *Prentis*, (1892) 2 Ch. 428.]

[(*d*) *Beckett* v. *Buckley*, 17 L. R. Eq. 435; *Salt* v. *Cooper*, 16 Ch. D. (C.A.) 544; *Smith* v. *Cowell*, 6 Q. B. D. 75.]

[(*e*) *Re Pope*, 17 Q. B. D. (C.A.) 743.]

[(*f*) *Re Pope*, *ubi sup.*]

(*g*) *Gore* v. *Bowser*, 3 Sm. & G. 1; affirmed 24 L. J. Ch. 440; *Smith* v. *Hurst*, 10 Hare, 30; *Smith* v. *Hurst*, 1 Coll. 705; *Partridge* v. *Foster*, 34 Beav. 1.

(*h*) *Bennett* v. *Powell*, 3 Drew. 326.

(*i*) *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 416, *per* Lord Cottenham; and see *Godfrey* v. *Tucker*, 33 Beav. 284.

satisfaction of his claim out of the personal assets, and in case of their deficiency, by a sale of the real estate, an actual *elegit* is *not* an essential requisite (*a*).

[Equitable execution by appointment of receiver.]

[35. Equitable execution by the appointment of a receiver is granted where there is an impediment to the obtaining of execution in due course of law by *elegit* or *fieri facias* or otherwise, and, notwithstanding the provision in the Judicature Act, 1873, sect. 25, enabling the Court to appoint a receiver whenever "it is just or convenient," will, in general, be granted only in such circumstances as would have enabled the Court of Chancery before the Judicature Act to interfere by way of injunction or receiver at the suit of the judgment creditor, for the enactment does not authorise the Court to invent new modes of enforcing judgments in substitution for the ordinary modes (*b*). In accordance with these principles, it has been held that a judgment creditor may obtain the appointment of a receiver of an equitable reversionary interest in personalty or proceeds of sale of realty (*c*), or of a life interest in settled funds (*d*), or of a debt or sum of money payable to the judgment debtor to which garnishee proceedings are not applicable (*e*); or where an order has been made for payment into Court by a defaulting trustee who is out of the jurisdiction, so that service of a writ of attachment cannot be effected (*f*); and under sect. 89 of the Judicature Act, 1873, a County Court has power to appoint a receiver by way of execution against equitable interests in land (*g*), but not, it would seem, against interests in patents (*h*). The

(*a*) *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 24; see the observations of Lord Fitzgibbon, p. 61; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 416.

[(*b*) *Harris* v. *Beauchamp*, (1894) 1 Q. B. (C.A.) 801, where the laxity which has prevailed in granting receivership orders on the ground of greater convenience only was animadverted on; *Manchester and Liverpool Banking Company* v. *Parkinson*, 22 Q. B. D. (C.A.) 173; *Re Shephard*, 43 Ch. D. (C.A.) 131; *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. (C.A.) 338; *Thompson* v. *Gill*, (1903) 1 K. B. (C.A.) 760, 765.]

[(*c*) *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Tyrrell* v. *Painton*, (1895) 1 Q. B. (C.A.) 202.]

[(*d*) *Oliver* v. *Lowther*, 42 L. T. N.S. 47; 28 W. R. 381.]

[(*e*) *Westhead* v. *Riley*, 25 Ch. D. 413; and see *Beamish* v. *Stephenson*, 18 L. R. Ir. 319; *Re M'Nulty*, 31 L. R. Ir. 391; *Picton* v. *Cullen*, (1900) 2 I. R. (C.A.) 612, (where a receiver was appointed of an instalment of salary due to a National schoolmaster); *Goldschmidt* v. *Oberrheinische Metallwerke*, (1906) 1 K. B. 373, (where judgment was obtained by the plaintiff against a German firm who had no property in this country, but were known to have divers English customers who were indebted to them, and whose debts they were endeavouring to collect in order to avoid proceedings).]

[(*f*) *Re Coney*, 29 L. R. Ch. D. 399, followed in *Re Pemberton*, (1907) W. N. 118.]

[(*g*) *Rex* v. *Selfe*, (1908) 2 K. B. 121.]

[(*h*) *Edwards & Co.* v. *Picard*, (1909) 2 K. B. (C.A.) 903.]

appointment of the receiver may, under special circumstances, be made *ex parte* upon an interlocutory application immediately after the institution of the action (*a*), or without the institution of a fresh action on an interlocutory application in the action in which the judgment was obtained (*b*). The appointment, though made conditional upon the receiver's giving security, operates as an *immediate* equitable execution (*c*), and as an injunction to restrain the judgment debtor from receiving the money over which the receiver is appointed (*d*), and if the property is already in the hands of a receiver, the Court may appoint another receiver, but not to act until the earlier receiver has been discharged, which will amount to equitable execution (*e*); and where a receiver of a partnership had been appointed in a Chancery action, the Court gave a judgment creditor of the firm a charge for his debt and costs on all the partnership moneys come or coming to the receiver, the creditor undertaking to deal with the charge according to the order of the Court (*f*). If the appointment of the receiver is merely for the purpose of giving a charge, and it is not intended that he should go into possession, the Court will make the appointment without security, on the judgment creditor and the receiver undertaking that the receiver shall not act without the leave of the Court (*g*). An *ex parte* injunction to restrain a judgment debtor from dealing with property until after the hearing of an application for a receiver, ought not to be granted unless it is shown that there is danger of the property being made away with by him (*h*).

This form of relief, though styled "equitable execution," is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Therefore a receiver by way of equitable execution of the property of a

[(*a*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. (C.A.) 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. (C.A.) 252; *Minter* v. *Kent, Sussex, and General Land Society*, 72 L. T. N.S. 186.]

[(*b*) *Smith* v. *Cowell*, 6 Q. B. D. 75; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Salt* v. *Cooper*, 16 Ch. D. (C.A.) 544: *Re Pope*, 17 Q. B. D. (C.A.) 743; *M'Garry* v. *White*, 16 L. R. Ir. 322.]

[(*c*) *Ex parte Evans*, *ubi sup.*]

[(*d*) *Tyrell* v. *Painton*, (1895) 1 Q. B. (C.A.) 202, 206, *per* Lindley, L. J.; *Re Marquis of Anglesey*, (1903) 2 Ch. 727.]

[(*e*) *Per* Jessel, M.R., *Salt* v. *Cooper*, 16 Ch. D. (C.A.) 544.]

[(*f*) *Kewney* v. *Attrill*, 34 Ch. D. 345; as to the effect of an order in this form, see *Ridd* v. *Thorne*, (1902) 2 Ch. 344.]

[(*g*) *Hewett* v. *Murray*, W. N. 1885, p. 53; 54 L. J. Ch. 572; see Seton, 6th ed. pp. 777, 793.]

[(*h*) *Lloyds Bank Limited* v. *Medway Upper Navigation Co.*, (1905) 2 K. B. (C.A.) 359.]

deceased person cannot be appointed in the absence of any person to represent the estate (*a*).

It is to be observed that, as regards personalty, there is no provision in the Judgments Act, 1838, corresponding with the provision in sect. 13 (*b*) conferring a charge upon real estate, and consequently, the Court has no jurisdiction to make a declaration of charge in favour of the judgment creditor as to personalty, or enforce such charge by sale (*c*).

["Execution" under Judgments Extension Act, 1868.]

36. Under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), which places a Scotch decreet, a certificate of which is registered pursuant to the Act, on the same footing as an English judgment, and confers jurisdiction on the English Court, "in so far only as relates to execution," the word "execution" includes equitable execution by the appointment of a receiver, and an order for such appointment may accordingly be made to enforce such a decreet (*d*).

[Attachment under Order 45.]

37. In order to found an attachment under Order 45 of the Rules of the Supreme Court, there must be an actual debt at the time, although it need not be then due. Therefore, where a judgment debtor was entitled for life to the income of a trust fund payable half-yearly, and the trustees had duly made the last half-yearly payment and had no money representing income in their hands, it was held that there was nothing to attach. The proper course in such a case is to obtain equitable execution by the appointment of a receiver (*e*).

[Effect of bankruptcy.]

38. A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. And an execution against goods is completed by seizure and sale; an attachment of a debt by receipt of the debt; and an execution against land by seizure, or, in the case of an equitable interest, by the appointment of a receiver (*f*).

[Registration of writs and orders affecting land under 51 & 52 Vict. c. 51.]

39. By and under the Land Charges Registration and Searches Act,

[(*a*) *Re Shephard*, 43 Ch. D. (C.A.) 131; and see *Re Cave*, W. N. (1892) p. 142.]

[(*b*) See *ante*, p. 1037.]

[(*c*) *Flegg* v. *Prentis*, (1892) 2 Ch. 428.]

[(*d*) *Thompson* v. *Gill*, (1903) 1 K. B. (C.A.) 760.]

[(*e*) *Webb* v. *Stenton*, 11 Q. B. D. (C.A.) 518; see *Re Cowan's Estate*, 14 Ch. D. 638.]

[(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45.]

1888 (51 & 52 Vict. c. 51), sect. 5, there is established and kept at the Office of Land Registry a register of writs and orders affecting land (*a*), wherein may be registered in the prescribed manner (*b*) any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute or recognisance, and any order appointing a receiver or sequestrator of land. Every entry made in pursuance of the section is to be made in the name of the person whose land is affected (*c*) by the writ or order registered. The registration of a writ or order in pursuance of the Act ceases to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, has effect for five years from the date of the renewal. Registration of a writ or order in pursuance of the section is to have the same effect as, and to make unnecessary, registration thereof in the Central Office of the Supreme Court in pursuance of any other Act.

[Protection of purchasers against non-registered writs and orders.]

40. Sect. 6 of the Act provides as follows: "Every such writ and order as is mentioned in sect. 5, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value (*d*) of the land unless the writ or order is for the time being registered in pursuance of this Act;" but it is further provided that, when the writ or order is, at the commencement of the Act (1st Jan. 1889), registered in pursuance of 27 & 28 Vict. c. 112 (*e*), nothing in the section is to affect the operation of such writ or order, until the expiry of the period for which it is so registered (*f*), and that where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens*, in the name of the person whose land is affected by the writ or order, nothing in the section shall affect the operation of such registration.

[Definitions of "land," "purchaser for value," "judgment."]

41. By sect. 4 "land" is defined as including "lands, messuages, tenements, and hereditaments, corporeal and incorporeal of any tenure" (*g*), and "purchaser for value" includes "a mortgagee or lessee, or other person who for valuable consideration takes any

[(*a*) See definition of land, *inf.*]

[(*b*) General rules under the Act have been issued, and will be found in Elphinstone and Clark on Searches.]

[(*c*) *I.e.* whose estate or interest is affected, see *inf.*, note (*g*).]

[(*d*) See definition, *inf.*]

[(*e*) See *ante*, p. 1048.]

[(*f*) This proviso is repealed by the Land Charges Act, 1900.]

[(*g*) The definition, it will be seen, does not expressly include equitable interests in land, but it appears to be clear, from the provisions as to registration and otherwise, that they are included. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), in every Act passed after 1850 the expression

interest in land or in a charge on land, and 'purchase' has a meaning corresponding with purchaser."

"Judgment" does not include "an order made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment" (*a*).

[Effect of enactment.]

42. The general effect of the Act appears to be, that, except in the case of receiving orders under the Bankruptcy Act, 1883, or process of execution by the Crown (which is not mentioned in the Act), unless the writ or order is registered under the Act, the lien of a judgment creditor as against a purchaser for value is taken away. It would further seem that, in the absence of such registration, a purchaser without notice will not in future be affected by mere delivery in execution (*b*). Registration, however, is requisite only as against a purchaser for value, and not as against volunteers or judgment creditors or the debtor himself.

[Land Charges Act, 1900.]

43. By the Land Charges Act, 1900 (63 & 64 Vict. c. 26), which is to be construed as one with the Land Charges Registration and Searches Act, 1888, after a provision in sect. 1, already referred to (*c*), for the transfer of the business relating to the registry of judgments to the Land Registry Office, it is enacted (*inter alia*) as follows (*d*):—Section 2:—"(1.) A judgment or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under sect. 5 of the Land Charges Registration and Searches Act, 1888.

"(2). This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

"(3). Except under an order of the High Court, no entry shall

"land" is (unless the contrary intention appears) to include "messuages, tenements, and hereditaments, houses and buildings of any tenure."]

[(*a*) A County Court judgment would seem to be within the Act, see Elphinstone and Clark on Searches, Supplement, pp. 9, 11.]

[(*b*) See Elphinstone and Clark on Searches, Supplement, p. 14, where the opinion is expressed that a purchaser without notice will be bound by the effect of delivery in execution, *plus* registration, and that where there is in fact an entry in the register at the time of the purchase, he will not be protected because he has omitted to search, and had no notice *aliunde*.]

[(*c*) See *ante*, pp. 587, 1054.]

[(*d*) The Act (except as to the transfer of business) came into operation on 1st July, 1901; see sect. 6.]

be made in any register kept under sects. 19 and 21 of the Judgments Act, 1838, sect. 8 of the Judgments Act, 1839, the Law of Property Amendment Act, 1860, the Judgments Act, 1864, or the Crown Suits, &c., Act, 1865."

Sect. 3 :—"Sect. 6 of the Land Charges Registration and Searches Act, 1888 (*a*), shall apply to every writ and order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this Act, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto."

The Act also provides that the Middlesex Registry Act, 1708, is not to apply to any instrument made after the passing of the Act, and capable of registration under the Act or the Land Charges Registration and Searches Act, 1888 (*b*), and repeals previous enactments (*c*).]

SECTION VIII

OF EXTENTS FROM THE CROWN

Extent binds trust.

1. The equitable interest of a term, or of a freehold held in trust, is liable to an extent from the Crown (*d*); and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law (*e*). The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person might be said to *have* lands, when by subpœna in Chancery he might exercise any dominion over them (*f*)

Sale of the lands extended.

2. At common law the extent of the Crown did not authorise a *sale* of the lands, but only the perception of the *rents and profits*, until the amount of the debt was levied (*g*). This defect

[(*a*) See p. 1054.]

[(*b*) See sect. 4.]

[(*c*) See sect. 5. The repeals are previously indicated, so far as material, in the notes to this section of the work.]

(*d*) *King* v. *Lambe*, M'Clel. 422, *per* Sir W. Alexander; *Chirton's case*, Dyer, 160, a; *S. C.*, cited *Sir E. Coke's case*, Godb. 293; the cases cited Id. 294; Id. 298; *Babington's case*, cited Id. 299; *King* v. *Smith*, Sugd. Vend. & Purch. Append. No. xv. 11th ed., *per* Ch. Baron Macdonald; and see Ib. 14th ed. p. 545.

(*e*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale.

(*f*) See *Sir E. Coke's case*, Godb. 294.

(*g*) *Rex* v. *Blunt*, 2 Y. & J. 122, *per* Baron Hullock.

was supplied partially by a statute of Elizabeth (*a*), and more effectually by the Crown Debtors Act, 1785 (25 G. 3. c. 35). It is by the latter statute enacted, that "it shall be lawful for the Court of Exchequer, and the same Court is hereby authorised, on the application of the *Attorney-General* (*b*) in a summary way by *motion* (*c*) to the same Court, to order that the *right, title, estate, and interest* of *any debtor* to the Crown, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under or by virtue of any extent or *diem clausit extremum*, shall be sold as the Court shall direct, and the conveyance shall be made by the Remembrancer in the said Court of Exchequer, or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the said Court."

Equity of redemption.

3. By the effect of this enactment, a trust or equity of redemption (*d*) of a Crown debtor may now be sold upon summary application to the King's Bench Division by motion.

SECTION IX

OF FORFEITURE

Trust not forfeitable at common law for attainder.

1. A trust of lands was never *forfeitable* at *common law* for attainder of either treason or felony (*e*); for forfeiture worked only upon *tenure*, and a trust was *holden* of nobody. The ground of the forfeiture at *law* was that all estates were *held* upon condition of duty and fidelity to the Lord, and upon breach of allegiance they returned to the Crown, from whom they originally proceeded (*f*).

[Whether forfeitable for treason under statute.]

[2. Under the provisions and upon the construction of the statutes 26 H. 8. c. 13, sect. 5, 27 H. 8. c. 10, and 33 H. 8. c. 20, sect. 2, it was matter of doubt whether a trust of lands was or was not forfeitable on attainder for high treason (*g*).]

Whether equities of redemption subject to forfeiture.

3. *Equities of Redemption* appear to have been made forfeitable for attainder of treason by 33 H. 8. c. 20 (*h*); for the statute

(*a*) 13 Eliz. c. 4.
(*b*) See *Rex* v. *Bulkeley*, 1 Y. & J. 256.
(*c*) See *Rex* v. *Blunt*, 2 Y. & J. 120.
(*d*) *King* v. *De la Motte*, Forr. 162.
(*e*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; 1 Hale's P. C. 247; Jenk. 190.
(*f*) Gilb. on Uses, 38.
[(*g*) See the subject considered in the ninth edition of this work, pp. 931, *et seq.*]
(*h*) *Anon. case*, cited *Reeve* v. *Attorney-General*, 2 Atk. 223.

enumerates *conditions*, and the interest of the mortgagor is a condition, which, though broken at law, is saved whole to him in a Court of Equity.

4. Trusts of *chattels*, whether real or personal, were always forfeitable to the Crown upon conviction (*a*); but in these cases the forfeiture did not reach the legal estate vested in the trustee, but entitled the Crown to sue a *subpœna* in equity (*b*).

Trusts of chattels forfeitable upon conviction.

Crown entitled to *subpœna*.

5. *Money* liable to be laid out in the purchase of *land* was regarded as land, and so protected from being forfeited as *personal* estate (*c*).

Money liable to be laid out in land.

6. Now by the Forfeiture Act, 1870, it is enacted that "from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se* shall cause any attainder or corruption of blood, or any *forfeiture* or escheat; provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*" (*d*).

33 & 34 Vict. c. 23, s. 1.

7. At *law* a tenant for life might, until the Real Property Act, 1845 (*e*), by certain tortious acts, as by a feoffment of the fee simple, have forfeited his estate to the remainderman (*f*); but had an *equitable* tenant for life affected to dispose of the *equitable* fee, no forfeiture would have accrued, for nothing passed beyond the grantor's actual interest (*g*). By the Act last referred to all conveyances are now innocent, that is, they pass nothing but what the grantor can lawfully part with.

Forfeiture by equitable tenant for life.

SECTION X

OF ESCHEAT

1. [Until the Intestates' Estates Act, 1884 (*h*)], a trust in fee of lands was not subject to escheat (*i*). This was determined in the great case of *Burgess* v. *Wheate* (*j*), before Lord Northington,

Trust formerly not subject to escheat.

Burgess *v.* Wheate.

(*a*) *Wikes's case*, Lane 54, agreed; *King* v. *Daccombe*, Cro. Jac. 512; Jenk. 190, case 92; *Attorney-General* v. *Sands*, Hard. 495; *Pawlett* v. *Attorney-General*, Hard. 467, *per* Lord Hale; *Sir J. Dack's case*, cited *Rex* v. *Holland*, Aleyn, 16; *Re Thomson's Trusts*, 22 Beav. 506.

(*b*) *Rex* v. *Holland*, Al. 14; *Sir J. Dack's case*, as cited by Rolle, J., Id. 16; *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; and see *Kildare* v. *Eustace*, 2 Ch. Ca. 188; *S. C.*, 1 Vern. 405, 419, 423, 428, 437.

(*c*) *Harrop's Estate*, 3 Drew. 726.

(*d*) See *ante*, pp. 27, 28.

(*e*) 8 & 9 Vict. c. 106, s. 4.

(*f*) See Co. Lit. 251, a.

(*g*) *Lethieullier* v. *Tracy*, 3 Atk. 728, 730; *Lady Whetstone* v. *Bury*, 2 P. W. 146.

[(*h*) 47 & 48 Vict. c. 71.]

(*i*) *Attorney-General* v. *Sands*, Hard. 488; and see 1 Harg. Jurid. Exerc. 383.

(*j*) 1 Eden, 176; *S. C.*, 1 W. Bl. 123.

assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges will amply repay a very careful perusal. It may be mentioned generally, that Sir T. Clarke and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by *uses*, and, therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large; for trusts do not follow absolutely the law of uses: for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine that, as lands escheat at law, so trusts must escheat in equity: that trusts, since the Statute of Uses (*a*), are not regulated by uses, but the maxim is "Equity follows law,"—"The *trust* is the *estate*." But to this it must be answered that a trust has always been recognised as a thing *sui generis*, and not as identical with the legal fee: it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8.: he agreed with Lord Mansfield, that trusts imitated the legal possession, but he added the qualification, *as between the privies to the trust only*, and not as respected strangers: his objection to the claim of the lord was, that it was for the execution of a trust that did not exist: where there was a trust, it should be considered in that Court as the real estate *between the cestui que trust and the trustee, and all claiming by or under them;* and the trustee should take no beneficial interest that the *cestui que trust* could enjoy; but he knew no instance where that Court ever permitted the creation of a trust to *affect the right of a third person* (*b*).

Trustee retained the estate.

2. The result of the determination in *Burgess* v. *Wheate*, as followed in more recent cases, was, that where the owner of the equitable fee died intestate without heirs, the trustee retained the estate (*c*).

(*a*) 27 H. 8. c. 10.

(*b*) 1 Eden, 251.

(*c*) *Taylor* v. *Haygarth*, 14 Sim. 16; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168; [*Keogh* v. *M'Grath*, 5 L. R. Ir. 478; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789. Where trustees had in their hands proceeds of sale of land under the Settled Land Acts, but no legal estate in the land was ever vested in them, and on the death

3. The same principle was applied by Sir John Romilly, M.R., to an equity of redemption; and his Honour decided, that, where there was a mortgage in fee, and then the mortgagor died intestate without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts (*a*). Principle applied to equity of redemption.

[4. Where a testatrix, who died without heirs, devised copyholds in trust for one for life, with remainder to charitable uses which were void, so that there was a resulting trust for the testatrix, the customary heiress of the survivor of the trustees of the will appointed by the Court was held entitled to be admitted as tenant for her own benefit (*b*). [Copyholds.]

5. Now by the Intestates' Estates Act, 1884 (*c*), where after the passing of that Act (14th August, 1884), a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat is to apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments; and where any beneficial interest in the real estate of a deceased person is not effectually disposed of, such person is, for the purposes of the Act, to be deemed to have died intestate as to the part ineffectually disposed of (*d*). An undisposed-of residue of proceeds of sale of freeholds devised to executors on trust for sale is covered by these provisions (*e*)]. [Trust estate now subject to escheat.]

SECTION XI

THE DESCENT OF THE TRUST

1. A trust is governed by the same rules of descent as the legal estate is on which the trust is engrafted, and *that* whether Trust descends as the legal estate.

of the tenant for life the land, if unsold, would have resulted in fee to the settlor, who left no heir or next of kin, it was held that the money belonged to the Crown as *bona vacantia: Re Bond*, (1901) 1 Ch. 15]. As to estates *pur autre vie*, see *ante*, p. 891. And where a trust of real estate was created in favour of an *alien*, the Crown was entitled to the benefit of the trust as against both the trustee and the heir at law of the settlor; *Barrow* v. *Wadkin*, 24 Beav. 1; and see *ante*, p. 46.

(*a*) *Beale* v. *Symonds*, 16 Beav. 406.

[(*b*) *Gallard* v. *Hawkins*, 27 Ch. D. 298.]

[(*c*) 47 & 48 Vict. c 71, s. 4; as to procedure in cases of escheat, see the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53).]

[(*d*) Sect. 7.]

[(*e*) *Re Wood*, (1896) 2 Ch. 596.]

the legal estate descends according to the course of common law, or is subject to a *lex loci*.

Seisin ex parte maternâ.

2. If one seised of land *ex parte maternâ* convey to a person in fee upon trust, and no trust is expressed, the resulting interest is part of the original estate, and will descend in the maternal line, and, failing the heirs on the part of the mother, would rather absolutely determine, than pass into the paternal line (*a*). But if one seised *ex parte maternâ* devise to A. and his heirs upon trust for a person for life, and then in trust to *convey* to the testator's heir at law, this breaks the descent, and the heir *ex parte paternâ* is entitled to the equitable remainder (*b*).

Gavelkind.

3. If the land be subject to *gavelkind, borough English,* or other *custom,* the equitable interest will follow the same course of inheritance (*c*).

Copyholds.

4. And a trust of *copyholds* as well as of freeholds is governed by the descent of the legal estate (*d*), [so that the customary heirs will take, unless there is some special custom of the manor confining the custom of descent to a tenant on the rolls or to a tenant dying seised (*e*).]

Possessio fratris.

5. The analogy to law is so strictly preserved that, until the Inheritance Act, 1833, if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* (*f*) at law, the trust would have descended to the *brother of the half blood*, not to the *sister of the whole blood* (*g*). By the Act referred to, the *half blood* is now in all cases (but subject to the preferable claim of the whole blood) capable of inheriting estates, whether legal or equitable (*h*).

Proceeds from sale of gavelkind lands.

6. If a settlement contain a power of sale, with a trust to reinvest the proceeds in a purchase to the same uses, and the lands are sold, but the proceeds are not reinvested, though the bulk of the estate sold was of *gavelkind* tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the

(*a*) *Burgess* v. *Wheate*, 1 Eden, 177, see 186, 216, 256; *Langley* v. *Sneyd*, 1 Sim. & St. 45; *Nanson* v. *Barnes*, 7 L. R. Eq. 250; [see now the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 19, 20, under which, on failure of heirs of the purchaser, the heirs of the person last entitled succeed].

(*b*) *Davis* v. *Kirk*, 2 K. & J. 391; [and see *Re Douglas*, 28 Ch. D. 327].

(*c*) *Fawcet* v. *Lowther*, 2 Ves. sen. 304, *per* Lord Hardwicke; *Banks* v. *Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper* v. *Cowper*, 2 P. W. 720; *Jones* v. *Reasbie*, 22 Vin. Ab. 185, pl. 7; *Buchanan* v. *Harrison*, 1 J. & H. 662.

(*d*) *Trash* v. *Wood*, 4 M. & Cr. 324.

[(*e*) *Re Hudson*, (1908) 1 Ch. 665.]

(*f*) See *ante*, p. 933.

(*g*) *Banks* v. *Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper* v. *Earl Cowper*, Ib. 736, *per eundem*; *Cunningham* v. *Moody*, 1 Ves. 174; Co. Lit 14 b; and see the cases cited, *Casborne* v. *Scarfe*, 1 Atk. 604.

(*h*) 3 & 4 W. 4. c. 106, s. 9.

heirs of A. at common law, and not to the heirs by the custom of gavelkind (*a*).

Limitation to heirs as purchasers.

7. And if *gavelkind* or *borough English* lands (*b*) be limited to a person's heirs as *purchasers*, the *common law heirs* and not the customary heirs are entitled; as, where a testator directed trustees to stand seised of gavelkind lands for the separate use of A. for life, and so as her husband should not intermeddle therewith, and after her death upon trust to convey to the heirs of her body for ever, Lord Hardwicke held that the trust was executory, and that the Court must therefore look to the intention, which was to give a life-estate to A., and the remainder to the heirs as *purchasers* (*c*); for, as the husband was not to intermeddle therewith, his curtesy was to be excluded, which would not be the case if A. were tenant in tail. A conveyance of the legal estate was therefore directed to the *eldest* son and the heirs of his body, with remainder to the second son, and the heirs of his body, &c. "Not," added Lord Hardwicke, "according to the custom of gavelkind, because it must go according to the rule of common law, being not a trust executed, but executory" (*d*).

SECTION XII

OF ASSETS

The general law relating to *assets*, as it stood previously to the Statute of Frauds may be thus stated.

Legal assets.

1. The executor or administrator of the deceased was bound to apply his *personal estate* in payment of his debts; and this in the order of their legal priorities, as first of judgments, then of specialties, and then of simple contract debts; or, as it was expressed, the personal estate was *legal assets*.

Assets *by descent*.

2. Again, where the deceased had executed an instrument binding himself and his *heirs*, the heir to the extent of the real estate (except copyholds) which came to him, was bound to satisfy this

(*a*) *Hougham* v. *Sandys*, 2 Sim. 95, see 153.

[(*b*) *Polley* v. *Polley* (No. 2), 31 Beav. 363; *Garland* v. *Beverley*, 9 Ch. D. 213.]

(*c*) Now by the Inheritance Act, 1833, s. 3, a *limitation* in a deed to the settlor or his heirs, or in a will to the *testator's heirs*, confers an estate *by purchase*; [and under a devise to "right heirs," the person who at the testator's death is his heir at law now takes as devisee, and not by descent, and co-heiresses take as joint tenants, and not as co-parceners; *Owen* v. *Gibbons*, (1902) 1 Ch. (C.A.) 636].

(*d*) *Roberts* v. *Dixwell*, 1 Atk. 607; and see *Thorp* v. *Owen*, 2 Sm. & G. 90; *Sladen* v. *Sladen*, 2 J. & H. 369.

obligation of his ancestor, or, in other words, the lands so inherited were *assets by descent.*

Equitable assets.

3. The 32 Henry 8. c. 15, which first gave the power of *devising* lands, inadvertently opened a door to fraud, since it was held that if the owner of land devised it away, a creditor claiming by bond or other instrument binding the heir could not sue the *devisee*, and if he sued the *heir*, the latter might plead he had no land by descent. Where, however, the owner had by his will *charged* his lands with or devised them subject to the payment of debts, a Court of Equity viewed the creditors as *cestuis que trust*, and made the land available in satisfaction of the debts; and in doing this it paid all the creditors *pari passu* without reference to their legal priorities, that is, the lands so charged or devised were *equitable assets.*

Equitable interests.

4. With these prefatory remarks we proceed to the consideration of *equitable interests* as assets *before the Statute of Frauds.*

Trusts of chattels are assets.

5. The trust of a *chattel* was always accounted assets in equity (*a*); by which is meant, not *equitable assets*, but assets for the due application of which in payment of debts the personal representative was responsible in *equity*, if not at law.

Trusts of a freehold.

6. But whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty in which the heirs were bound was for a long time *vexata quæstio.* On the one hand it was argued, that the trust ought to follow the use, and that the use was *not* liable to a bond creditor; on the other hand it was said, that trusts since the Statute of Uses had been conducted by the Courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, so a Court of Equity ought to adopt the same rule in the administration of trusts.

Bennet *v.* Box.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet* v. *Box*, that a trust in fee should not be assets (*b*); and Lord Keeper Bridgman afterwards felt himself bound by the authority of this decision in respect of a *trust* (*c*), though he doubted somewhat as to an *equity of redemption* (*d*); and so the law as to a trust was laid down by Lord Hale in *Attorney-General* v. *Sands* (*e*).

Grey *v.* Colvile.

The question was renewed before Lord Nottingham in

(*a*) *Attorney-General* v. *Sands*, Freem. 131; *Barthrop* v. *West*, 2 Ch. Rep. 33; *Duke of Norfolk's case*, 3 Ch. Ca. 10. See *post*, p. 1066.

(*b*) 1 Ch. Ca. 13.

(*c*) *Pratt* v. *Colt*, 1 Ch. Ca. 128; *S. C.*, Freem. 139.

(*d*) *Trevor* v. *Peryor*, 1 Ch. Ca. 148.

(*e*) Hard. 490; *S. C.*, Freem. 131; *S. C.*, Nels. 135.

Grey v. *Colvile* (*a*), when trust estates were declared to be *assets in equity*. The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed* v. *Colvile* (*b*), and his Lordship said, he "should be much governed by the case of *Bennet* v. *Box*, unless they could show that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the Court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the question (*c*). In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lords Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, *the bill should be dismissed without further motion* (*d*). No further proceedings appear in the case; and, therefore, it must be concluded that the bill was dismissed. There can be no doubt, however, that Lord Nottingham's decision was correct, and in *Goffe* v. *Whalley* (*e*), the question was renewed, but the result does not appear, unless the overruling of the heir-at-law's demurrer to the creditor's bill was on the ground that the Court held the trust to be assets.

Statute of Frauds.

7. Thus stood the law before the Statute of Frauds (*f*). By the 10th section of that Act a trust in fee simple was declared to be assets by descent. But the enactment was taken to embrace *simple* trusts only, and not *complicated* trusts (*g*), or equities of redemption (*h*), so that the question still remained whether such interests as were not within the statute might not still, upon the *general principles* of equity, be treated as assets by analogy to law. This was expressly so decided as to equities of redemption in *Plucknet* v. *Kirk* (*i*), and other cases (*j*); and upon principle, the rule governing equities of redemption ought equally to be applied to every other equitable interest.

(*a*) 2 Ch. Rep. 143.
(*b*) 1 Vern. 172.
(*c*) R. L. 1683, A. fol. 166.
(*d*) R. L. 1684, A. fol. 210.
(*e*) 1 Vern. 282, Raithby's edit.
(*f*) 29 Car. 2. c. 3.
(*g*) The former part of the clause, which enables the sheriff to take a trust in execution, was construed not to include a *complicated* trust, and therefore it is presumed the latter part of the clause could not be differently interpreted.
(*h*) *Plunket* v. *Penson*, 2 Atk. 293, *per* Lord Hardwicke; *Solley* v. *Gower*, 2 Vern. 61, *per* Lord Jeffries.
(*i*) 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184; and see Lord Jeffries' opinion in *Solley* v. *Gower*, 2 Vern. 61.
(*j*) *Anon.*, Freem. 115; *Acton* v. *Peirce*, 2 Vern. 480; *Plunket* v. *Penson*, 2 Atk. 290.

3 & 4 W. 4. c. 104.

8. The question is now of little importance, as it was enacted by the Administration of Estates Act, 1833 (*a*), that all a person's "*estate or interest*" (which must include any trust) in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, should be assets for the payment of debts as well on simple contract as on specialty.

Whether a trust is legal or equitable assets.

9. There remains to be considered the question, whether a trust shall, as to persons who died *before* 1*st January*, 1870 (*b*), be administered as *legal* or *equitable* assets.

Trust of a chattel.

10. It has in some cases been considered that the mere circumstance that property was *equitable* at the testator's death, was sufficient to make it *equitable assets* (*c*), but this is clearly erroneous, the question being, not whether the assets can be recovered at law or in equity, but whether the *creditor* can obtain payment thereout only from a Court of Equity (*d*). Now if an executor recover money in that character under a trust or other equitable right, the proceeds, *when actually come to his hands*, will be legal assets, even in a Court of Law (*e*); and it would be an inconsistency to say, that if the property has been reduced into possession, a Court of Equity shall administer it as legal assets, but if it be outstanding at the time when the creditor institutes proceedings in equity, it shall be administered as equitable assets. Upon this principle it has at length been established, after much fluctuation (*f*), that equitable interests in personal estate are to be distributed as legal assets (*g*). "Whether," observed Sir R. Kindersley, "the assets are such that the executor can recover them in a Court of Law or in a Court of Equity only is immaterial. The true test is, whether he recovers them *virtute officii*. If the assets come to his hands *as executor*, a Court of Law would treat them as assets, and they are to be administered (in equity) as legal assets" (*h*).

Trust in fee in the hands of the *heir*.

11. A trust in *fee* stands in a very different light from the trust of a *chattel* in the hands of the executor. As regards the

[(*a*) See *post*, p. 1068.]

(*b*) See *post*, p. 1070.

(*c*) *Cox's case*, 3 P. W. 341, and note Ib.; *Hartwell* v. *Chitters*, Amb. 308; *Clay* v. *Willis*, 1 B. & C. 372.

(*d*) *Cook* v. *Gregson*, 3 Drew. 549.

(*e*) *Hawkins* v. *Lawse*, 1 Leon. 155, *per* Periam, J.; *Anon. case*, 1 Roll. Rep. 56; *Harwood* v. *Wrayman*, cited Ib.; *S. C.*, reported Mo. 858.

(*f*) See cases cited in note (*c*), *supra*, and *Morgan* v. *Sherrard*, 1 Vern. 293; *Wilson* v. *Fielding*, 10 Mod. 426; *S. C.*, 2 Vern. 763; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 541.

(*g*) *Cook* v. *Gregson*, 3 Drew. 547; *Shee* v. *French*, Ib. 716; *Christy* v. *Courtenay*, 26 Beav. 140; and see *Lovegrove* v. *Cooper*, 2 Sm. & G. 271; *Mutlow* v. *Mutlow*, 4 De G. & J. 539.

(*h*) *Cook* v. *Gregson*, 3 Drew. 547.

inheritance, until modern Acts (*a*), it was only in respect of creditors by specialty in which the heirs were bound, that the question of legal or equitable assets could in fact have arisen, for specialties in which the heirs were not bound, and simple contract debts, were not payable out of real estate, and statutes and judgments, though *liens*, to a partial extent, upon the equitable fee, were not payable as debts, but as incumbrances. In respect then of specialties in which the heirs were bound, a plain and simple trust was made assets in a Court of Law in the hands of the *heir* by the Statute of Frauds, and therefore was *legal assets* in equity (*b*); but complicated trusts and equities of redemption were not touched by the statute; and it would seem, upon principle, that as equity subjected the trust to specialty creditors by analogy only to law, the Court ought, by observing the analogy throughout, to adopt the *legal course of administration.*

Grey *v.* Colvile.

In the case of *Grey* v. *Colvile*, before referred to, in which bond-creditors had, *after* the debtor's decease, entered up judgments against the *heir* who took by descent, it appears to have been assumed by the litigants, and was decreed by Lord Nottingham, than whom no Chancellor had a more just conception of the true nature of trusts, that the creditors should be paid *according to the priority of their judgments* out of a trust in fee (*c*).

Whether trust in fee *devised* is legal or equitable assets.

12. In the case of the *devise* of a *trust* in fee, the analogy presented by the case of the devise of a *legal fee* ought, it is conceived, to be pursued. By 3 & 4 W. & M. c. 14, the power of the owner of the land to devise it away in fraud of his creditors (*d*) was first restrained, and a remedy was given against the heir and devisee jointly, in respect of the property so devised. The statute, however, expressly excepted from its operation, as do also the subsequent Acts enlarging the creditors' remedies (*e*), devisees clothed with a trust or charge for payment of debts. It is conceived, that the true test whether an equitable estate in fee devised shall be legal or equitable assets, is, whether the

(*a*) 47 G. 3. c. 74, Sess. 2, as to traders *only;* and 3 & 4 Will. 4. c. 104, *post*, p. 1068.

(*b*) *Plunket* v. *Penson*, 2 Atk. 293, *per* Lord Hardwicke; *King* v. *Ballett*, 2 Vern. 248.

(*c*) *Grey* v. *Colvile*, 2 Ch. Rep. 143; and see *Morrice* v. *Bank of England*, 2 Sw. 585; *Dollond* v. *Johnson*, 2 Sm. & G. 301.

(*d*) See *ante*, p. 229.

(*e*) 47 G. 3. c. 74, Sess. 2; the Debts Recovery Act, 1830 (11 G. 4. & 1 W. 4.), c. 47; [*Re Atkinson*, (1908) 2 Ch. (C.A.) 307, *ante*, p. 930 ("devisee" including equitable tenant for life)]; the Administration of Estates Act, 1833 (3 & 4 W. 4.), c. 104.

estate *if legal* and *devised in similar terms* would have constituted legal or equitable assets (*a*).

Administration of Estates Act, 1833.

13. By 3 & 4 W. 4. c. 104, it was enacted that when any person should die seised of or entitled to any *estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, *which he should not by his last will have charged with, or devised subject to the payment of his debts,* the same should be assets, *to be administered in Courts of Equity,* for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, should be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seised of freehold estates, was or were before the passing of that Act liable to, in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: provided always that in the administration of assets *under and by virtue of that Act,* all creditors by specialty in which the heirs were bound should be paid the full amount of the debts due to them before any of the creditors, by simple contract, or by specialty in which the heirs were not bound, should be paid any of their demands.

Construction of the Act.

Upon the construction of this statute the following observations occur:—

a. The Act creates a *general* charge on the estate for the benefit of creditors (*b*), subject only to the right of alienation in the heir or devisee (*c*).

β. The words "assets to be administered in equity" mean only that the creditor's *remedy* shall be in equity, and not that the estate shall be administered as *equitable assets,* and [it would seem], therefore, that the estate is to be administered as legal assets (*d*).

[*γ.* No right of retainer is given to the heir or devisee for a

(*a*) See *Plunket* v. *Penson,* 2 Atk. 51, 290; *Sharpe* v. *Earl of Scarborough,* 4 Ves. 538; and the observations on those cases in 3rd ed. of this work, p. 690.

(*b*) *Kinderley* v. *Jervis,* 22 Beav. 1.

(*c*) See cases *ante,* p. 279, note (*c*).

(*d*) See *Foster* v. *Handley,* 1 Sim. N.S. 200; more fully reported, 15 Jur. 73; *Re Burrell,* 9 L. R. Eq. 443, where it was held that creditors by specialty in which the heirs were bound were entitled to priority as against an equity of redemption in *copyholds.* [In *Re Illidge,* 24 Ch. D. 654, in which, however, the earlier cases were not cited, it seems to have been assumed by Chitty, J., that the assets were to be administered as equitable assets: and see *S. C.,* on appeal, 27 Ch. D. (C.A.) 478, 484.]

debt due to him on a simple contract. But it would seem that such a right of retainer in respect of a debt by specialty in which the heirs are bound is not taken away (*a*).]

δ. The express terms of the Act giving priority to creditors by specialty in which the heirs are bound over creditors by specialty in which the heirs are not bound, have, as a matter of course, had full effect given to them (*b*).

ε. The Act makes no mention of debts by *judgment* or by *decree of a Court of Equity*, so that the remedies for the recovery of these out of the real estate may perhaps be viewed as still depending upon the general law (*c*).

[(*a*) *Re Illidge*, 24 Ch. D. 654; 27 Ch. D. (C.A.) 478; explaining *Ferguson* v. *Gibson*, 14 L. R. Eq. 379. The foundation of the rule, allowing the right of retainer out of the real estate to an heir at law or devisee being a creditor by specialty in which the heirs were bound, was, that he might not be under a disadvantage by not being able to sue himself; since, if he could not retain, other like creditors might have obtained priority over him by suing him. But a simple contract creditor, or creditor by specialty in which the heirs were not bound, could not get a judgment giving him priority, and so the rule had no application in his case. There appears to be nothing in the Administration of Estates Act, 1833, or in the Administration of Estates Act, 1869, to take away from a creditor by specialty in which the heir is bound the old right of action against the heir or devisee, and it seems to follow that although the former statute makes real estate liable to be administered by Courts of Equity, the right of the heir or devisee to retain is no more taken away than the power of Courts of Equity to administer personal estate takes away an executor's right of retainer; *Re Illidge*, 24 Ch. D. 654.]

(*b*) *Richardson* v. *Jenkins*, 1 Drew. 477.

(*c*) *Judgments* against the *testator* or *intestate* and decrees in equity against the *testator* or *intestate* are paid out of the personal estate *pari passu*. *Decrees* (if for payment of money or costs) were by the Judgments Act, 1838, s. 18 (though they were not formerly; *Bligh* v. *Darnley*, 2 P. W. 619; *Mildred* v. *Robinson*, 19 Ves. 585) *liens* upon the real estate; and they always ranked as of equal degree with judgments in the administration of *personal* estate, and therefore above specialty or simple contract debts; *Searle* v. *Lane*, 2 Vern. 37; *Foly's case*, 2 Eq. Ca. Ab. 459; *Stasby* v. *Powell*, 1 Freem. 333; *Peploe* v. *Swinburn*, Bunb. 48. Judgments and decrees against the *personal representative* are paid out of legal assets in the order of their dates; *Dollond* v. *Johnson*, 2 Sm. & G. 301, and cases cited, Ib.; [and see *Re Bentinck*, (1897) 1 Ch. 673]. When dockets were in use, a judgment against a person had no priority in the administration of his assets over other debts unless it was docketed; *Hickey* v. *Hayter*, 6 T. R. 384; *Landon* v. *Ferguson*, 3 Russ. 349. But when the docket was closed the judgment had priority *per se*, and the executor or administrator was bound by that priority though he had no notice, and no means of obtaining notice of the judgments; *Fuller* v. *Redman*, 26 Beav. 600. To remedy this inconvenience it was in effect enacted by Lord St Leonards' Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), ss. 3, 4, that judgments should have no priority in the administration of assets unless they were registered; *Van Gheluwe* v. *Nerinckx*, 21 Ch. D. 189. But the Act does not apply where the judgment is recovered against the executor or administrator, as in that case the personal representative has full notice necessarily, and no remedy is required; *Jennings* v. *Rigby*, 33 Beav. 198; *Gaunt* v. *Taylor*, 3 Man. & G. 886, and 3 Scott, (N.S.) 700; *Re Williams' Estate*, 15 L. R. Eq. 270; *Re Maggi*, 20 Ch. D. 545. And the Act is retrospective, so that an unregistered judgment, though entered up against a debtor living at

Hinde Palmer's Act.

14. As regards the administration of estates of persons who may have died *on or after the 1st January*, 1870, the legislature, by the Administration of Estates Act, 1869 (*a*), has now abolished the distinction between *specialty* and *simple contract debts*, and has directed that all specialty and simple contract debts shall be paid *pari passu*. [But this does not interfere with or enlarge the right of the executor to retain his own debt, as against creditors in equal degree with himself, except in so far as the Act, by placing the specialty and simple contract creditors on an equality, necessarily increases the fund available for payment of the latter class of creditors (*b*); nor does the Act affect his general right to pay the testator's debts in any order he thinks fit, and to pay a simple contract creditor in priority to a specialty creditor, notwithstanding that the latter may eventually remain *pro tanto* unpaid (*c*).

[Retainer by executor.]

15. Where there are specialty debts and simple contract debts, and the right of retainer of the executor is in respect of a simple contract debt, the assets should be apportioned on the footing

the date of the Act, has no preference; *Kemp* v. *Waddingham*, 1 L. R. Q. B. 355. But otherwise, where the debtor was dead at the date of the Act, so that the creditor had acquired a vested right; *Evans* v. *Williams*, 2 Dr. & Sm. 324. [And the priority of judgment creditors in the administration of assets is not affected by s. 10 of the Judicature Act, 1875; *Smith* v. *Morgan*, 5 C. P. D. 337; *Re Maggi*, 20 Ch. D. 545; but as to voluntary creditors, see *Re Whitaker*, (1901) 1 Ch. (C.A.) 9.]

(*a*) 32 & 33 Vict. c. 46.

[(*b*) *Crowder* v. *Stewart*, 16 Ch. D. 368; *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, 31 Ch. D. 440; and see *Re Bentinck*, (1897) 1 Ch. 673, 677, observing on *Re Williams' Estate*, 15 L. R. Eq. 270. The right is not extended to real assets by the Land Transfer Act, 1897. *Re Williams*, (1904) 1 Ch. 52. If made *bonâ fide* the retainer is good as against creditors of higher degree of whose existence the executor, before fully administering, had no knowledge: *Re Fludyer*, (1898) 2 Ch. 562. It is the duty of an executor or administrator to exercise his right of retainer for the benefit of his *cestuis que trust*; *Fox* v. *Garrett*, 28 Beav. 16; *Re Owen*, 23 L. R. Ir. 328; but the legal personal representative of a sole or last surviving trustee, who has himself never acted in the trust, is not bound to exercise, for the benefit of the *cestuis que trust*, his right of retainer in respect of a debt due to him in the character of trustee, by reason of the default of his testator or intestate: *Re Ridley*, (1904) 2 Ch. 774; *Re Benett*, (1906) 1 Ch. (C.A.) 216 (where *Fox* v. *Garrett*, *sup.*, and *Re Owen*, *sup.*, were observed upon, and the representative having exercised a power of apppointing new trustees, it was questioned whether the right of retainer continued.) The administrator retaining his own debts is not "unduly preferring" himself as a creditor within the meaning of the common form of administration bond; *Davies* v. *Parry*, (1899) 1 Ch. 602; *Re Belham*, (1901) 2 Ch. (C.A.) 52; but as the right of retainer is anomalous, the Court will not willingly lend its assistance to the exercise of it; *Trevor* v. *Hutchins*, (1896) 1 Ch. (C.A.) 844, 852, and see *ante*, p. 737.]

[(*c*) *Re Samson*, (1906) 2 Ch. (C.A.) 584 (overruling *Re Hankey*, (1889) 1 Ch. 541); *Re Orsmond*, 58 L. T. N.S. 24. An order in an administration action under Order XV., Rule 1, merely for an account by an executrix and reserving further consideration, does not affect the right of creditors to sue her, or her right to prefer creditors; *Re Barratt*, 43 Ch. D. 70.]

of giving all the creditors an equal dividend. The dividend in respect of the specialty debts is payable to the specialty creditors in full, and out of the residue of the assets the executor will retain his debt, and the surplus, if any, is divisible rateably among the other simple contract creditors (*a*).

16. The Act does not affect the priority of the Crown over creditors in equal degree, and, therefore, where there is a simple contract debt due to the Crown, the assets will be apportioned rateably between the specialty and simple contract creditors, and the Crown debt paid out of the amount apportioned to the latter (*b*). [Priority of Crown debt.]

17. By the Bankruptcy Act, 1883 (*c*), sect. 125, and the Bankruptcy Act, 1890 (*d*), sect. 21, an order may be made in bankruptcy for the administration, according to the law of bankruptcy, of the estate of a deceased debtor. And where proceedings for administration of the debtor's estate have been instituted in another Court, such Court may, on proof that the estate is insufficient for payment of debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon that Court can make an order for the administration of the estate according to the law of bankruptcy. It is, however, in the discretion of the Court in which the estate is being administered to retain the administration (*e*), and where the estate was small, the number of creditors small, and considerable expense had been incurred in the administration before the application for transfer was made, an order for transfer was refused; and a doubt was expressed whether a creditor who had not proved his debt had any *locus standi* to apply for the transfer (*f*); but it has been said that the scheme of the section is to make the administration of the estate of an insolvent deceased person equivalent, as far as possible, to the administration of the estate of a bankrupt living person, and that therefore, unless there is some reason against it, the transfer ought to be made (*g*). And the circumstances that the executor has a right of retainer, and that he is not bound to plead the Statute of Limitations, are not grounds for directing a transfer (*h*). By sub-sect. 5 of sect. 125, upon an order being [Administration in bankruptcy of estate of deceased debtor.]

[(*a*) *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, 31 Ch. D. 440.]

[(*b*) *Re Bentinck*, (1897) 1 Ch. 673.]

[(*c*) 46 & 47 Vict. c. 52.]

[(*d*) 53 & 54 Vict. c. 71.]

[(*e*) *Re Baker*, 44 Ch. D. (C.A.) 262.]

[(*f*) *Re Weaver*, 29 Ch. D. 236; and as to the effect of section 125 generally, see *Re Williams*, 36 Ch. D. 573.]

[(*g*) *Re Kenward*, W. N. (1906) 16, *per* Kekewich, J.]

[(*h*) *Re York*, 36 Ch. D. 233; *Re Baker*, 44 Ch. D. (C.A.) 262; as to right of retainer of assets by an executor in respect of his own debt, before

made for administration, the property of the debtor vests in the official receiver as trustee, and he is to realise and distribute it in accordance with the provisions of the Act. The provisions here referred to are those relating to the property of the debtor, not those relating to the property of other persons; thus, for instance, sect. 47, avoiding certain voluntary settlements executed by a bankrupt, has no application (*a*); and the administration order under sect. 125 is not equivalent to a receiving order for the purposes of sect. 45 (*b*), restricting the rights of execution creditors (*c*); but sect. 55 of the Act, giving the trustee power to disclaim onerous property, applies (*d*). By sub-sect. 7 of sect. 125, the official receiver is to have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him, and such claims are to be deemed a preferential debt, and paid in full out of the debtor's estate, in priority to all other debts. By sub-sect. 8, any surplus assets, after payment in full of all debts, costs of administration, and interest, are to be paid over to the legal personal representative of the debtor, or dealt with in such other manner as may be prescribed. By sub-sect. 9, notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under the section, if an order for administration is made thereon, is to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative is to operate as a discharge as between himself and the official receiver, but save as aforesaid nothing in the section is to invalidate any payment made, or any act or thing done, in good faith, by the legal personal representative before the date of the order for administration.

If an order for administration be made under this section, it is conceived that the executor's right of retainer will, as from the time of his receiving notice of the petition, cease so far as regards any assets not actually retained at the date of the notice (*e*).]

notice of petition for an administration order by another creditor, see *Re Gilbert*, (1898) 1 Q. B. 282.]

[(*a*) *Re Gould*, 19 Q. B. D. (C.A.) 92, 99.]

[(*b*) See *ante*, p. 1054.]

[(*c*) *Hasluck* v. *Clark*, (1899) 1 Q. B. (C.A.) 699.]

[(*d*) *Re Mellison*, (1906) 2 K. B. 68.]

[(*e*) But see *Re Baker*, 44 Ch. D. (C.A.) 262, 271. As to the administration of small estates under the Public Trustee Act, 1906, sect. 3, see *ante*, pp. 703, 704.]

CHAPTER XXIX

RELIEF OF THE CESTUI QUE TRUST AGAINST THE FAILURE OF THE TRUSTEE

We have now pointed out in what the estate of the *cestui que trust* primarily consists. We have also examined what are the incidents and properties of it by analogy to estates at law or by statute. It follows next that we speak of certain *collateral or subsidiary rights*, by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

Trust follows the estate.

1. It is a general rule that, whenever the intention of the settlor can be clearly collected, and there is no want of consideration, the Court will follow the estate into the hands of the *legal* owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance.

Trustee dying in testator's lifetime, or otherwise failing.

Thus, if a devisor or settlor appoints a trustee, who either dies in the testator's lifetime (*a*), or disclaims (*b*), or is incapable of taking the estate (*c*), or if the trustee otherwise fail (*d*), the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved. "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that *the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for*

(*a*) *Moggridge* v. *Thackwell*, 3 B. C. C. 528; *S. C.*, 1 Ves. jun. 475, *per* Lord Thurlow; *Attorney-General* v. *Downing*, Amb. 552, admitted; *Tempest* v. *Lord Camoys*, 35 Beav. 201.

(*b*) *Backhouse* v. *Backhouse*, V.C. of Eng. 20 Dec. 1844.

(*c*) *Sonley* v. *Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349; *White* v. *Baylor*, 10 Ir. Eq. Rep. 53, 54.

(*d*) *Attorney-General* v. *Stephens*, 3 M. & K. 347.

valuable consideration without notice. A Court of Equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate; and the *legal estate* is nothing but the *shadow which always follows the trust estate* in the eye of a Court of Equity" (*a*).

Direction to sell and no person to sell named.

2. If a testator direct a sale of his lands for certain purposes, but *omits to name a person* to sell, the trust attaches upon the conscience of the heir, and he is strictly bound in equity to give effect to the intention (*b*).

Direction for separate use, and no trustee appointed.

3. So, if [before the Married Women's Property Act, 1882,] the lands were devised (*c*), or a sum of money was bequeathed (*d*) to a *feme covert* for her sole and separate use, but without the interposition of a trustee, the property vested at *law* in the husband, in her right, but in *equity* he held upon trust for the separate use of the wife.

Failure of trustee of a power imperative.

4. We have seen, in a former chapter (*e*), that powers are distributable into powers *arbitrary* and powers *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the Court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. "If," said Lord Eldon, "the power be one which it is the duty of the party to execute —made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a *trustee for the exercise of the power*, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it" (*f*). "As to the objection," said Lord Chief Justice Wilmot, "that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers*, but *trusts*, and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they

(*a*) *Attorney-General* v. *Lady Downing*, Wilm. 21, 22.

(*b*) First clearly settled in *Pitt* v. *Pelham*, Freem. 134.

(*c*) *Bennet* v. *Davis*, 2 P. W. 316; *Major* v. *Lansley*, 2 R. & M. 355.

(*d*) *Rolfe* v. *Budder*, Bunb. 187; *Tappenden* v. *Walsh*, 1 Phillim. 352; *Prichard* v. *Ames*, T. & R. 222; *Parker* v. *Brooke*, 9 Ves. 583; and see *Roberts* v. *Spicer*, 5 Mad. 491; *Wills* v. *Sayers*, 4 Mad. 409; *Rich* v. *Cockell*, 9 Ves. 375; [*Wassell* v. *Leggatt*, (1896) 1 Ch. 554]. At first there was some doubt: *Harvey* v. *Harvey*, 1 P. W. 125; *Burton* v. *Pierpoint*, 2 P. W. 78.

(*e*) See *ante*, pp. 750, 751.

(*f*) *Brown* v. *Higgs*, 8 Ves. 574.

are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This Court supplies the *defective execution* of powers, but never the *non-execution* of them, for the powers are meant to be *optional*. But the person who creates a trust means it should *at all events* be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office. There is some personality in every choice of trustees; but this personality is *res unius ætatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?' 'No: I trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all'" (*a*).

Trustee of a discretion dying in testator's lifetime, declining office, &c.

5. If trustees, then, have an *imperative power* committed to them, and they either die in the testator's lifetime (*b*), or decline the office (*c*), or disagree among themselves as to the mode of execution (*d*), or do not declare themselves before their death (*e*), or if, from any other circumstance (*f*), the exercise of the power by the party intrusted with it becomes impossible, the Court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the Court assumes the jurisdiction of exercising the power *retrospectively* (*g*), and

(*a*) *Attorney General* v. *Lady Downing*, Wilm. 23.

(*b*) *Attorney-General* v. *Lady Downing*, Wilm. 7; *S. C.*, Amb. 550; *Attorney-General* v. *Hickman*, 2 Eq. Ca. Ab. 193; *Maberly* v. *Turton*, 14 Ves. 499.

(*c*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Izod* v. *Izod*, 32 Beav. 242; [and see *Re Stanger*, 39 W. R. 455; 64 L. T. N.S. 693].

(*d*) *Moseley* v. *Moseley*, Rep. *t.* Finch, 53; and see *Wainwright* v. *Waterman*, 1 Ves. jun. 311; [*Re Roth*, 74 L. T. N.S. 50].

(*e*) *Hewett* v. *Hewett*, 2 Eden, 332; *Flanders* v. *Clark*, 1 Ves. 10, *per* Lord Hardwicke; *Harding* v. *Glyn*, 1 Atk. 469; *Ray* v. *Adams*, 3 M. & K. 243, *per* Sir J. Leach; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Croft* v. *Adam*, 12 Sim. 639; *Re Hargrove's Trusts*, 8 Ir. R. Eq. 256.

(*f*) *Attorney-General* v. *Stephens*, 3 M. & K. 347; *Re Richards*, 8 L. R. Eq. 119.

(*g*) *Edwards* v. *Grove*, 2 De G. F.

will take up the trust, whatever difficulties or impracticabilities may stand in the way (*a*); for, as Lord Kenyon laid down the rule strongly, if the trust can *by any possibility* be executed by the Court, the non-execution by the trustee shall not prejudice the *cestui que trust* (*b*).

Mode of execution.

6. In what *mode* the Court will execute the power will vary according to the circumstances of the case.

Where the settlor has prescribed a rule, the Court will adopt it.

Where the discretion of the trustee is to be *governed by some rule*, or to be *measured by a state of facts, which the Court can inquire into as effectually as a private person*, then the Court *can* "look with the eyes of trustees," and will substitute its own judgment for that of the individual (*c*).

Gower v. Mainwaring.

Thus, in *Gower* v. *Mainwaring* (*d*), John Mainwaring executed a trust deed, by which the trustees were to give the residue of the real and personal estate among the settlor's relations *where they should see most necessity, and as they should think most equitable and just.* Two of the trustees died, and, the third refusing to act, it was discussed how far the discretion of the trustees could be vicariously exercised by the Court. Lord Hardwicke said: "What differs it from the cases mentioned is this, that *here is a rule laid down for the trust.* Wherever there is a trust or power—for this is a mixture of both—I do not know that the Court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally* according to their discretion *without any object pointed out or rule laid down*, the Court interposes not; unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge of such necessity and occasions of the family: the Court can* (*e*) *judge of the necessity: that is a judgment to be made of facts existing, so that the Court can make the judgment as well as the trustees, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity,*" and his Lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the

and J. 222, *per* L. J. Turner; *Maberly* v. *Turton*, 14 Ves. 499.

(*a*) *Pierson* v. *Garnet*, 2 B. C. C. 46, *per* Lord Kenyon.

(*b*) *Brown* v. *Higgs*, 5 Ves. 505

(*c*) *Hewett* v. *Hewett*, 2 Eden, 332; *Maberly* v. *Turton*, 14 Ves. 499.

(*d*) 2 Ves. 87.

(*e*) In Mr Belt's edition of Vesey there is the strange misprint of "*cannot* judge."

Master should inquire into, and consider how it might be most equitably and justly divided (*a*).

How the Court will exercise the power where the settlor has laid down no rule.

7. Where the settlor has given *no rule* or *measure* by which the discretion is to be governed, the Court cannot in that case act upon mere caprice, but will execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit.

Equality is equity.

And upon ordinary occasions the Court proceeds upon the maxim that *equality* is *equity* (*b*). Thus in *Doyley* v. *Attorney-General* (*c*), a testator gave his real and personal estate to trustees upon trust to dispose thereof to such of his relations on his mother's side who were most deserving, and in such manner as they should think fit, *and* for such charitable uses and purposes as they should also think most proper and convenient; and the power having devolved upon the Court, Sir J. Jekyll directed that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to charitable uses, the known rule that *Equality is equity* being, he said, the best rule to go by. He had no rule of judging of the merits of the testator's *relations*, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

Words of gift and words of power distinguished.

8. With respect to the subject under consideration, the cases in which the donor's intention is expressed in the form of a *gift* may admit of distinction from those in which it is expressed in the form of a *power*.

Upon trust for the children of A. as B. shall appoint.

If a fund be limited "upon trust for the children of A. as B. shall appoint," the construction is, that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed (*d*). But the

(*a*) 2 Ves. 110; and see *Liley* v. *Hey*, 1 Hare, 580. [As to the construction of a bequest to "poor relations," see the 10th edition of this work, p. 1021, note (1), and Williams on Executors, 9th ed. p. 980.]

(*b*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 195; *Fordyce* v. *Bridges*, 2 Ph. 497; *Longmore* v. *Broom*, 7 Ves. 124; *Salusbury* v. *Denton*, 3 K. & J. 536; *Penny* v. *Turner*, 2 Ph. 493; *Izod* v. *Izod*, 32 Beav. 242; *Gray* v. *Gray*, 13 Ir. Ch. Rep. 404; [*Re Douglas*, 35 Ch. D. (C.A.) 473, 485. As to the mode of distribution of money received by way of compensation under the Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act (9 & 10 Vict. c. 93), see *Bulmer* v. *Bulmer*, 25 Ch. D. 409].

(*c*) 2 Eq. Ca. Ab. 195. See *Down* v. *Worrall*, 1 M. & K. 561; but there the two sets of objects were connected not by "*and*," but by "*or*"; and *Doyley* v. *Attorney-General* was not cited; see V. C. Wood's observations, 3 K. & J. 538.

(*d*) *Davy* v. *Hooper*, 2 Vern. 665; *Fenwick* v. *Greenwell*, 10 Beav. 412; *Madoc* v. *Jackson*, 2 B. C. C. 588;

gift is subject to the exercise of the power, and, therefore, if the power be testamentary, the donee of the power may well appoint in favour of those who may be living at his death, to the exclusion of those who may have predeceased him (*a*). [And where the will creating the power of appointment contained a recital that the testator had already provided for his children (who were the objects of the power), and did *not intend thereby to make any further provision* for them, it was held that the power was not a power coupled with a trust, and that the children were not entitled in default of appointment (*b*).]

[Implication of gift over negatived by recital.]

Upon trust to dispose amongst the children of A.

Where an estate is vested in trustees "upon trust to *dispose* thereof among the children of A.," in this case the children take nothing by way of *gift*, but the transmission of their interest must be through the *medium* of the *power*. If the trust be to distribute *equally* among the objects, the bequest, though in the form of a power, must be tantamount to a simple gift (*c*); and if the trustees be at liberty to distribute *unequally*, and make no distribution, the Court itself executes the power, and divides the fund equally amongst the objects of it (*d*).

Discretion as to objects of the power.

9. But, further, a discretion may be given to the trustee, not only in respect of the *proportions* to be appointed, but also in respect of the *objects* to whom the appointment is to be made; as where a fund is bequeathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

Whether to be regarded as a trust or power.

In the last case the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust?* (*e*).

Harding *v.* Glyn.

In *Harding* v. *Glyn* (*f*), a testator gave to Elizabeth his wife a house and certain goods and chattels, "but *desired* her at or before her death to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of." The wife died without having made any appointment, and

Hockley v. *Mawbey*, 1 Ves. jun. 143, see 149, 150; *Jones* v. *Torin*, 6 Sim. 255; *Falkner* v. *Lord Wynford*, 9 Jur. 1006.

(*a*) *Woodcock* v. *Renneck*, 4 Beav. 196; 1 Ph. 72; and see *Lambert* v. *Thwaites*, 2 L. R. Eq. 151.

[(*b*) *Carberry* v. *M'Carthy*, 7 L. R. Ir. 328.]

(*c*) *Phillips* v. *Garth*, 3 B. C. C. 64; *Rayner* v. *Mowbray*, Ib. 234.

(*d*) *Hands* v. *Hands*, cited *Swift* v. *Greyson*, 1 T. R. 437, note; *Pope* v. *Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Powers, 650, 6th ed.; *Walsh* v. *Wallinger*, 2 R. & M. 78; *S. C.*, Taml. 425; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Brown* v. *Pocock*, 6 Sim. 257; *Finch* v. *Hollingsworth*, 21 Beav. 112; *Re White's Trusts*, Johns. 656; [and see *Re Douglas*, 35 Ch. D. (C.A.) 473, 485].

[(*e*) See *Re Weekes' Settlement*, (1897) 1 Ch. 289.]

(*f*) 1 Atk. 469; *S. C.*, stated from Reg. Lib. in *Brown* v. *Higgs*, 5 Ves. 501.

the Court considered a *trust* was created, and divided the estate equally amongst the testator's relations living at the time of the wife's death.

In *The Duke of Marlborough* v. *Lord Godolphin* (*a*), Lord Hardwicke held, in a similar case, that there was merely a *power* and no trust. [And the like was held in a recent case where the testatrix simply gave "power" to her husband "to dispose of the property, by will amongst our children" (*b*).] Marlborough *v.* Godolphin.

In *Brown* v. *Higgs* (*c*), on the contrary, where the introductory words used were, "*I authorise and empower*," Lord Alvanley decided that there was a *trust*. The cause was reheard before his Lordship, and, after grave consideration on the subject, he decreed as before (*d*). The decree was afterwards affirmed on appeal by Lord Eldon (*e*), and again affirmed in the House of Lords (*f*). Brown *v.* Higgs.

The doctrine of *Harding* v. *Glyn* has since been affirmed by other authorities (*g*), and may be now viewed as established. The rule has been thus laid down by Lord Cottenham: "When there appears a general intention in favour of *individuals* of a class to be *selected* by *another person*, and the *particular* intention fails from that selection not being made, the Court will carry into effect the *general* intention in favour of the class" (*h*). The doctrine of Harding *v.* Glyn now established.

10. The question in favour of *what objects* a power *imperative*, whether of *distribution* merely, or of *selection*, will be executed by the Court, viz. whether in favour of those *living at the death of the testator*, or those *living at the death of the donee of the power*, remains to be considered; and it is conceived that, in reference to this question, the following results may be deduced from the authorities:— In favour of what objects the Court will exercise a power imperative.

First. Where a testator bequeaths property with a power *imperative* in favour of a class, whether of children, relations, or others, and it appears to be the intention that the distribution or selection should take place *as soon as conveniently may be* after the testator's death, there the Court will execute the power Case where an immediate exercise of the power is contemplated.

(*a*) 2 Ves. sen. 61; [and see *Re Weekes' Settlement*, (1897) 1 Ch. 289.]

[(*b*) *Re Weekes' Settlement*, *sup.*]

(*c*) 4 Ves. 708.

(*d*) 5 Ves. 495.

(*e*) 8 Ves. 561, see p. 576.

(*f*) 18 Ves. 192.

(*g*) *Birch* v. *Wade*, 3 V. & B. 198; *Burrough* v. *Philcox*, 5 M. & Cr. 72; *Penny* v. *Turner*, 2 Ph. 493; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Re Caplin*, 11 Jur. N.S. 383; 2 Dr. & Sm. 527; and see *Salusbury* v. *Denton*, 3 K. & J. 535; *Re White's Trusts*, Johns. 656; *Re Eddowes*, 1 Dr. & Sm. 395; [*Pocock* v. *Attorney-General*, 3 Ch. D. (C.A.) 342; *Wilson* v. *Duguid*, 24 Ch. D. 244.]

(*h*) *Burrough* v. *Philcox*, 5 M. & Cr. 92; [and see *Re Weekes' Settlement*, (1897) 1 Ch. 289].

in favour of the class as existing at the date of the *testator's death* (*a*).

Where an immediate exercise not contemplated.

Secondly. Where the *frame* of the will does not of *necessity* point to an immediate exercise of the power, as where the donee of the power takes a *life estate* expressly, or by implication, the *nature of the power* given to the donee has to be taken into consideration:

Where power testamentary.

α. If the devise or bequest be in the form not of a gift, but of a power to be exercised by *will* only, then, inasmuch as the objects of the power are necessarily those only living at the death of the donee, the Court executes the power in favour of those members of the class only who are *in esse* at the *death of the donee* (*b*). But the rule applies only where the class takes *through the medium of a power*, for if there be a *gift* to them in the first instance, in such shares, &c., as the donee of the power shall appoint by will, then, in default of exercise of the power, the whole class take, whether they survive the donee of the power or not (*c*).

Where power not merely testamentary.

β. Where the power given to the tenant for life is not merely testamentary, but may be exercised either by *deed or will*, the question whether the class to take is to be ascertained at the death of the testator or of the donee of the power, is involved in still further difficulty. The decisions which support an execution of the power in favour of the class of objects as existing at the *death of the donee* (*d*), and those which support an execution in favour of the class as existing at the *death of the original testator* (*e*), are almost evenly balanced; but the apparent absence of any full consideration of the question, and the circumstance that in some of the cases the power, though not expressly limited to an exercise by will, did not in terms authorise an execution by deed or writing, and may perhaps have been viewed by the

(*a*) *Brown* v. *Higgs*, 4 Ves. 708, &c.; *Longmore* v. *Broom*, 7 Ves. 124. The result will, of course, be the same where a life estate being given to the donee of the power, the donee dies in the testator's lifetime; see *Penny* v. *Turner*, 2 Ph. 493; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332.

(*b*) *Cruwys* v. *Colman*, 9 Ves. 319; *Birch* v. *Wade*, 3 V. & B. 198; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Brown* v. *Pocock*, 6 Sim. 257; *Burrough* v. *Philcox*, 5 M. & Cr. 72; *Bonser* v. *Kinnear*, 2 Giff. 195; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Freeland* v. *Pearson*, 3 L. R. Eq. 658; *Re Saville*, 14 W. R. 603; [*Sinnott* v. *Walsh*, 5 L. R. Ir. 27; Farwell on Powers, 2nd ed. 474, 507;] and see the analogous cases of *Woodcock* v. *Renneck*, 4 Beav. 190; 1 Ph. 72; *Finch* v. *Hollingsworth*, 21 Beav. 112.

(*c*) *Lambert* v. *Thwaites*, 2 L. R. Eq. 151; [Farwell, 472].

(*d*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 195; *Harding* v. *Glyn*, 1 Atk. 469; *Pope* v. *Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Pow. 650, 6th ed.

(*e*) *Hands* v. *Hands*, cited 1 T. R. 437, note; *Grieveson* v. *Kirsopp*, 2 Keen, 653; [*Wilson* v. *Duguid*, 24 Ch. D. 244].

Court as testamentary, detract from their value as authorities upon this point.

Upon principle, too, as well as upon authority, the question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the Court has to supply, is the non-exercise *just before the death*, and that default must, therefore, be supplied in favour of those who were objects at the date of the death of the donee (*a*). On the other hand, the donee of the power may exercise it in favour of the class existing at the time of exercise, to the exclusion of those who have died before, and also, where the power is one of selection, to the exclusion of those who may come into *esse* subsequently, but the *Court* cannot act arbitrarily, and cannot show any favour, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it, that is, those living at the death of the testator, and those who come into being during the continuance of the life estate (*b*); otherwise, should all the class predecease the tenant for life (an event not improbable, where *children* or some limited class of relations are the objects), there would be a power imperative which is construed as a trust, and no *cestui que trust*, a result which, it is conceived, the Court would be somewhat unwilling to adopt.

[In a case where there was a residuary bequest to A., with a direction that "the whole principal at her death was to be divided amongst her children, if she had any, in such proportions as she should think fit," Sir G. Jessel, M.R., held (1) that A. had a power of appointment, either by instrument *inter vivos*, or by will; and (2) that, as she did not exercise the power, her surviving child and the representatives of her children who had

(*a*) See also observation by V. C. Wood in *Re White's Trusts*, Johns. 659, 660, a case different, however, from any of those discussed in the text, the donees of the power being trustees, who both died before the tenant for life.

[(*b*) See *Wilson* v. *Duguid*, 24 Ch. D. 244.]

died in her lifetime were entitled to participate in the property (*a*). It is observable that the power in this case was only one of distribution; but in a later case (*b*), where the power was one of selection and distribution, the objects who had died in the lifetime of the donee of the power were held entitled to participate; but the decision in the latter case was also based upon other grounds. The cases in which an intention appears that there should be a *personal enjoyment* by the objects of the power stand on a different footing, and in these cases there is good ground for holding that the object must survive the donee of the power in order to participate (*c*); but apart from any such indication, it is conceived that the governing principle should be that all persons in whose favour the power could at any time have been exercised are objects, and that they all are equally entitled to participate.]

Whole purview of instrument must be regarded.

γ. It is clear that where the donee tenant for life may exercise the power by *deed or will*, the members of the class in existence at the date of the death of the donee will alone take, if, upon the purview of the original instrument, they alone appear to be the objects of the power (*d*).

Construction of the word "relations."

Power of selection and power of distribution.

11. Where there is a power of appointment in favour of "relations," the *donee* of the discretion, if he have a power of *selection*, may appoint to relations in any degree (*e*), and it is only in those cases where he has a mere power of *distribution* that he must confine himself to the relations within the Statute of Distribution (22 & 23 Chas. 2. c. 10) (*f*). But the Court,

[(*a*) *Re Jackson's Will*, 13 Ch. D. 189.]

[(*b*) *Wilson* v. *Duguid*, 24 Ch. D. 244.]

[(*c*) *Re White's Trusts*, Johns. 656; *Re Phene's Trust*, 5 L. R. Eq. 346.]

(*d*) *Winn* v. *Fenwick*, 11 Beav. 438; and see *Tiffin* v. *Longman*, 15 Beav. 275.

(*e*) *Supple* v. *Lowson*, Amb. 729; *Grant* v. *Lynam*, 4 Russ. 292; *Harding* v. *Glyn*, 1 Atk. 469; *S. C.*, stated from Reg. Lib., *Brown* v. *Higgs*, 5 Ves. 501; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Cruwys* v. *Colman*, 9 Ves. 324, *per* Sir W. Grant; *Spring* v. *Biles*, cited *Swift* v. *Gregson*, 1 T. R. 435, note (*f*); *Salusbury* v. *Denton*, 3 K. & J. 536; *Snow* v. *Teed*, 9 L. R. Eq. 622. In *Brunsden* v. *Woolredge*, Amb. 507, Sir T. Sewell seems (contrary to his opinion in *Supple* v. *Lowson*, *ubi sup.*) to have confined the trustees to relations within the statute.

(*f*) *Isaac* v. *Defriez*, Amb. 595; but see the case stated from Reg. Lib., *Attorney-General* v. *Price*, 17 Ves. 373, note (*a*); *Carr* v. *Bedford*, 2 Ch. Rep. 146; *Lawlor* v. *Henderson*, 10 Ir. R. Eq. 150; *Pope* v. *Whitcombe*, 3 Mer. 689. The last case, and *Forbes* v. *Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a power, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of selection will be implied in a case of "relations," where it would not have been implied in the case of "children";

except where the bequest is for the benefit of *poor relations* by way of founding a charity (*a*), or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained (*b*), must in all cases appoint to the relations within the statute; for as on the one hand the Court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum* (*c*).

Whether relations shall take *per stirpes* or *per capita*.

12. A further point open to discussion is, in what *shares* such relations shall take,—whether those who in case of intestacy would have claimed by representation shall, under the execution of the power by the Court, take *per stirpes* or *per capita*.

Now, the rule that those are deemed relations who would take a distributive share under the statute was adopted on the ground that, unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void for uncertainty. As this was the sole foundation for appealing to the statute at all, it is evident the single inquiry for the Court is *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beside the Court's jurisdiction; for, when the class has been ascertained, the testator himself has determined the proportions by devising to the objects in words creating a joint tenacy (*d*). No distinction can be taken between real and personal estate; yet it could scarcely be held, that if *lands* were devised to the testator's "relations," the kindred within the statute would take in unequal proportions.

Principle to be extracted from the cases.

The result of the authorities would seem to accord with what is correct upon principle, viz. that *in a gift to "relations" (whether the testator has added the words "equally to be divided" or not), the distribution among the relations within the statute must be made* per capita, *and not* per stirpes (*e*). The question

Spring v. *Biles*, cited 1 T. R. 435, note (*f*); *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Salusbury* v. *Denton*, 3 K. & J. 536. In the last two cases the words were "*amongst* the relations," but see *Pope* v. *Whitcombe*, 3 Mer. 689, where the expression was similar.

(*a*) See *White* v. *White*, 7 Ves. 423; *Attorney-General* v. *Price*, 17 Ves. 371; *Isaac* v. *De Friez*, Ib. 373, note (*a*); and see *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

(*b*) *Bennett* v. *Honywood*, Amb. 708.

(*c*) Thus in *Bennett* v. *Honywood*, Amb. 708, 456 persons applied as relations within two years.

(*d*) See *Walker* v. *Maunde*, 19 Ves. 427, 428.

(*e*) See *Thomas* v. *Hole*, Cas. *t.* Talb. 251; *Stamp* v. *Cooke*, 1 Cox, 236; *Phillips* v. *Garth*, 3 B. C. C. 64; *Green* v. *Howard*, 1 B. C. C. 33; *Rayner* v. *Mowbray*, 3 B. C. C. 234; Reg. Lib. B. 1791, fol. 183; *Pope* v. *Whitcombe*, 3 Mer. 689; Reg. Lib. B. 1809, fol. 1535; *Hinckley* v. *Maclarens*, 1 M. & K. 27; *Withy* v. *Mangles*, 4 Beav. 358; 10 Cl.

can no longer arise where the gift is [*simpliciter*, and without any reference to the intestacy of the propositus (*a*)] to "*next of kin*": for by the decision of *Elmsley* v. *Young*, upon appeal from Sir J. Leach to the Lords Commissioners (*b*), the words "next of kin" must be construed to mean "nearest of kin," to the exclusion of those who would take under the statute by representation.

Subject of the gift incapable of division.

13. We have stated that, as a general principle, the Court will execute the power among the objects *equally;* but it sometimes happens that the subject of the gift is *incapable of division*, or the settlor has expressly directed the whole to be bestowed on *one* object to be selected by the trustee. In such cases the Court still acts upon the maxim, that, if *by any possibility* the power can be executed the Court will do it.

Moseley *v.* Moseley.

In *Moseley* v. *Moseley* (*c*), a very early case, an estate was devised to trustees upon trust to settle on *such* (*i.e.* on such *one*) of the sons of N. as the trustees should think fit. The trustees having neglected to comply with the direction, the sons of N. filed a bill to have the benefit of the trust, and the Court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of the plaintiffs as they should think fit, upon whom to settle the lands of the testator; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the Court would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

Richardson *v.* Chapman.

In *Richardson* v. *Chapman* (*d*), Dr Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof "regard should be had according to their discretion to his eldest son, his sons-in-law, his present and former chaplains, and others his domestics, particularly Dr T., his chaplain, and Dr H., his librarian; also to his worthy friends and acquaintance, particularly to Dr Richardson." The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr Venner. On a bill filed to set aside the

& Fin. 215; *Fielden* v. *Ashworth*, 20 L. R. Eq. 410. The above cases are discussed in Append. No. IX. to 3rd ed. of this work.

[(*a*) See *Re Gray's Settlement*, (1896) 2 Ch. 802.]

(*b*) 2 M. & K. 780; and see *Withy* v. *Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; [*Re Gray's Settlement, sup.*].

(*c*) Rep. *t.* Finch, 53; *S. C.*, cited *Clarke* v. *Turner*, Freem. 199.

(*d*) 7 B. P. C. 318; *S. C.*, cited *Brown* v. *Higgs*, 5 Ves. 504, 505.

presentation, Lord Northington considered the trust to be of a kind that the Court could not execute, and dismissed the bill. Dr Richardson appealed against this decision to the House of Lords, and the other person, who stood prior to him, not appearing, the House reversed the decree, and ordered the presentation to be made to the appellant. "This case," says Lord Alvanley, "shows that, however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was to make the selection, it is decisive to show the Court must do it, though the trust is in its nature so discretionary" (*a*).

(*a*) *Brown* v. *Higgs*, 5 Ves. 504. In this case (see 4 Ves. 718, 719; 5 Ves. 508), an estate was devised "to *one* of the sons of Samuel Brown as John Brown should direct by a conveyance in his lifetime, or by his last will and testament"; and John Brown not having executed the power, Lord Alvanley was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim; but the ground of this opinion was not that a *trust* had been created which the Court could not execute, but that the intention of the testator as collected from the will was to communicate a *mere power*.

CHAPTER XXX

THE RIGHTS OF A CESTUI QUE TRUST IN PREVENTION OF BREACH OF TRUST

As the estate of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable that the *cestui que trust*, whose interest is thus materially concerned, should be allowed by all practicable means to secure himself against the occurrence of any act of misconduct. We shall, therefore, next consider the rights of the *cestui que trust* that are calculated to arm him with this protection.

Cestui que trust entitled to appointment of proper trustees.

First. The *cestui que trust* is entitled to have the custody and administration of the estate confided to the care both of *proper persons* and of a *proper number* of such persons.

Trustee dying in testator's lifetime.

1. Thus, if the trustee originally appointed by a will happen to die in the testator's lifetime, the *cestui que trust*, where such a course would be for his interest, may have the property better secured by a conveyance to an express trustee for himself; and where a testator did not appoint a trustee at all, but only appointed executors, the Court asserted an inherent jurisdiction of its own to appoint trustees to take charge of the fund (*a*).

Death of trustees after having acted.

2. So, where the original number of trustees has become reduced by deaths, the *cestui que trust* may restore the property to its original security by calling for the appointment of new trustees in the place of the trustees deceased (*b*); and even a *cestui que trust* in remainder may take proceedings to have the proper number of trustees filled up (*c*), and under the new practice the Court has appointed new trustees upon an action by infant *cestuis que trust*, without any statement of claim, upon an admission

(*a*) *Dodkin* v. *Brunt*, 6 L. R. Eq. 580.

(*b*) *Buchanan* v. *Hamilton*, 5 Ves. 722; *Hibbard* v. *Lamb*, Amb. 309.

(*c*) *Finlay* v. *Howard*, 2 Dru. & War. 490.

in the statement of defence by the sole trustee that she was willing to retire (*a*).

Trustee refusing to act, becoming incapable, or misconducting himself, &c.

3. If a trustee refuse to act (*b*), or become so circumstanced that he cannot effectually execute the office, as where a trustee goes *abroad* to reside permanently (*c*), or the trustees of a chapel entertain opinions *contrary to the founder's intention* (*d*), or if a trustee of money become *bankrupt* (*e*), or if a trustee *misconduct* himself in any manner (*f*), as by dealing with the trust property for his own *personal advancement* (*g*), by suffering a co-trustee to commit a *breach of trust* (*h*), or by *absconding* on a charge of forgery (*i*); in these and the like cases the *cestui que trust* may have the old trustee removed, and a new trustee appointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it will be impertinent, and

(*a*) *Mooney* v. *Summerlin*, W. N. 1876, p. 90.

(*b*) *Maggeridge* v. *Grey*, Nels. 42; *Travell* v. *Danvers*, Rep. *t.* Finch, 380; *Wood* v. *Stane*, 8 Price, 613; *Anon.* 4 Ir. Eq. Rep. 700.

(*c*) *O'Reilly* v. *Alderson*, 8 Hare, 101; *Re Ledwich*, 6 Ir. Eq. Rep. 561; *Commissioners of Charitable Donations* v. *Archbold*, 11 Ir. Eq. Rep. 187; [and see *Re Earl of Stamford*, (1896) 1 Ch. 288].

(*d*) *Attorney-General* v. *Pearson*, 7 Sim. 290, 309; *Attorney-General* v. *Shore*, Ib. 309, 317.

(*e*) *Bainbrigge* v. *Blair*, 1 Beav. 495; *Re Roche*, 1 Conn. & Laws. 306; *Commissioners of Charitable Donations* v. *Archbold*, 11 Ir. Eq. Rep. 187; *Harris* v. *Harris*, (No. 1), 29 Beav. 107; *Re Barker's Trusts*, 1 Ch. D. 43, in which case Sir G. Jessel, M.R., observed: "It is the duty of the Court to remove a bankrupt who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions under special circumstances to that general rule. And it may also be, that where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt, but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate than one who is wealthy; and, besides, a man who has not shown prudence in managing his own affairs, is not likely to be successful in managing those of other people." An exception to the general rule was made in *Re Bridgman*, 1 Dr. & Sm. 164, where a trustee became bankrupt, but without any imputation on his moral character, and had been honourably unfortunate, and but for an accident would have been solvent, and had been treated by all parties since his bankruptcy as a proper person to manage the trust. If the trustee compound with his creditors, the same rule applies as in bankruptcy, for the *cestuis que trust* have equally a right to have the administration of the trust estate committed to responsible persons; [*Re Adam's Trust*, 12 Ch. D. 634; and see *Re Hopkins*, 19 Ch. D. (C.A.) 61; *Re Foster's Trusts*, 55 L. T. N.S. 479].

(*f*) *Mayor of Coventry* v. *Attorney-General*, 7 B. P. C. 235; *Buckeridge* v. *Glasse*, Cr. & Ph. 126, see 131.

(*g*) *Ex parte Phelps*, 9 Mod. 357; [and see *Moore* v. *M'Glyn*, (1894) 1 I. R. 74].

(*h*) *Ex parte Reynolds*, 5 Ves. 707.

(*i*) *Millard* v. *Eyre*, 2 Ves. jun. 94.

may be scandalous, to state circumstances of *general* malice or personal hostility (*a*). And if the old trustee be removed on the ground of *misconduct*, he must bear the expense of the appointment of a new trustee, as an act necessitated by himself (*b*).

[But where the instrument creating the trust contemplates the possibility of a single trustee being appointed to act alone, and the power of appointing new trustees is given to the trustees or trustee for the time being, it is not a breach of trust in the last surviving trustee to refuse to appoint another trustee to act with himself, and an action to compel him to do so, if not sustainable on other grounds, will be dismissed with costs (*c*).

[Trustee removed where it is to the advantage of the trust.]

4. The jurisdiction of a Court of Equity to remove a trustee is ancillary to its principal duty, to see that the trusts are properly executed. And therefore, though charges of misconduct are not made out, or are greatly exaggerated, the Court may, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, remove the trustee, as trustees exist for the benefit of those to whom the creator of the trust has given the trust estate (*d*); and in an administration action the Court will exercise the jurisdiction at any time when it deems it expedient so to do, and notwithstanding that the removal of the trustee has not been expressly asked for by the pleadings (*e*).]

Trust property under administration by the Court.

5. If the trust property be under administration by the Court, and the surviving trustee dies, the appointment of other trustees is not matter of course, but rests in the discretion of the Court, having regard to the state of the trust at the time (*f*); and if liberty has been given by a former order to apply at chambers, and the parties present a petition instead of applying at chambers for the appointment of new trustees, the petitioners will be disallowed their costs (*g*).

Trustees required to be "inhabitants."

6. If the settlement require the trustees of a charity to be *inhabitants of a particular place*, it is irregular to appoint persons trustees who do not answer that description, provided at the time of the election there be any inhabitants proper to be

(*a*) *Earl of Portsmouth* v. *Fellows*, 5 Mad. 450.

(*b*) *Ex parte Greenhouse*, 1 Mad. 92.

[(*c*) *Peacock* v. *Colling*, 54 L. J. N.S. Ch. 742; 33 W. R. 528; 53 L. T. N.S. 620.]

[(*d*) *Letterstedt* v. *Broers*, 9 App. Cas. 371, 386; and see *Moore* v. *M'Glyn*, (1894) 1 I. R. 74.]

[(*e*) *Re Wrightson*, (1908) 1 Ch. 789.]

(*f*) *Ryan* v. *Stockdale*, W. N. 1875, p. 106.

(*g*) *Bund* v. *Green*, W. N. 1875, p. 213. [By Rules of Court, 1883, Order LV., Rule 11, when an originating summons has been taken out under Rules 3 and 4, every subsequent summons relating to the same matter is to be marked with the name of the judge to whom the matter is assigned.]

trustees (*a*). But where it has been the custom to appoint trustees not being inhabitants, the Court will not *remove* the existing trustees, though it will take care that the founder's directions shall be better observed for the future (*b*); and generally, though trustees may have been appointed irregularly in the first instance, their removal cannot be demanded after acquiescence for a great number of years (*c*). And in the selection of trustees of charities the Court inquires whether the parties proposed are *proper persons*, not whether they are the *most proper* that could be found (*d*).

[7. Where the administration of a charity had been committed by the settlor to the lord provost and town council of Edinburgh and the ministers of the burgh, but for a long period the administration had been solely in the hands of the provost and council, it was held that, notwithstanding the length of time during which a contrary practice had prevailed, the ministers must in future be admitted as joint administrators of the charity (*e*).] [Proper mode of administration of charity restored.]

8. The Court will not dismiss a trustee for the mere *caprice* of the *cestui que trust* without any reasonable cause shown (*f*), or because the trustee has *refused* from *honest motives* to exercise a *power* at the request of a tenant for life (*g*), or because a *dissension* has arisen between the trustee and one of the *cestuis que trust* (*h*), or because a *cestui que trust* puts forward a claim, which may be unfounded, that property of the trustee ought to be brought into the settlement (*i*), or because the trustee has transgressed the *strict line* of his duty, provided there was *no wilful default*, but merely a *misunderstanding* (*j*). Where, however, a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him, Lord Nottingham said: "He liked not that a man should be ambitious of a trust when he could get nothing but trouble by [Trustee not to be dismissed from caprice.]

(*a*) *Attorney-General* v. *Cowper*, 1 B. C. C. 439. As to the force of the word "residence," see *Blackwell* v. *England*, 3 Jur. N.S. 1302; *Attenborough* v. *Thompson*, 2 H. & N. 559.

(*b*) *Attorney-General* v. *Stamford*, 1 Ph. 737; *Attorney-General* v. *Clifton*, 32 Beav. 596; *Attorney-General* v. *Daugars*, 33 Beav. 621.

(*c*) *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139, see 150.

(*d*) *Re Lancaster Charities*, 7 Jur. N.S. 96.

[(*e*) *The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823.]

(*f*) *O'Keeffe* v. *Calthorpe*, 1 Atk. 18; and see *Pepper* v. *Tuckey*, 2 Jon. & Lat. 95.

(*g*) *Lee* v. *Young*, 2 Y. & C. C. C. 532.

(*h*) *Forster* v. *Davies*, 4 De G. F. & J. 133.

(*i*) *S. C.*

(*j*) See *Attorney-General* v. *Coopers' Company*, 19 Ves. 192; *Attorney-General* v. *Caius College*, 2 Keen, 150.

it," and without any reflection on the conduct of the trustee, declared he should meddle no further in the trust (*a*).

In appointing new trustees the Court would not give them a power of appointing other trustees.

9. As the substitution of a trustee by the Court proceeds upon a full consideration of the case, and is never made unless the Court is satisfied as to the fitness of the person proposed, it could not be expected that the Court should, when appointing new trustees and directing the trust property to be conveyed to them, authorise the insertion of a *power* in the conveyance, enabling the new trustees to *nominate other trustees* in their stead as often as occasion may require: this would plainly be an abandonment by the Court of its own jurisdiction—a delegation of it to the care and judgment of individuals. Accordingly, notwithstanding some previous fluctuation in the practice (*b*), it was settled that, except in charity cases (*c*), the Court would not authorise the insertion of such a power in the deed of conveyance (*d*). [But now, as we have seen (*e*), the statutory power of appointing new trustees is, by sect. 10 of the Trustee Act, 1893 (*f*), expressly extended to the case of trustees appointed by the Court.]

Rules for selecting new trustees.

10. In appointing new trustees the Court does not act arbitrarily, but upon certain general principles. *First*, the Court has regard to the *wishes of the author of the trust*, whether actually expressed in the instrument, or plainly deducible from it; and if he has declared a particular person not fit to be appointed a trustee, the Court will refrain from appointing him. *Secondly*, the Court will not appoint a new trustee with a view to the interests of some of the parties beneficially interested, in opposition to the wishes of others; for a trustee ought to hold an *even hand as between all parties*, and not favour a particular class. And, *thirdly*, the Court has regard to the nature of the trust, and the question by whose instrumentality it can *best be carried into execution* (*g*).

Statutory powers.

11. The exercise by the *cestui que trust* of his right to have the custody of the trust estate confided to a proper number of

(*a*) *Uvedale* v. *Ettrick*, 2 Ch. Ca. 130.

(*b*) *Joyce* v. *Joyce*, 2 Moll. 276; *White* v. *White*, 5 Beav. 221.

(*c*) *Attorney-General* v. *Hurst*, M.R., Dec. 2, 1791; Reg. Lib. A. 1791, f. 487; see the decree, stated Seton's Dec. 6th ed. pp. 1330, 1331; *In the matter of* 52 G. 3. c. 101, 12 Sim. 262: *Re Lovett's Exhibition Sidn. Suss. Coll. Camb.*, cor. V. C. Knight Bruce, Dec. 20, 1849.

(*d*) *Bayley* v. *Mansell*, 4 Madd. 226; *Brown* v. *Brown*, 3 Y. & C. 395; *Southwell* v. *Ward*, Taml. 314; *Bowles* v. *Weeks*, 14 Sim. 591; *Oglander* v. *Oglander*, 2 De G. & Sm. 381; *Holder* v. *Durbin*, 11 Beav. 594, in which last case Lord Langdale, M.R., in deference to the views of the other judges, declined to follow his own previous decision in *White* v. *White*, *ubi sup.*

[(*e*) See *ante*, p. 806.]

[(*f*) 56 & 57 Vict. c. 53.]

(*g*) *Re Tempest*, 1 L. R. Ch. App. 485; 12 Jur. N.S. 539.

duly qualified trustees has been greatly facilitated by various statutes enabling him to obtain, in certain cases, the removal of unfit trustees, and the appointment of others in their room, and also the appointment of new trustees where the office is merely vacant; and this by a cheaper and more summary proceeding than by action. [The more important of these enactments have been already considered, but there are some others which it is convenient here to refer to (*a*).]

12. By the Municipal Corporations Act, 1835, sect. 71, it was enacted that in every borough in which the body corporate, or any one or more of the members of such body corporate in *his or their corporate capacity* then stood, solely or together with any person or persons elected solely by such body corporate, or by any members thereof, *seised or possessed for any estate or interest whatsoever* of any hereditaments or personal estate whatsoever, in whole or in part, in trust for any charitable trusts, all the estate and interest, and all the powers of such body corporate or of such members thereof, should, from and after the 1st day of August, 1836, utterly cease; with a proviso that if Parliament should not otherwise direct, on or before the said 1st day of August, 1836 (*which was not done*), the Lord Chancellor should make such orders as he should see fit for the administration of such trust estates. 5 & 6 W. 4. c. 76, s. 71.

Under the authority "to make orders," the Court of Chancery from time to time appointed trustees for the due management of the charity property in the place of the corporation. The jurisdiction of the Court, however, was held not to apply to a case where no *estate* was vested in the *old corporation*, but the charity property was vested in trustees, and the *corporation* was merely the visitor with powers of nomination (*b*). Where there was a charity corporation *substantially*, though not *identically*, the same in its component parts as the municipal corporation, the case was held to be within the spirit if not the letter of the section above referred to (*c*). Jurisdiction of the Court of Chancery under 5 & 6 W. 4. c. 76, s. 71.

The appointment of trustees by the Court under this Act, though it made them custodians of the property, could not of course transfer to them the legal estate, which, it was decided, notwithstanding the strong negative words used in the statute, remained in the corporation (*d*). Legal estate.

[(*a*) For the powers under the Trustee Act, 1893, see *ante*, pp. 838 *et seq.*; and for those under the Settled Land Act, *ante*, pp. 654 *et seq.*]

(*b*) *Attorney-General* v. *Newbury Corporation*, C. P. Coop. Rep. 1837-38, 72; *Christ's Hospital* v. *Grainger*, 16 Sim. 102.

(*c*) *Attorney-General* v. *Mayor, &c., of Exeter*, 2 De G. M. & G. 507.

(*d*) *Doe* v. *Norton*, 11 M. & W. 913.

16 & 17 Vict. c. 137, s. 65.

13. But by the Charitable Trusts Act, 1853, sect. 65, the legal estate was vested, without any actual conveyance, in the trustees appointed by the Court, and upon the death, resignation, or removal of any of the trustees, and the appointment of any new trustee or trustees, the legal estate transferred itself to the trustees for the time being without any conveyance.

[45 & 46 Vict. c. 50, s. 133.]

[14. By the Municipal Corporations Act, 1882 (*a*), which repealed the previous Municipal Corporations Act, and 16 & 17 Vict. c. 137, sect. 65, without prejudice to anything done under those Acts respectively, the provision for the transfer of the legal estate without conveyance on the appointment of new trustees is, by sect. 133, re-enacted. It is to be observed that the section does not continue the power to make orders for the administration of trust estates, but the appointment of trustees can still be made under Sir S. Romilly's Act (*b*), though it will seldom be necessary to resort to it for the purpose.]

Appointment of trustees of charities under the Charitable Trusts Acts.

15. By the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), sect. 28, new trustees of any charity the gross annual income whereof exceeds 30*l.* (*c*) may be appointed by a judge of the Chancery Division (*d*) *in chambers*, and the Court has power at the same time to make an order under the Trustee Act, without petition, vesting the estates in the new trustee (*e*). But the sanction of the Charity Commissioners, under the 17th section, must first be obtained. And by the Charitable Trusts Act, 1860, (23 & 24 Vict. c. 136), s. 2, the *Charity Commissioners* are empowered upon the application of the *trustees* or a *majority* of them, under their hands or common seal, to make the *like orders for the appointment of new trustees of charities as could have been made by a judge at chambers;* and this power extends even to contentious cases (*f*).

Peto's Act.

16. By the Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), "Wherever freehold, leasehold, copyhold, or customary property in England or Wales, has been or shall be acquired by any congregation, or society, or body of persons associated for *religious purposes* or for the promotion of *education*, as a chapel, meeting-house," &c., "and wherever the conveyance, assignment, or other

[(*a*) 45 & 46 Vict. c. 50.]

[(*b*) See *post*, Chap. XXXI., sec. 4.]

(*c*) By s. 32, where the income is below 30*l.* (since extended by 23 & 24 Vict. c. 136, s. 11, to an income not exceeding 50*l.*), the District Courts of Bankruptcy and County Courts have jurisdiction.

[(*d*) See the Judicature Act, 1873, s. 34.]

(*e*) *Re Davenport's Charity*, 4 De G. M. & G. 839. In *Re Lincoln Primitive Methodist Chapel*, 1 Jur. N.S. 1011, V.C. Stuart does not appear to have had his attention drawn to the previous decision of Lord Cranworth in *Davenport's Charity*, *ubi sup.*

(*f*) *Re Burnham National Schools*, 17 L. R. Eq. 241.

assurance of such property has been or may be taken" to trustees duly appointed, such conveyance, assignment, or other assurance shall not only vest the property in the parties named, but also in their successors from time to time, and where there is *no power to appoint new trustees*, the *society* may, for the purpose of vesting the estate, appoint new *trustees;* [but every] such appointment [whether under a power in the trust deed or by virtue of the Act] must be evidenced by deed under the hand and seal of the chairman and attested by two witnesses. The primary, if not the only object of this enactment obviously was to make the trust estate devolve upon the trustees of the society from time to time without conveyance, and it is doubtful whether new trustees thus appointed by the society [in the absence of any special direction in the trust deed] succeed generally to all the powers of the old trustees, or take the legal estate only (*a*).

By the Trustee Appointment Act, 1869, the provisions of 13 & 14 Vict. c. 28, were extended to burial-grounds, and [by the Trustee Appointment Act, 1890 (*b*), are made to "apply to and include any land acquired by trustees in connection with any society or body of persons comprising several congregations or other sections or divisions or component parts associated together for any religious purpose, when such land is held in trust for any of the following purposes: (1) a place for religious worship; (2) an endowment or provision for the maintenance of a place of religious worship, or the minister thereof, or provision for expenses connected therewith; (3) a burial-ground; (4) a place for education and training of students, whether for the ministry or for any other purpose; (5) a school house for a Sunday school, day school, or other school; (6) a residence for a minister or schoolmaster, or for the caretaker of a place of religious worship, or of a school house, or a meeting house, or offices, or other buildings for or in connection with religious or educational purposes." The power of appointing new trustees conferred by the Trustee Act, 1893 (*c*), is applicable to all land acquired and held on trust for any purpose to which the Acts of 1850 or 1869 apply, and any such statutory power may be exercised either by the persons and in the manner provided by that statutory power, or by the person or persons and by resolution at a meeting, or in any other mode in which, under the instrument creating the trust, or any other

[32 & 33 Vict. c. 26.]

[Trustee Appointment Act, 1890.]

(*a*) See as to the construction of the Act, *Re Houghton's Chapel*, 2 W. R. 631.

[(*b*) 53 & 54 Vict. c. 19, s. 2.]

[(*c*) Imported into that Act from the Conveyancing and Law of Property Act, 1881.]

instrument, the appointment of a new trustee in place of a deceased trustee can be effected (*a*). The vesting clause in the Act of 1850 is extended to the case of trustees appointed under any power conferred by the Act of 1890, or under any other statutory power (*b*), and where an appointment of a trustee can be made under a power in an instrument as well as under a statutory power, the latter power is not to be exercised until twelve months from the date of the vacancy to be filled up have expired (*c*); and provision is made whereby purchasers and mortgagees from trustees invalidly appointed are protected, if no proceedings are taken or effectively prosecuted to set aside the appointment within six months from its date (*d*). It is further provided that where trustees, or the major part of them, or other persons present at a meeting duly constituted, are empowered to appoint trustees by resolution, a memorandum of the appointment of any trustee which states that the meeting was duly constituted, and is otherwise in the form indicated by the Act of 1850, shall be sufficient and conclusive evidence that the appointment appearing by the memorandum was duly made (*e*).]

Trustee may be compelled to any act of duty.

Secondly. The *cestui que trust* is entitled to bring an action against his trustee, and *compel him to the execution of any particular act of duty.*

Maintenance of right at law.

1. Thus, if the legal estate in the hands of the trustee be disturbed by a stranger, the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority (*f*), may oblige the trustee, on giving him a proper indemnity, to lend his name for asserting the legal right (*g*). If the trustee of a covenant, even a voluntary one, will not sue upon it, the *cestui que trust* may compel the trustee on a proper indemnity to lend his name to the *cestui que trust*, to enable him to sue (*h*). Otherwise, should the trust property be lost, and the trustee himself become insolvent, the *cestui que trust's* equitable interest would be absolutely destroyed. [In equity, the mere refusal by the trustee to sue will not entitle the *cestui que trust* to

[(*a*) See 53 & 54 Vict. c. 19, s. 3.]
[(*b*) See s. 4.]
[(*c*) See s. 5.]
[(*d*) See s. 6.]
[(*e*) See s. 7.]
(*f*) See *Crossley* v. *Crowther*, 9 Hare, 386; [and the name of the trustee as co-plaintiff cannot be added without his consent in writing pursuant to Rules of Court, 1883, Order XVI., Rule 11; *Besley* v. *Besley*, 37 Ch. D. 648].
(*g*) *Foley* v. *Burnell*, 1 B. C. C. 277, *per* Lord Thurlow; Cary, 14; [*Ex parte Kearsley*, 17 Q. B. D. 1;] and see *Kirby* v. *Mash*, 3 Y. & C. 295; *Malone* v. *Geraghty*, 2 Conn. & Laws. 251.
(*h*) See *Fletcher* v. *Fletcher*, 4 Hare, 78; *Jerdein* v. *Bright*, 2 J. & H. 325; [and see *Re Plumtre's Marriage Settlement*, (1910) 1 Ch. 609].

maintain a suit in his own name, as, for, example, for an account against a debtor to the trust estate (*a*); and so, mere refusal by a legal personal representative to sue for outstanding assets will not *per se* justify a residuary legatee or next of kin in suing the legal personal representative and the alleged debtor to the estate (*b*): to justify such a course special circumstances must be shown tending to disable the trustee from suing (as where his acts and conduct with reference to the estate are impeached), or rendering it inconvenient that he should do so (*c*).]

Tenant for life of renewable leaseholds neglecting to renew.

2. If a tenant for life of leaseholds be bound to renew, and by his threats or acts manifest an intention not to renew, the remainderman may institute proceedings and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate; and if the period of renewal has already expired, a receiver may be appointed on proof of the tenant for life's default (*d*).

Trustee giving security.

3. In one case, where a suspicion was entertained that the trustee would not fairly execute his trust, the Court required of him, if he continued in the office, to enter into securities for his good faith (*e*).

Cestui que trust may have a contingent interest secured.

4. And generally a *cestui que trust*, who can allege an existing interest, however minute or remote, may, upon reasonable cause shown, apply to the Court to have his interest properly secured (*f*).

[(*a*) *Sharpe* v. *San Paulo Railway Company*, 8 L. R. Ch. 597, 609, where it was said by James, L.J., that if the trustee would not take proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust, or for the realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action or proper suit in equity.]

[(*b*) *Yeatman* v. *Yeatman*, 7 Ch. D. 210, where it was intimated that the test to be applied, in ascertaining the right of the *cestui que trust* to sue, was whether an inquiry by the Court as to the propriety of proceedings being instituted would be answered in the affirmative; and see *Travis* v. *Milne*, 9 Ha. 14; and, *semble*, "if the Court upon the materials before it came to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, then it would be a proper case to allow a party to sue in his own name"; *Yeatman* v. *Yeatman*, 7 Ch. D. 216, *per* Hall, V.C.; *Meldrum* v. *Scorer*, 56 L. T. N.S. 474. In the latter case, on objection taken by the defendant, and in order to guard against multiplicity of actions, all the *cestuis que trust* were made parties.]

[(*c*) *Beningfield* v. *Baxter*, 12 App. Cas. 167; *Meldrum* v. *Scorer*, 56 L. T. N.S. 471, 474.]

(*d*) *Bennett* v. *Colley*, 5 Sim. 192; *S. C.*, 2 M. & K. 233.

(*e*) *Kneeling* v. *Child*, Rep. *t.* Finch, 360.

[(*f*) See *Bartlett* v. *Bartlett*, 4 Ha. 631; *Governesses' Benevolent Institution* v. *Rushbridger*, 18 Beav. 467; Seton, 6th ed. p. 1508; and see *Re Dartnall*, (1895) 1 Ch. (C.A.) 474.]

Possibility upon a possibility.

5. But a distinction must be taken between an existing interest, whether vested or contingent, and the *mere possibility of a future event, which, if it occurs may give birth to an interest.* Thus, where a one-fifteenth share of a residue was bequeathed to Isaac for life, if he married Esther, and after his death for Isaac's eldest or only child living at his decease, and who should attain twenty-one, with a gift over in case Isaac should not marry Esther, and Isaac married Isabella while Esther was still living, it was held by M.R. (*a*), and affirmed by Lord Westbury (*b*), that the eldest child of Isaac, an infant, as his interest was preceded by the condition that Isaac should survive his present wife, and then marry Esther, a possibility upon a possibility, could not sustain a suit for having his interest secured. Had Isaac survived his wife and then married Esther, the interest of the child would still have been contingent, and in that case M.R. appears to have thought that the child would have had no *locus standi* in Court, but L.C. was of a different opinion. And in another case, where a house was devised to trustees in trust for tenants for life, and after their respective deceases for their children then living, and the issue of such of them as should be dead, and failing such children and issue in trust for a class, and, there being issue of one of the tenants for life but not of the others, some of the class presented a petition for the appointment of new trustees, on the footing that they were "persons beneficially interested" under the 37th section of the Trustee Act, 1850, M.R. dismissed the petition with costs (*c*), but on appeal the order below was reversed, and the L.JJ. held that the petitioners were persons beneficially interested (*d*).

Trustee may be restrained from violating his duty.

Thirdly. As the *cestui que trust* may compel the trustee to the observance of his duty, so, on the other hand, if the *cestui que trust* have reason to suppose, and can satisfy the Court, that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may obtain *an injunction from the Court to restrain the trustee from such a wanton exercise of his legal power* (*e*).

(*a*) *Davis* v. *Angel*, 31 Beav. 223; [and see *Re Parsons*, 45 Ch. D. 51, 60; *Allcard* v. *Walker*, (1896) 2 Ch. 369, 380].

(*b*) 10 W. R. 723.

(*c*) *Re Sheppard's Trusts*, 10 W. R. 704.

(*d*) 1 N. R. 76; 4 De G. F. & J. 423.

(*e*) *Balls* v. *Strutt*, 1 Hare, 146. So a mortgagee with a power of sale will proceed at his peril to sell the mortgaged estate after tender of principal and interest, though costs be not included, if the security be sufficient; and a purchaser with notice cannot shelter himself under a clause in the mortgage deed exempting the pur-

Though the damage would not be irreparable.

1. It is clear that the *cestui que trust* would be entitled to an injunction where the act in contemplation would, if done, be irremediable (*a*); but in *Pechel* v. *Fowler* (*b*), a case in the Exchequer while it was a Court of Equity, it is said to have been held that a *cestui que trust* could not restrain an improvident *sale* by the trustee, because the *cestui que trust* might proceed against the trustee for the consequential damage to the trust estate, and so the injury was not irreparable; but Sir J. Leach, under similar circumstances, granted an injunction (*c*); and other authorities are not wanting in support of so just and reasonable a right, which may now be considered as established (*d*).

Partial owner may obtain injunction.

2. And not only a person exclusively interested in a trust fund, and therefore the absolute owner, may obtain an injunction against the disposition of it, which is almost matter of course; but one who has only a common interest with others in the trust estate, is entitled on behalf of himself and those others to have the property secured (*e*).

Injunction against bankrupt or insolvent trustee.

3. An injunction against the disposition of the fund may be obtained against an insolvent trustee (*f*), and *a fortiori* against one who is actually a bankrupt (*g*), and the Court will grant an injunction against the administration of the assets by an executor who is proved to be of bad character, drunken habits, and great poverty (*h*), [or who has misappropriated assets and become bankrupt (*i*). But the Court will not thus interfere in favour of a creditor, unless it is shown that the assets are being wasted, and in a creditor's action for administration a receiver will not be appointed merely because the executor will probably exercise his legal right of retaining his own debt or of preferring a

chaser from the necessity of seeing to the validity of the sale; *Jenkins* v. *Jones*, 2 Giff. 99; [and see *Selwyn* v. *Garfit*, 38 Ch. D. (C.A.) 273; *Barker* v. *Illingworth*, (1908) 2 Ch. 20].

(*a*) See *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 57; *Re Chertsey Market*, 6 Price, 279, 281; *Attorney-General* v. *Foundling Hospital*, 2 Ves. jun. 42.

(*b*) 2 Anst. 549.

(*c*) *Anon. case*, 6 Mad. 10.

(*d*) See *Webb* v. *Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve* v. *Parkins*, 2 J. & W. 390; *Milligan* v. *Mitchell*, 1 M. & K. 446; *Attorney-General* v. *Mayor of Liverpool*, 1 M. & Cr. 210; *Vann* v. *Barnett*, 2 B. C. C. 157; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902; *Marshall* v. *Sladden*, 4 De G. & Sm. 468, and *ante*, p. 506.

(*e*) *Scott* v. *Becher*, 4 Price, 346; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902.

(*f*) *Mansfield* v. *Shaw*, 3 Mad. 100; *Scott* v. *Becher*, 4 Price, 346; *Taylor* v. *Allen*, 2 Atk. 213.

(*g*) *Gladdon* v. *Stoneman*, 1 Mad. 143, note.

(*h*) *Howard* v. *Papera*, 1 Mad. 143; *Hathornthwaite* v. *Russel*, 2 Atk. 126; *S. C.*, Barn. 334.

[(*i*) *Bowen* v. *Phillips*, (1897) 1 Ch. 174.]

particular creditor (*a*)], nor will the Court interfere merely because an executor is poor (*b*).

[Solicitor buying up mortgages by his client.]

[4. If a solicitor buy up mortgages created by his client in order to relieve the client from embarrassment, and afterwards refuses to give information as to the securities and threatens to sell the property, he will be restrained from selling upon the terms of the client paying into Court such a sum as the Court considers sufficient to cover the amount actually paid by the solicitor (*c*).]

[(*a*) *Re Wells*, 45 Ch. D. 569; *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 173; *Harris* v. *Harris*, 57 L. J. Ch. 754; 35 W. R. 710; *Philips* v. *Jones*, (C. A. 1884, 28 S. J. 360), disapproving dictum of Jessel, M.R., in *Re Radcliffe*, 7 Ch. D. 733.]

(*b*) *Everett* v. *Pryterch*, 12 Sim. 365.

[(*c*) *Macleod* v. *Jones*, 24 Ch. D. (C.A.) 289.]

CHAPTER XXXI

THE REMEDIES OF THE CESTUI QUE TRUST IN THE EVENT OF A BREACH OF TRUST

UPON the subject of the *cestui que trust's* remedies for a breach of trust, we shall consider, *First.* The right of the *cestui que trust* to follow the *specific* estate into the hands of a stranger, to whom it has been tortiously conveyed; *Secondly.* The right of attaching the property into which the trust estate has been *wrongfully converted*; *Thirdly.* The remedy against the trustee *personally*, by way of compensation for the mischievous consequences of the act; and *Fourthly.* The *mode* and *extent* of redress in breaches of trust committed by trustees of charities.

SECTION I

OF FOLLOWING THE ESTATE INTO THE HANDS OF A STRANGER

The questions that suggest themselves upon this subject are, *First.* Into whose hands the estate may be followed; *Secondly.* Within what limits of time; *Thirdly.* What account the Court will direct of the mesne rents and profits.

First. Into whose hands the estate may be followed.

1. If the alienee be a *volunteer*, then (subject to any bar arising out of the Statute of Limitations) the estate may be followed into his hands, whether he had notice of the trust (*a*), or not (*b*); for though he had no actual notice, yet the Court will imply it

Where alienee is a volunteer estate may be followed.

(*a*) *Mansell* v. *Mansell*, 2 P. W. 678; and see *Saunders* v. *Dehew*, 2 Vern. 271; *S. C.*, 2 Freem. 123; *Langton* v. *Astrey*, 2 Ch. Rep. 30; *S. C.*, Nels. 126.

(*b*) *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 58, *per Cur.*; *Pye* v. *George*, 2 Salk. 680, *per* Lord Harcourt; and see 1 Rep. 122 b; *Burgess* v. *Wheate*, 1 Eden, 219; *Spurgeon* v. *Collier*, 1 Eden, 55; *Cole* v. *Moore*, Mo. 806.

against him where he paid no consideration. But if the alienee be a *purchaser* of the estate at its full value, then (subject as aforesaid) if he take with *notice* of the trust, whether the notice be actual or constructive (*a*), he is bound to the same extent and in the same manner as the person of whom he purchased (*b*), even though the conveyance was made to him by fine with non-claim (*c*); for, knowing another's right to the property, he throws away his money voluntarily, and of his own free will (*d*). And the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*e*), or a *lien* for purchase-money (*f*). But, if a *bonâ fide* purchaser have *not notice*, either expressly or constructively, he then merits the full protection of the Court, and his title, even in equity, cannot be impeached (*g*).

Purchaser without notice cannot protect himself by getting in legal estate from an express trustee.

2. If the purchaser have no notice of the trust at the time of the purchase, but afterwards *discovers the trust and obtains a conveyance from the trustee*, he cannot protect himself by taking

(*a*) *Boursot* v. *Savage*, 2 L. R. Eq. 134. And see *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204.

(*b*) *Dunbar* v. *Tredennick*, 2 B. & B. 319, *per* Lord Manners; *Pawlett* v. *Attorney-General*, Hard. 469, *per* Lord Hale; *Burgess* v. *Wheate*, 1 Eden, 195; *per* Sir T. Clarke; *Bovy* v. *Smith*, 1 Vern. 149; *Phayre* v. *Peree*, 3 Dow, 129; *Adair* v. *Shaw*, 1 Sch. & Lef. 262, *per* Lord Redesdale; *Wigg* v. *Wigg*, 1 Atk. 382; *Mead* v. *Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke; *Mackreth* v. *Symmons*, 15 Ves. 350, *per* Lord Eldon; *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Willoughby* v. *Willoughby*, 1 T. R. 771, *per* Lord Hardwicke; *Verney* v. *Carding*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 345; *Flemming* v. *Page*, Rep. *t.* Finch. 320; *Powell* v. *Price*, 2 P. W. 539, admitted; *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *S. C.*, Id. 208; *Walley* v. *Walley*, 1 Vern. 484; *Pearce* v. *Newlyn*, 3 Mad. 186; *Slattery* v. *Axton*, W. N. 1866, p. 113; *Macbryde* v. *Eykyn*, W. N. 1867, p. 306; *Heath* v. *Crealock*, 18 L. R. Eq. 215; 10 L. R. Ch. App. 22.

(*c*) *Kennedy* v. *Daly*, 1 Sch. & Lef. 355; and see *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 44.

(*d*) *Mead* v. *Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke.

(*e*) *Daniels* v. *Davison*, 16 Ves. 249; *Earl Brook* v. *Bulkeley*, 2 Ves. 498; *Taylor* v. *Stibbert*, 2 Ves. jun. 437; *Winged* v. *Lefebury*, 2 Eq. Ca. Ab. 32; *Ferrars* v. *Cherry*, 2 Vern. 384; *Jackson's case*, Lane, 60; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

(*f*) *Mackreth* v. *Symmons*, 15 Ves. 329; *Walker* v. *Preswick*, 2 Ves. 622, *per* Lord Hardwicke; *Cator* v. *Pembroke*, 1 B. C. C. 302, *per* Lord Loughborough; *Gibbons* v. *Badall*, 2 Eq. Ca. Ab. 682, note (*b*); *Elliott* v. *Edwards*, 3 B. & P. 181; and see *Grant* v. *Mills*, 2 V. & B. 306; *Dunbar* v. *Tredennick*, 2 B. & B. 320; [*Jared* v. *Clements*, (1903) 1 Ch. (C.A.) 428].

(*g*) *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir. T. Clarke; Id. 246, *per* Lord Henley; *Millard's case*, 2 Freem. 43; *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Willoughby* v. *Willoughby*, 1 T. R. 771, *per* Lord Hardwicke; *Dunbar* v. *Tredennick*, 2 B. & B. 318, *per* Lord Manners; *Trevor* v. *Trevor*, 1 P. W. 633; *Harding* v. *Hardrett*, Rep. *t.* Finch, 9; *Cole* v. *Moore*, Mo. 806, *per Cur.*; *Jones* v. *Powles*, 3 M. & K. 581; *Payne* v. *Compton*, 2 Y. & C. 457; *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Heath* v. *Crealock*, 18 L. R. Eq. 215; 10 L. R. Ch. App. 22; *Waldy* v. *Gray*, 20 L. R. Eq. 238; [*Taylor* v. *Blakelock*, 32 Ch. D. (C.A.) 560].

shelter under the legal estate; for this is not like getting in a first mortgage, which the first mortgagee has a right to transfer to whomsoever he will (*a*); but here notice of the trust converts the purchaser into a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust (*b*). [But he will be entitled to the benefit of the legal estate which he has acquired as against persons other than the *cestuis que trust*, or those deriving title from them, for the plaintiff who seeks to deprive another of the benefit of the legal estate must rely on an equity of his own, not on that of a stranger (*c*).]

Purchaser without notice from purchaser with notice.

3. A purchaser *without notice from a purchaser with notice* is not liable, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it (*d*); and a purchaser taking the legal estate without actual notice of the trust, but taking it from a person in whom it vested by an instrument which disclosed the trust, but *of which instrument the purchaser was ignorant at the time of purchase*, can still protect himself as a purchaser without notice (*e*).

Exception in case of a charity.

But the rule does not apply to the case of a *charitable use*, for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of charity (*f*). In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons (*g*).

Shares in a company.

Where a trustee of shares of a company within the Companies' Clauses Consolidation Act transferred them to a *stranger without notice*, but who had notice before the transfer was *registered*, the

(*a*) *Bates* v. *Johnson*, Johns. 304; *Baillie* v. *M'Kewan*, 35 Beav. 177; *Joyce* v. *Rawlins*, 11 L. R. Eq. 53; *Mumford* v. *Stohwasser*, 18 L. R. Eq. 556; [*Garnham* v. *Skipper*, 55 L. J. N.S. Ch. 263; 53 L. T. N.S. 940; 34 W. R. 135; *Bailey* v. *Barnes*, (1894) 1 Ch. (C.A.) 25, 37; *Taylor* v. *Russell*, (1892) A. C. 244, 255; *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642].

(*b*) *Saunders* v. *Dehew*, 2 Vern. 271; *S. C.*, 2 Freem. 123; *Langton* v. *Astrey*, 2 Ch. Rep. 30; *S. C.*, Nels. 126; *Carter* v. *Carter*, 3 K. & J. 617; *Sharples* v. *Adams*, 32 Beav. 213; *Collier* v. *M'Bean*, 34 Beav. 426; *Justice* v. *Wynne*, 10 Ir. Ch. Rep. 489; 12 Ir. Ch. Rep. 289; *Prosser* v. *Rice*, 28 Beav. 68; *Heath* v. *Crealock*, 10 L. R. Ch. App. 22; [*Harpham* v. *Shacklock*, 19 Ch. D. (C.A.) 207, 214; and see *Taylor* v. *Russell*, (1891) 1 Ch. 8, 20, 29; (1892) A. C. 244; *Bailey* v. *Barnes*, (1894) 1 Ch. (C.A.) 25, 36, 37].

[(*c*) *Taylor* v. *Russell*, (1891) 1 Ch. 8, 28; (1892) A. C. 244.]

(*d*) *Mertins* v. *Jolliffe*, Amb. 313, *per* Lord Hardwicke; *Ferrars* v. *Cherry*, 2 Vern. 384; see *Pitts* v. *Edelph*, Tothill, 164; *Salsbury* v. *Bagott*, 2 Sw. 608.

(*e*) *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259, overruling *Carter* v. *Carter*, 3 K. & J. 617.

(*f*) *East Greenstead's case*, Duke, 65; *Sutton Colefield case*, Id. 68; and see Id. 94, 173; see *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 194.

(*g*) See Sugd. Vend. & Pur. 722, 14th ed.

purchaser was protected; for he had no notice when he paid his money, and it was like a conveyance where the legal estate was to become vested on the performance of some condition, such as making a demand or the like, and the registration involved no breach of trust by the trustee (*a*).

[Trustee can avail himself of legal estate.]

[A trustee who has the legal estate, and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice (*b*).]

Purchaser with notice from purchaser without notice.

4. A purchaser *with notice from a purchaser without notice* is exempt from the trust, not from the merits of the second purchaser, but of the first; for if an innocent purchaser were prevented from disposing of the beneficial interest, the necessary result would be a stagnation of property (*c*). But if the trustee sell the lands to a *bonâ fide* purchaser without notice, and afterwards *himself* becomes the owner of the lands, though for a good and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust (*d*); and in this respect equity follows the law; for, if a trespasser of goods sell them in the market overt, the owner's title is barred; but if they come to the trespasser again, the owner may seize them (*e*). ["The only exception to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he

(*a*) *Dodds* v. *Hills*, 2 H. & M. 424; [and see *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. D. (C.A.) 257; followed in *Fox* v. *Martin*, 64 L. J. Ch. 473; W. N. (1895) p. 36, and *Roots* v. *Williamson*, 38 Ch. D. 485; and see *ante*, p. 901. In order to confer a legal title to such shares a deed duly delivered by the transferor is necessary: *Powell* v. *London and Provincial Bank*, (1893) 1 Ch. 610; Ib. 2 Ch. (C.A.) 555; and see Seton, 6th ed. pp. 2096, 2109, 2114].

[(*b*) *Newman* v. *Newman*, 28 Ch. D. 674.]

(*c*) *Harrison* v. *Forth*, Pr. Ch. 51; *Bradwell* v. *Catchpole*, stated *Walker* v. *Symonds*, 3 Sw. 78, note (*a*); *Mertins* v. *Jolliffe*, Amb. 313, *per* Lord Hardwicke; *Brandlyn* v. *Ord*, 1 Atk. 571, *per eundem*; *Sweet* v. *Southcote*, 2 B. C. C. 66; *M'Queen* v. *Farquhar*, 11 Ves. 478, *per* Lord Eldon; *Lowther* v. *Carlton*, 2 Atk. 242; *S. C.*, 3 Barn. 358; *S. C.*, Forr. 187; *Andrew* v. *Wrigley*, 4 B. C. C. 136, *per Cur.*; *Salsbury* v. *Bagott*, 2 Sw. 608, *per Cur.*; [*Barrow's case*, 14 Ch. D. (C.A.) 432].

(*d*) *Bovy* v. *Smith*, 2 Ch. Ca. 124; *S. C.*, 1 Vern. 60, 84, 144; *Kennedy* v. *Daly*, 1 Sch. & Lef. 379, *per* Lord Redesdale, [and see *Ledbrook* v. *Passman*, 59 L. T. N.S. 306; 57 L. J. Ch. 855, as to the incapacity of a trustee for payment of mortgages to tack third mortgage to first, having taken transfers of both].

(*e*) See *Bovy* v. *Smith*, 2 Ch. Ca. 126.

sold it to a *bonâ fide* purchaser without notice, and has got it back again" (*a*).]

How far purchaser bound by notice of a doubtful equity.

5. Upon the question, how far a purchaser will be bound by notice of a *doubtful equity*, Lord Northington said, in *Cordwell* v. *Mackrill* (*b*), "A man must take notice of a deed on which *an equity, supported by precedents the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends on their locality.*" And Sir W. Grant observed "There may be such a *doubtful equity* that a purchaser is *not to be taken to know what will be the decision*, and that is all Lord Camden (*c*) means; but in this case the equity is *clear*" (*d*).

Notice of "heirs of the body."

6. The rule, that "heirs of the body" in articles shall be construed "first and other sons," does not appear to have been fully established till about the year 1720 (*e*): Lord Hardwicke therefore said, that notice of *ancient* articles, that is of articles before the doctrine was well settled, should not bind a *bonâ fide* purchaser (*f*). And afterwards, in a case of both articles and settlement before marriage, the settlement reciting the articles, Lord Hardwicke thought that, as the equity in this instance rested upon a single authority (*g*), and *that* one in which the question arose between the parties and their representatives and mere volunteers, the purchaser ought not to be bound by the claim of the issue (*h*). But notice of *modern* articles, that is, of articles entered into since the clear establishment of the rule, will affect a purchaser (*i*); but, even then, the articles themselves must be produced, that the Court may judge from the whole instrument; for the true construction depends upon the words, and other parts of the deed may be material to find out their meaning (*j*).

Lord St Leonards' observations on Cordwell v. Mackrill.

Lord St Leonards observed, that *Cordwell* v. *Mackrill* was of no great authority, though decided by a great Judge; and conceived the true rule to be that, where upon the whole articles it is plain

[(*a*) *Per* Jessel, M.R., *Barrow's case*, 14 Ch. D. (C.A.) 445; and see *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. D. (C.A.) 954, 963.]

(*b*) 2 Eden, 347; *S. C.*, Amb. 516.

(*c*) Sir W. Grant appears to have supposed that the decision was by Lord Camden.

(*d*) *Parker* v. *Brooke*, 9 Ves. 588.

(*e*) By *Trevor* v. *Trevor*, 1 P. W. 622.

(*f*) *Senhouse* v. *Earle*, Amb. 288; and accordingly relief not asked against purchasers in *West* v. *Errissey*, 2 P. W. 349.

(*g*) *West* v. *Errissey*, 2 P. W. 349.

(*h*) *Warrick* v. *Warrick*, 3 Atk. 291.

(*i*) *Senhouse* v. *Earle*, Amb. 288, *per* Lord Hardwicke; *Davies* v. *Davies*, 4 Beav. 54; and see *Parker* v. *Brooke*, 9 Ves. 587.

(*j*) *Cordwell* v. *Mackrill*, Amb. 515; *S. C.*, 2 Eden, 344.

what construction the Court would have put upon them, had it been called upon to execute them at the time they were made, they should be enforced, *however difficult the construction might be*, even as against a *purchaser* with notice, but not after a lapse of time where there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated (*a*).

Title long neglected.

7. In a case where a residuary legatee had enjoyed for nineteen years a copyhold estate, which had been mortgaged to the testator in fee, and then the heir of the testator recovered the land by ejectment and mortgaged it, and the residuary legatee, having neglected to assert his title to the possession for nine years, at the end of that period filed a bill in Chancery, and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee; for it was not that "*clear, broad, plain equity*" which should affect a purchaser (*b*).

Separate use.

8. A testator had given a leasehold estate to his daughter to her sole and separate use, but *without the interposition of a trustee* (*c*), and the husband, supposing himself absolutely entitled, entered into possession, and afterwards mortgaged the premises, and it was held that the mortgagee was bound to notice the equitable construction of the will, as a doctrine well understood (*d*); and the husband having obtained a reversionary lease and mortgaged it, the mortgagee was of course held cognisant of the rule, that leases obtained under cover of the tenant right would be subject to the equity of the original term (*e*).

[Conveyancing Act, 1882.]

[9. By the Conveyancing Act, 1882 (*f*), sect. 3, it is provided that "a purchaser (*g*) shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections

(*a*) *Thompson* v. *Simpson*, 1 Dru. & War. 491.
(*b*) *Hardy* v. *Reeves*, 4 Ves. 466; *S. C.*, 5 Ves. 426, 431.
(*c*) See *ante*, p. 969.
(*d*) *Parker* v. *Brooke*, 9 Ves. 583.
(*e*) And see *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

[(*f*) 45 & 46 Vict. c. 39, s. 3.]
[(*g*) Which term by sect. 1, sub-s. 4 (ii.) of the same Act includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property.]

had been made as ought reasonably to have been made by the solicitor or other agent." The section is not to exempt a purchaser from any liability under any covenant or provision contained in the instrument under which his title is derived, mediately or immediately, but it applies to purchases made either before or after the commencement of the Act.

The section, which was designed to restrict and not to extend the doctrine of notice (*a*), does not affect the ordinary rule that a purchaser cannot avoid constructive notice by omitting to investigate the title to the property (*b*), or set up the legal estate as against the title of a third person when he himself "did not take the usual ordinary precaution to make inquiry about it, but was content to accept the title, to take a conveyance, and to advance his money without inquiry of any sort or kind" (*c*), but it was intended to remedy the evil consequences of such a doctrine as was well illustrated by *Hargreaves* v. *Rothwell* (*d*), whereby where a solicitor had acted in a former transaction with reference to the estate, "notice was imputed to the client if there was such a distance only between the former transaction and the present transaction in which he was engaged as left the Court under the impression—it could not be more than an impression—that the solicitor had actually remembered the former transaction; and in that way knowledge was imputed to the solicitor, and through the solicitor notice was imputed to the client" (*e*).

The expression "ought reasonably" in the end of sub-section (ii.) means "ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances," and the "gross and culpable negligence" on the part of a purchaser in not obtaining information as to the title, referred to by Lord Cranworth in *Ware* v. *Egmont* (*f*) as fixing him with constructive notice, is to be understood in a similar sense, and not as importing any breach of legal duty, "for a purchaser of property

[(*a*) *Bailey* v. *Barnes*, (1894) 1 Ch. (C.A.) 25, 35; and see *Bateman* v. *Hunt*, (1904) 2 K. B. 530, 540, *ante*, p. 916.]

[(*b*) *Patman* v. *Harland*, 17 Ch. D. 353 (showing that even an express representation by the vendor, that a particular deed contains no restrictive covenants nor anything affecting the title, will not relieve the purchaser from the obligation of investigation), and cases there cited; and see *Re Nisbet and Potts Contract*, (1905) 1 Ch. 395, to the effect that any purchaser taking less than a forty years' title, is fixed with constructive notice of everything of which he would have received actual notice, if he had insisted on a full title.]

[(*c*) *Gainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. N.S. Ch. 994, *per* North, J.; and see *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460; *Bailey* v. *Barnes*, (1894) 1 Ch. (C.A.) 25.]

[(*d*) 1 Keen, 154, 160.]

[(*e*) *Re Cousins*, 31 Ch. D. 671, 676, *per* Chitty, J.]

[(*f*) 4 De G. M. & G. 460.]

is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title, is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way" (*a*).

Where one of two trustees, who was a solicitor, had secretly dealt with securities, which appeared to belong to the trust, in such a way that they had become appropriated to another trust, the other trustee was not affected with notice, for (1) no possible inquiries by him, or by any independent solicitor on his behalf, would have brought the appropriation to his knowledge, and (2) the appropriation did not come to the knowledge of his co-trustee either as his solicitor or in the same transaction in respect to which the question of notice arose (*b*).]

Choses in action.

10. As regards choses in action, and other personal estate not transferable at law, which may have been purchased from a trustee, the purchaser, whatever amount may have been paid by him, cannot stand on a better footing than the person of whom he purchases, but must (in conformity with the established rule governing assignments of choses in action) hold them subject to the same equities as the trustee did (*c*).

Equitable mortgage by trustee.

11. So a trustee who has the legal estate cannot, without a transfer of the legal estate, create an equity, in breach of his duty; as if a trustee holding a mortgage were wrongfully to deposit the deeds by way of security, the depositee could not hold the deeds as against the *cestuis que trust*, for the transaction being inequitable in itself could not give birth to an equity (*d*).

[Equity of *cestui que trist* prevails over subsequent equities however arising.]

[12. So, where trust money was improperly laid out in the purchase of an estate, which was conveyed to A. and mortgaged by him to several persons in succession without notice of the breach of trust, of whom the first only had the legal estate, it

[(*a*) *Bailey* v. *Barnes*, (1894) 1 Ch. (C.A.) 25, 35, *per* Lindley, L. J.; and see *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231, 258; *Re Alms Corn Charity*, (1901) 2 Ch. 750.]

[(*b*) *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231.]

(*c*) *Ord* v. *White*, 3 Beav. 357; *Cockell* v. *Taylor*, 15 Beav. 103; *Clack* v. *Holland*, 19 Beav. 262; *Barnard* v. *Hunter*, 2 Jur. N.S. 1213; *Mangles* v. *Dixon*, 1 Mac. & G. 437; 3 H. L. Ca. 702; *Athenæum, &c., Society* v. *Pooley*, 3 De G. & J. 294; [*Perham* v. *Kempster*, (1907) 1 Ch. 373]; and see *ante*, pp. 892 *et seq.*

(*d*) *Newton* v. *Newton*, 6 L. R. Eq. 135; 4 L. R. Ch. App. 143; see *Joyce* v. *De Moleyns*, 2 Jon. & Lat. 374; [*Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263; see *ante*, p. 925].

was held that the claim of the *cestuis que trust* against the property was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time (*a*). And where a lease was surrendered by an executor, and a new lease including additional property was taken by him in his own name and at an increased rent, and was deposited by him as a security for an advance made to him, it was held that the *cestuis que trust* had priority over the equitable mortgagee (*b*). But where a receipt for purchase-money, not in fact paid, is given by a trustee who in other respects is acting in conformity with the trust, persons who, under sect. 55 of the Conveyancing and Law of Property Act, 1881 (*c*), are entitled to rely on the receipt, may, although their title is equitable only, be entitled to priority over the *cestuis que trust* (*d*). Where the sale by the trustee was, to the knowledge of the purchaser, fictitious, as between an innocent mortgagee by deposit of the purchase deed and the innocent *cestuis que trust*, the equity of the latter prevailed (*e*).]

Improper loans of trust money.

13. And if a trustee in breach of his duty lend trust money, and the borrower, *with notice of the trust*, applies it to his own use, the conscience of the latter is affected, and he cannot separate the loan from the trust, and insist that, when the loan would as a loan have been barred, the trust is barred (*f*).

General rule.

14. And it may be laid down generally that the rules of the Court are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds (*g*).

Secondly. Within what limits of time the suit must be instituted.

[(*a*) *Cave* v. *Cave*, 15 Ch. D. 639; and see *Rice* v. *Rice*, 2 Drew. 73. The decision in *Cave* v. *Cave* has been questioned by the Court of Appeal in Ireland, on the ground that the right of a *cestui que trust* to follow trust money into land is an inferior equity to that of an innocent purchaser for value of an equitable estate in the land; *Re Ffrench's Estate*, 21 L. R. Ir. 283; and see *Re Sloane*, (1895) 1 I. R. 146; *Kelly* v. *Munster and Leinster Bank*, 29 L. R. Ir. 19; *Bourke* v. *Lee*, (1904) 1 I. R. 280; see, however, *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263; *Re Richards*, 45 Ch. D. 589.]

[(*b*) *Re Morgan*, 18 Ch. D. (C.A.) 93.]

[(*c*) 44 & 45 Vict. c. 41.]

[(*d*) *Lloyd's Bank* v. *Bullock*, (1896) 2 Ch. 192; and see *King* v. *Smith*, (1900) 2 Ch. 425.]

[(*e*) *Capell* v. *Winter*, (1907) 2 Ch. 376, see *ante*, p. 921.]

(*f*) *Ernest* v. *Croysdill*, 2 De G. F. & J. 198, *per* L. J. Turner; and see *Wilson* v. *Moore*, 1 My. & K. 337; *Child* v. *Thorley*, 16 Ch. D. 151, 155.

(*g*) *Gray* v. *Lewis*, 8 L. R. Eq. 526, 543.

Time no bar in a direct trust, otherwise in a constructive trust.

1. It is a well-known rule, that, as between *cestuis que trust* and trustee in the case of a *direct trust*, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title (*a*). It has hence been argued, that as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim. But the authorities show that this doctrine cannot be maintained (*b*).

"It is certainly true," said Sir W. Grant, "that no time bars a *direct trust;* but if it is meant to be asserted that a Court of Equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief*" (*c*). And Lord Redesdale observed: "The position that *trust* and *fraud* are not within the statute must be thus qualified: that if a trustee is in possession, and does not execute his trust, the possession of

(*a*) See *Chalmer* v. *Bradley*, 1 J. & W. 67; *Bennett* v. *Colley*, 2 M. & K. 232; *Llevellyn* v. *Mackworth*, Barn. 449; *Wilson* v. *Moore*, 1 M. & K. 146; *Townshend* v. *Townshend*, 1 B. C. C. 554; *Hamond* v. *Hicks*, 1 Vern. 432; *Norton* v. *Turvill*, 2 P. W. 144; *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 66; *Attorney-General* v. *Mayor of Exeter*, Jac. 448; *Heath* v. *Henly*, 1 Ch. Ca. 26; *Wedderburn* v. *Wedderburn*, 2 Keen, 749; 4 M. & Cr. 41; 22 Beav. 84; *Smith* v. *Acton*, 26 Beav. 210; *Lord Hollis's case*, 2 Vent. 345; *Earl of Pomfret* v. *Windsor*, 2 Ves. 484; *Hargreaves* v. *Michell*, 6 Mad. 326; *Nevarre* v. *Rutton*, 1 Vin. Ab. 185; *Shields* v. *Atkins*, 3 Atk. 563; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; *Ward* v. *Arch*, 12 Sim. 472; *Young* v. *Waterpark*, 13 Sim. 204; *Gough* v. *Bult*, 16 Sim. 323; *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22; *Crawford* v. *Crawford*, 1 Ir. Rep. Eq. 436; [*Foxton* v. *Manchester, &c., Banking Company*, 44 L. T. N.S. 406]. See *post*, p. 1130.

(*b*) *Townshend* v. *Townshend*, 1 B. C. C. 550, see 554; *Bonney* v. *Ridgard*, 1 Cox, 145; *Andrew* v. *Wrigley*, 4 B. C. C. 125; *Collard* v. *Hare*, 2 R. & M. 675; and see *Cholmondeley* v. *Clinton*, 2 J. & W. 190; *S. C.*, affirmed, 4 Bligh, 4; *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 66; *Portlock* v. *Gardner*, 1 Hare, 594; *Ex parte Hasell*, 3 Y. & C. 622; *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 53; but see *Attorney-General* v. *Christ's Hospital*, 3 M. & K. 344 (the case of a charity); *Rolfe* v. *Gregory*, 11 Jur. N.S. 98; 4 De G. J. & S. 576; *Sturgis* v. *Morse*, 3 De G. & J. 1; [*Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390].

(*c*) *Beckford* v. *Wade*, 17 Ves. 97; [and see *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 401].

the trustee is the possession of the *cestui que trust;* and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because *his possession is according to his title.* But the question of *fraud* is of a very different description; *that is a case where a person who is in possession by virtue of the fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a Court of Equity, founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches a transaction on the ground of fraud"* (*a*).

General operation of lapse of time.

2. For more clearly understanding how lapse of time operates in reference to the remedy of the *cestui que trust,* in the event of a wrongful alienation of the trust estate by the trustee, it may be useful to consider *the effect of lapse of time upon suits for equitable relief generally.*

Three bars to equitable relief.

To claims in equity there appear to be three bars arising from lapse of time:—I. *A statute of limitation;* II. The *presumption* of something done which, if done, is subversive of the plaintiff's right; III. The ground of *public policy* or *inconvenience* of the relief.

Bar by analogy to a statute.

I. Where there is a statutable bar at *law,* the same period was always, either by analogy or in obedience to the statute, adopted as a bar in *equity* in reference to equitable claims (*b*).

Lord Camden's views.

(1) The language of Lord Camden upon this subject has been admired as peculiarly energetic. "As a Court of Equity," he said, "has no legislative authority, it cannot properly define the time of bar by a *positive rule* to an hour, a minute, or a year: it is governed by circumstances. But *as often as Parliament has limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery has adopted that rule, and applied it to similar cases in equity;* for when the legislature has fixed a time at *law,* it would be preposterous for *equity,* which by its own proper authority always maintained a limitation, to countenance *laches* beyond the period that *law* is

(*a*) *Hovenden* v. *Lord Annesley,* 2 Sch. & Lef. 633.

(*b*) See *Ex parte Dewdney,* 15 Ves. 496; *Bonney* v. *Ridgard,* 1 Cox, 149; *Beckford* v. *Wade,* 17 Ves. 97; *Townshend* v. *Townshend,* 1 B. C. C. 554; *Aggas* v. *Pickerell,* 3 Atk. 225; *Belch* v. *Harvey,* Appendix to Sugd. Vend. and Purch. No. XIV. 13th ed.; *White* v. *Ewer,* 2 Vent. 340; *Knowles* v. *Spence,* 1 Eq. Ca. Ab. 315; *Pearson* v. *Pulley,* 1 Ch. Ca. 102; *Johnson* v. *Smith,* 2 Burr. 961; *Attorney-General* v. *Mayor of Exeter,* Jac. 448; *Salter* v. *Cavanagh,* 1 Dru. & Walsh, 668; *Kingston* v. *Lorton,* 2 Hog. 166; *Foley* v. *Hill,* 1 Ph. 399; *Hamilton* v. *Grant,* 3 Dow, 44; *Marquis of Clanricarde* v. *Henning,* 30 Beav. 175; [*Re Tidd,* (1893) 3 Ch. 154].

confined to by Parliament; and therefore in all cases, *where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar*" (*a*).

Lord Redesdale's views.

Lord Redesdale, in a case before him, observed: "It is said that Courts of Equity are not within the statutes of limitations. This is true in one respect; they are not within the *words* of the statutes, because the words apply to particular legal remedies; but they are within the *spirit* and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that Courts of Equity act merely by *analogy* to the statutes; they act in *obedience* to them" (*b*). And again, "I think the statute must be taken *virtually* to include Courts of Equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed law; and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also" (*c*). And the same doctrines have been repeatedly recognised by the highest authorities, amongst whom may be mentioned Lord Manners (*d*), Sir T. Plumer (*e*), Lord Lyndhurst (*f*), and Lord Westbury (*g*).

Limitation of twenty years.

(2) Upon these principles, then, an *equitable* claim to *lands* could never have been enforced after a lapse of twenty years; for though to *writs of right*, and to *formedons* much longer periods were allowed at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James, which fixed the limitation to the prosecution of *rights of entry* (*h*).

Suits for redemption.

(3) At *law* the remainderman's right always ran only from the determination of the particular estate, but in the case of a

(*a*) *Smith* v. *Clay*, cited in note to *Deloraine* v. *Browne*, 3 B. C. C. 639; [*Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. (P.C.) 351].

(*b*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630; [and see *Charter* v. *Watson*, (1899) 1 Ch. 175, where real estate and a policy being comprised in one mortgage, and the mortgagee having a possessory title of twelve years, it was held that, as the mortgagor was barred from redemption of the real estate, he was also barred from redeeming the policy].

(*c*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 631; and see *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 192; *Bond* v. *Hopkins*, 1 Sch. & Lef. 429; [*Re Baker*, 20 Ch. D. (C.A.) 230; *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. (C.A.) 59].

(*d*) *Medlicott* v. *O'Donel*, 1 B. & B. 166.

(*e*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 151.

(*f*) *Foley* v. *Hill*, 1 Ph. 405.

(*g*) See *Knox* v. *Gye*, 5 L. R. H. L. 674; [*How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626, 640; *Friend* v. *Young*, (1897) 2 Ch. 421; *Re Plumtre's Settlement*, (1910) 1 Ch. 609].

(*h*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 192.

bill to redeem filed by the person entitled in remainder to the equity of redemption, twenty years' possession by the mortgagee without account or admission of title, though partly or wholly during the lifetime of the tenant for life, barred the remainderman; the ground for the distinction apparently being, that the remainderman might have filed a bill to redeem during a continuance of the life estate (*a*). But where the mortgagee is also tenant for life of the equity of redemption, [so that the same person is entitled to the rents and the interest,] the time does not run against the remainderman until the death of the tenant for life (*b*); [and the fact that the rents are payable to one set of trustees, and the interest to another, does not alter the case where the *cestui que trust* is the same (*c*),] and the same rule applies where the mortgagee is tenant in common with others of the equity of redemption (*d*). [But where the equitable tenant for life of a sum charged on land but not raised, is also devisee in fee of the land, here, as the tenant for life is only entitled to receive interest, and not liable to pay it, time will run against the trustees of the charge during his lifetime (*e*).]

Fine.

(4) Where a fine, with proclamations, was levied by a person claiming adversely, though a volunteer, without actual notice or other imputation of fraud, a constructive trust was held to be barred after a lapse of *five* years (*f*).

Statutory bar not avoided by ignorance, poverty, &c.

(5) In the case of a *statutory bar* the limited period affords a substantial insuperable obstacle to the plaintiff's claim, and no plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, could the merits be inquired into, the limited time has elapsed, and the door of justice is closed (*g*). If the Court could relieve after twenty years on the ground of distress, or any similar plea, so might it

(*a*) See *Giffard* v. *Hort*, 1 Sch. & Lef. 407 note; *Blake* v. *Foster*, 4 Bligh, N.S. 140; *Corbett* v. *Barker*, 1 Anstr. 138; 3 Anstr. 755; *Harrison* v. *Hollins*, 1 S. & S. 471; but see 2 Ph. 121. [Possession of the land by a prior mortgagee does not suspend the running of time against a subsequent mortgagee: *Samuel Johnson & Sons, Ltd.* v. *Brock*, (1907) 2 Ch. 533.]

(*b*) *Raffety* v. *King*, 1 Keen, 601, and cases there cited; *Burrell* v. *Lord Egremont*, 7 Beav. 205.

[(*c*) *Topham* v. *Booth*, 35 Ch. D. 607.]

(*d*) *Wynne* v. *Styan*, 2 Ph. 303.

[(*e*) *Re England*, (1895) 2 Ch. 100; Ib. (C.A.) 820; and see *Re Allen*, (1898) 2 Ch. 499.]

(*f*) *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 44; and see 3 P. W. 310, note (G.).

(*g*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 139, *per* Sir T. Plumer; *Byrne* v. *Frere*, 2 Moll. 171, 178, *per* Sir A. Hart; *Astley* v. *Earl of Essex*, 18 L. R. Eq. 290. But as to mistake, see *Brooksbank* v. *Smith*, 2 Y. & C. 58; [and as to statute running in such case from time of payment, and not of discovery of mistake, see *Baker* v. *Courage*, (1910) 1 K. B. 56].

after thirty, forty, or fifty; there would be no limitation, and property would be thrown into confusion (*a*).

Effect of forbearance of the trustee to sue.

(6) Sir Joseph Jekyll is reported on one occasion to have laid down the rule that, "the *forbearance* of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestuis que trust*" (*b*); and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust*; but this is not the case generally as regards the operation of the statutes of limitation. "The rule, that the Statute of Limitations does not bar a trust estate," said Lord Hardwicke, "holds only as between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on the one side, and strangers on the other, for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the Act would never take place. Therefore, where a *cestui que trust and his trustee are both out of possession* for the time limited, the party in possession has a good bar against them both" (*c*). "A *cestui que trust*," said Lord Redesdale, "is always barred by length of time operating against the *trustee*. If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount, the *cestui que trust* is barred" (*d*). And Lord Manners observed: "The opinion of Sir J. Jekyll, if intended to apply to *third persons*, which I do not conceive it was, has often been denied, and is contrary to many decisions. If trustees neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the Statute of Limitations is a bar to the *cestui que trust*" (*e*).

Case where *cestui que trust* is under disability, or is entitled in remainder.

(7) It results from the foregoing statements of the doctrine of the Court, that, as a general rule, where both *cestui que trust* and trustee are out of possession for the time prescribed by the statutes of limitation, the former suffers for the neglect of the latter and is barred. But the question still remains, whether in cases where the *cestui que trust* would, if his title were legal, have more than the ordinary time to sue (as where he is under *disability* or *entitled in remainder* only), he will be allowed

(*a*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 640.

(*b*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215.

(*c*) *Lewellin* v. *Mackworth*, 2 Eq. Ca. Ab. 579; *S. C.*, Barn. 445.

(*d*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629.

(*e*) *Pentland* v. *Stokes*, 2 B. & B. 75; and see *Cooper* v. *Ware*, 18 Ir. Jur. 24.

the same extended period for suing in *equity*, notwithstanding that the *trustee* may be barred.

Where subject matter of trust is a debt.

(8) Where the subject matter of the trust is a debt, arising under a *covenant* or *contract*, it seems difficult to avoid the conclusion that when the trustee is barred, the *cestui que trust* is barred also (*a*). But if the debtor borrowed the money as trust money, or knowing it to be such, he cannot set up the statute (*b*).

Where subject matter is land, and possession is adverse.

(9) The same result would seem to follow where the subject matter of the trust is *land*, and the possession has been held adversely to both trustee and *cestui que trust*, without any species of privity, as when the trustee is disseised. Here there is generally no remedy in equity. The proper course for the *cestui que trust* is to bring ejectment in the name of the trustee [or since the Judicature Acts, in a proper case, to sue in his own name, making the trustee a co-defendant]. The rare instance of a person entering without privity or authority upon lands belonging in equity to an infant, may perhaps constitute an exception, the rule being that he who so enters must, whether the infant is legally or equitably entitled, be regarded as a bailiff or receiver for the infant (*c*). But no such exception can be maintained where the infant has *never* been in possession by himself, his guardian, or agent, but the title was adverse to those through whom he claims (*d*). And even the existence of the exception itself cannot be viewed as free from doubt (*e*).

Where trust is of *land*, and party in possession claims by conveyance from trustee.

(10) Where the subject matter of the trust is *land*, and the person in possession claims by *conveyance* from the trustee, here, unless the facts warrant the defence of *purchase for value without notice*, the right of the *cestui que trust* to fix the person in possession with the liability to perform the trust falls under an ordinary head of equitable jurisdiction. The *cestui que trust* is clearly entitled to proceed in equity against the legal

(*a*) See *Wych* v. *East India Company*, 3 P. W. 309; *Stone* v. *Stone*, 5 L. R. Ch. App. 74; *Hammond* v. *Messenger*, 9 Sim. 327; *Bolton* v. *Powell*, 14 Beav. 275.

(*b*) *Spickernell* v. *Hotham*, Kay, 669; *Bridgman* v. *Gill*, 24 Beav. 302; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175; 6 Jur. N.S. 740; and see *Stone* v. *Stone*, 5 L. R. Ch. App. 74; [*Coleman* v. *Bucks and Oxon Union Bank*, (1897) 2 Ch. 243; *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 397, 402; *Re Plumtre's Settlement*, (1910) 1 Ch. 609].

(*c*) See cases cited *post*, p. 1144, note (*e*).

(*d*) *Crowther* v. *Crowther*, 23 Beav. 305; [*Murray* v. *Watkins*, 62 L.T. 786; *Garner* v. *Wingrove*, (1905) 2 Ch. 233, *post*, p. 1123]. But see *Quinton* v. *Frith*, 2 Ir. R. Eq. 414.

(*e*) See *Allen* v. *Sayer*, 2 Vern. 368, corrected from R. L., Treat. on Trusts, 3rd ed. App. X., and the author's remarks at p. 720 of the same edition; *Wych* v. *East India Company*, 3 P. W. 309; *The Earl* v. *Countess of Huntingdon*, cited Ib. 310, note (G.); *Thomas* v. *Thomas*, 2 K. & J. 79.

owner, and the only question is within what time he must do so. In these cases, it is conceived, the *cestui que trust* (although the trustee may be barred from his action of ejectment) must, in the absence of any express statutory enactment applicable to the case (*a*), be entitled to sue in equity within the same extended period in reference to disability and accruer of right, as if his title were legal (*b*).

Fraud.

(11) No time will cover a *fraud so long as it remains concealed;* for, until discovery (or at all events until the fraud might with *reasonable diligence* have been discovered), the title to avoid the transaction does not properly arise (*c*). But, *after discovery*, the defendant may avail himself of the statute, for he has a right to say: "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the period limited by the statute" (*d*). [But the concealed fraud which is relied on as taking a case out of the statute must be that of the defendant who is setting up the statute, or of some one for whose fraud he is in law responsible, and not that of a stranger (*e*), nor, in general, a fraud committed subsequently to the time when the right of action first accrued (*f*); and the qualification as to

(*a*) See *post*, p. 1125.

(*b*) See *Scott* v. *Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*c*) *Blair* v. *Bromley*, 2 Ph. 354; *Rolfe* v. *Gregory*, 11 Jur. N.S. 97; *S. C.*, 4 De G. J. & S. 576; *Cotterell* v. *Purchase*, Cas. *t.* Talbot, 63, *per* Lord Talbot; *Medlicott* v. *O'Donel*, 1 B. & B. 166, *per* Lord Manners; *Arran* v. *Tyrawly*, cited Ib. 170; *Alden* v. *Gregory*, 2 Eden, 280; *Morse* v. *Royal*, 12 Ves. 374, *per* Lord Erskine; *Bicknell* v. *Gough*, 3 Atk. 558; *South Sea Company* v. *Wymondsell*, 3 P. W. 143; *Booth* v. *Warrington*, 4 B. P. C. 163; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 280, *per* Lord Alvanley; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 634; *Roche* v. *O'Brien*, 1 B. & B. 330; *Blennerhassett* v. *Day*, 2 B. & B. 118, *per* Lord Manners; *Robinson* v. *Norris*, 1 Giff. 421; *Whatton* v. *Toone*, 5 Mad. 54; [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. (C.A.) 319; *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. (C.A.) 59; *Moore* v. *Knight*, (1891) 1 Ch. 547; *Thorne* v. *Heard*, (1894) 1 Ch. 599, 605, 609, 614; *S. C.*, in H. L. (1895) A. C. 495, 502; *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. (P. C.) 351 (where underground coal was fraudulently taken, without any laches by the party defrauded);] and see *Whalley* v. *Whalley*, 1 Mer. 436; *Western* v. *Cartwright*, Sel. Cas. Ch. 34; *Re Agriculturists' Cattle Insurance Co.*, 3 L. R. Eq. 769; [*Barber* v. *Houston*, 14 L. R. Ir. 273; *S. C.*, 18 L. R. Ir. 475]. But Sir A. Hart thought time would run against fraud from the date of it, though undiscovered, provided the person entitled had knowledge of the fraud a reasonable time before the expiration of the period; *Byrne* v. *Frere*, 2 Moll. 157.

(*d*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 634, *per* Lord Redesdale; *Western* v. *Cartwright*, Sel. Ch. Ca. 34; [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. (C.A.) 319;] and see *Mulcahy* v. *Kennedy*, 1 Ridg. 337.

[(*e*) *Thorne* v. *Heard*, (1894) 1 Ch. 599; (1895) A. C. 495; *Willis* v. *Earl Howe*, (1893) 2 Ch. (C.A.) 545; *Re McCallum*, (1901) 1 Ch. (C.A.) 143, *per* Lord Alverstone, C.J., and Vaughan Williams, L.J.]

[(*f*) *Willis* v. *Earl Howe*, (1893) 2 Ch. (C.A.) 545; *Lawrance* v. *Lord Norreys*, 15 App. Cas. 210; *Thorne* v. *Heard*, (1894) 1 Ch. 599, 605, *per* Lindley, L.J.]

reasonable diligence may be difficult of application, for as was intimated in a recent case (which, however, arose between partners, and not between trustee and *cestui que trust*), the fraudulent cannot be permitted to say to the defrauded: "I was fraudulent, but you ought to have found me out" (*a*).

How defendant may take advantage of the statute.

(12) The defendant may avail himself of the Statute of Limitations, by *pleading it himself* (*b*); but, if he neglect to do so,] he cannot shelter himself under the statute at the time of the hearing (*c*); though it seems the Court itself may still, in its own discretion, refuse to grant relief after the limited period (*d*).

In cases of fraud.

(13) Even where the plaintiff charges *fraud*, the defendant may plead [the statute] (*e*). If the plaintiff allege that he only discovered the fraud within the period limited by the statute before action brought, the defendant must either deny the fraud, or insist that the plaintiff had earlier knowledge of it (*f*).

Bar from presumption.

II. The Court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand (*g*).

At what time presumption is raised.

(1) The period at which the Court raises the *presumption* depends upon the circumstances of the case. As a general rule, the Court presumes after a lapse of twenty years (1), but where there is a statutable bar at *law*, and of a different period, the Court will not entertain a *presumption* within a *less time* than the period fixed by the statute (*h*).

Ground of the presumption.

(2) Presumptions are made, not necessarily because the Court really believes what is presumed, but in the absence of evidence,

[(*a*) *Betjemann* v. *Betjemann*, (1895) 2 Ch. (C.A.) 474, 483, *per* Rigby, L.J.]

[(*b*) Rules of the Supreme Court, 1883, Order XIX., Rule 15. As to the right under the old practice to raise the question by demurrer, see the 7th edition of this work, p. 739, and cases there cited; and as to the present practice in lieu of demurrer, see Order XXV.]

(*c*) *Prince* v. *Heylin*, 1 Atk. 494; *Harrison* v. *Borwell*, 10 Sim. 382; *Roch* v. *Callen*, 6 Hare, 535; *Sleight* v. *Lawson*, 3 K. & J. 296.

(*d*) *Prince* v. *Heylin*, 1 Atk. 494.

(*e*) *South Sea Company* v. *Wymondsell*, 3 P. W. 143; [*Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. (C.A.) 59].

(*f*) See Mitford on Pleading, 4th ed. 269; 5th ed. 312. [*Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. (C.A.) 59.]

(*g*) *Pattison* v. *Hawksworth*, 10 Beav. 375; and see *Attorney-General* v. *Moor*, 20 Beav. 119; [but see *Thomson* v. *Eastwood*, 2 App. Cas. 215, 256].

(*h*) *Eldridge* v. *Knott*, Cowp. 214.

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(1) In *Harmood* v. *Oglander*, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of *thirty-two years*, yet neither Lord Alvanley nor Lord Eldon considered the length of time to bar the plaintiff's demand; but in this case the parties were *equitable tenants in common*, and as between them the presumption of *ouster* did not arise.

for the purpose of quieting the possession (*a*). Lord Erskine observed: "It is said you cannot *presume* unless you *believe*. It is because there are no means of creating belief or disbelief that such general presumptions are raised" (*b*). Where *positive* evidence can be presented to the Court, the fact may be presumed after a period much shorter than the usual one. And, on the other hand, though the distance of time may be far greater than the ordinary limit of presumption, yet if there appear any positive evidence to negative the fact, the legal interference cannot be sustained, for the rule is *stabit præsumptio donec probetur in contrarium*. But the Court has judged it better, for the ends of justice, that presumption should be *favoured* in law, and should not be rebutted by slight evidence in contradiction (*c*).

Ignorance, mistake, and distress.

(3) The Court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labours under a *mistake* (*d*); and the *distress* of a person, so far as it accounts for his *laches*, will *pro tanto* weaken the foundation of the presumption (*e*). So a release of right cannot with the same force be presumed against a *class of persons*, as against an individual; for it is not likely that a person having only an aliquot share in the property, should pursue his remedy with the same spirit as if he were the exclusive proprietor (*f*).

Bar from public or private inconvenience.

III. Though the plaintiff's demand cannot be met by an *absolute bar*, and no release or right can be *presumed*, yet, thirdly, relief will not be granted where, if administered, *it would lead to great public or private inconvenience* (*g*).

In action for account a settlement may be presumed.

(1) Thus in an action for an account against an executor or administrator, who is in equity a *trustee*, and was formerly not

(*a*) *Eldridge* v. *Knott*, Cowp. 215, *per* Lord Mansfield; and see *Grenfell* v. *Girdlestone*, 2 Y. & C. 682; *Magdalen College* v. *Attorney-General*, 3 Jur. N.S. 675.

(*b*) *Hillary* v. *Waller*, 12 Ves. 266.

(*c*) *Jones* v. *Turberville*, 2 Ves. jun. 13, *per* Lord Commissioner Eyre; and see *Grenfell* v. *Girdlestone*, 2 Y. & C. 662.

(*d*) See *Marquis Cholmondeley* v. *Lord Clinton*, 2 Mer. 362; *Randall* v. *Errington*, 10 Ves. 427; *Roche* v. *O'Brien*, 1 B. & B. 330, see 342; *Pickering* v. *Stamford*, 2 Ves. jun. 280, and following pages; *S. C.*, Ib. 585; *Chalmer* v. *Bradley*, 1 J. & W. 65, and following pages; *Bennett* v. *Colley*, 2 M. & K. 232; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; [*Allcard* v. *Walker*, (1896) 2 Ch. 369, and see *ante*, p. 582].

(*e*) See *Roche* v. *O'Brien*, 1 B. & B. 342; *Hillary* v. *Waller*, 12 Ves. 266; *Gowland* v. *De Faria*, 17 Ves. 25; *Byrne* v. *Frere*, 2 Moll. 171, 178.

(*f*) See *Whichcote* v. *Lawrence*, 3 Ves. 752; *Anon. case*, cited *Lister* v. *Lister*, 6 Ves. 632; *Kidney* v. *Coussmaker*, 12 Ves. 158; *Hardwick* v. *Mynd*, 1 Anst. 109; *Attorney-General* v. *Lord Dudley*, G. Coop. 146; [*Boswell* v. *Coaks*, 27 Ch. D. (C.A.) 425, 457;] but see *Elliot* v. *Merriman*, 2 Atk. 42; *Hercy* v. *Dinwoody*, 2 Ves. jun. 87, and *ante*, p. 581.

(*g*) See *Attorney-General* v. *Mayor of Exeter*, Jac. 448.

protected by any statute of limitations (*a*), though the *presumption* of a final settlement may be rebutted by positive evidence, the Court will not open the account at any distance of time, when it is probable that most of the parties are dead, and the vouchers and receipts are lost (*b*).

Instances of great delay.

(2) Where a suit was prosecuted after a delay of threescore and two years, Lord Keeper Wright said, that "the cause being now within one year of the grand climacteric, it was fit it should be at rest" (*c*). But bills have been dismissed at the end of twenty-seven years (*d*), and a much shorter period would be a sufficient bar, should the Court see a difficulty in granting the relief: every case must be determined with reference to its own particular circumstances (*e*).

Pickering v. Stamford.

(3) In *Pickering* v. *Lord Stamford* (*f*), a testator gave the residue of his personal estate to a charity, and *thirty-five years* after his decease the next of kin filed their bill for an account, and prayed that such part as consisted of money upon mortgage or other real securities might be declared a void bequest, and distributable, subject to debts, &c., among the testator's next of kin. Lord Alvanley said: "*I know no rule that has established that mere length of time will bar.* Therefore, that being the case, I am to say whether under the circumstances a bar can be *presumed*" (*g*). And for facilitating the question of presumption, his Lordship directed certain previous inquiries by the Master; and it appearing from the report that no release or assignment of their interest by the next of kin for the purposes of the charity could, under the circumstances, be presumed, his Lordship then had recourse to the ground of *Inconvenience*. The question, he observed, in all these cases is, whether there are motives of public policy or private inconvenience, to induce the Court to say, the suit ought not to be entertained. "If," said his Lordship, "from the plaintiff's lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the Court will oppose, what

(*a*) See now the Real Property Limitation Act, 1833 (3 & 4 W. 4. c. 27), s. 40; the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13; the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.

(*b*) *Hunton* v. *Davies*, 2 Ch. Rep. 44; *Huet* v. *Fletcher*, 1 Atk. 467; *Pearson* v. *Belchier*, 4 Ves. 627; *Hercy* v. *Dinwoody*, 2 Ves. jun. 87.

(*c*) *St John* v. *Turner*, 2 Vern. 418.

(*d*) *Campbell* v. *Graham*, 1 R. & M. 453.

(*e*) See *Hercy* v. *Dinwoody*, 2 Ves. jun. 93; *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 483.

(*f*) 2 Ves. jun. 272.

(*g*) 2 Ves. jun. 283; [and see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196, 212].

I think the best ground, *Public convenience.* The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any demand made. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts that there is no difficulty in finding the personal estate at the death of the testator. Therefore desiring to be understood by no means to give any countenance to these stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favour of the plaintiffs" (*a*).

Bar from length of time.

(4) The doctrine laid down by Lord Alvanley in the case referred to, that *mere length of time* will not bar, requires some qualification. Lapse of time or delay in suing, unaccounted for by disability or other circumstances, constitutes *per se*, in the eye of a Court of Equity, *laches* disentitling the plaintiff, in *certain classes of cases* at least, to relief from the Court. Thus where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than twenty years may bar his title to relief (*b*). So where a plaintiff seeks to set aside a purchase from him by his solicitor (*c*), or of a reversionary interest (*d*), or to fix a defendant with a constructive trust (*e*), or to call a person to account for acts of waste (*f*), or comes to a Court of Equity alleging a case of fraud as a ground for avoiding the operation of the Statute of Limitations (*g*). So where an account was sought by a surviving partner against the estate of a deceased partner, the Court, even assuming such case to fall within the exception as to merchants' accounts in the Statute of Limitations, refused its aid after a delay of thirteen years (*h*). And where the assistance of the Court is sought in a suit for specific performance (*i*), or in one partaking of that character (*j*), the rule

(*a*) 2 Ves. jun. 582, and following pages.

(*b*) See the cases, p. 581, *ante*.

(*c*) See *Gresley* v. *Mousley*, 4 De G. & J. 78, and the cases there cited; and *Lyddon* v. *Moss*, Ib. 104; [*Nutt* v. *Easton*, (1899) 1 Ch. 873; (1900) 1 Ch. (C.A.) 29].

(*d*) *Roberts* v. *Tunstall*, 4 Hare, 257.

(*e*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 3 Jur. N.S. 299; *Isald* v. *Fitzgerald*, cited Amb. 735, 737; and see *Pennell* v. *Home*, 3 Drew. 337; *Norris* v. *Le Neve*, 3 Atk. 38; *Jackson* v. *Welsh*, Ll. & G. Rep. *t.* Plunk. 346; [*Kennedy* v. *De Trafford*, (1896) 1 Ch. (C.A.) 762, 777; *S. C.*, (1897) A.C. 180].

(*f*) *Harcourt* v. *White*, 28 Beav. 303.

(*g*) *Blair* v. *Ormond*, 1 De G. & Sm. 428.

(*h*) *Tatam* v. *Williams*, 3 Hare, 347; and see *Harcourt* v. *White*, 28 Beav. 303.

(*i*) *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; *Alloway* v. *Braine*, 26 Beav. 575; *Sharp* v. *Wright*, 28 Beav. 150.

(*j*) *Hope* v. *Corporation of Gloucester*, 1 Jur. N.S. 320.

is extremely strict. It is difficult to refer the refusal of the relief by the Court, in the instances mentioned, to any one general principle. In the cases of purchases by trustees, or of claims founded upon constructive trust, the probability of alteration of circumstances in regard to the property, and the unfairness of the plaintiff in lying by, have weighed with the Court (*a*). Perhaps the nearest approach to general principle will be found under the head of "Public Convenience"; *Expedit Reipublicae ut sit finis litium* (*b*).

Bar from *laches*, where there is a Statute of Limitations.

(5) It has been pointed out that in *certain special cases* a delay of less than twenty years operates as a bar; and the Court in these instances departs still further from the analogy offered by the Statute of Limitations, by taking partly into account time which may have elapsed while the plaintiff's interest was reversionary (*c*). The question remains whether, *in general*, *laches* can be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one of the statutes of limitation; and it seems the legislature itself having prescribed a term of limitation which it deems sufficiently short, the Court ought not further to abridge that term (*d*).

Acquiescence.

(6) Besides the bars which have been enumerated arising from the effect of time, a plaintiff may also be precluded from relief on the ground of *acquiescence*. This is of two kinds:— *First*, direct, where the act complained of was done with the full knowledge and express approbation of another, in which case a Court of Equity will not allow that other to seek relief against the very transaction to which he was himself a party (*e*). *Secondly*, indirect, where a person, having a right to set aside a transaction, stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection; when also a Court of Equity will not relieve (*f*). But in

[(*a*) See *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196.]

(*b*) See *Gresley* v. *Mousley*, 4 De G. & J. 95; *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330; *Payne* v. *Evens*, 18 L. R. Eq. 356.

(*c*) *Roberts* v. *Tunstall*, 4 Hare, 266; *Browne* v. *Cross*, 14 Beav. 105; but as to the latter case see observations of Turner, L.J., in *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 73.

(*d*) See *Rochdale Canal Company* v. *King*, 2 Sim. N.S. 89; *Penny* v. *Allen*, 7 De G. M. & G. 426; *Mehrtens* v. *Andrews*, 3 Beav. 76; *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117; *Clarke* v. *Hart*, 6 H. L. C. 633; *Beaudry* v. *Mayor, &c., of Montreal*, 11 Moore, P. C. C. 339; *Story* v. *Gape*, 2 Jur. N.S. 706; [*Re Baker*, 20 Ch. D. (C.A.) 230; *Phillips* v. *Homfray*, (1892) 1 Ch. (C.A.) 465].

(*e*) See *Kent* v. *Jackson*, 14 Beav. 384; *Styles* v. *Guy*, 1 Mac. & G. 427; 1 Hall & Tw. 523; *Ex parte Morgan*, 1 Hall & Tw. 328; *Graham* v. *Birkenhead, &c., Railway Company*, 2 Mac. & G. 146.

(*f*) *Duke of Leeds* v. *Amherst*, 2 Ph. 123; *Phillipson* v. *Gatty*, 7 Hare, 523; *Stafford* v. *Stafford*, 1 De G. & J. 202;

the latter case, the Court not only looks to the conduct of the person who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the Court. Where, for instance, the possessor lays out his money, with a full knowledge that the property which he improves belongs to another, then it is said he makes the outlay to his own cost. "If," observed L.J. Turner, "a man places his property on the land of another with full knowledge of that person's title, how can the fact that the landowner assented to its being placed there give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it repaid" (*a*).

[Where, however, the act complained of has been completed without any knowledge or assent on the part of the person seeking relief, there can be no acquiescence in the strict sense of the word, which has been defined as "quiescence under such circumstances as that assent may be reasonably inferred from it," and is no more than an instance of the law of estoppel by words or conduct. When once the Act is completed without any knowledge or assent upon the part of the person whose right is infringed, a right of action has vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances (*b*).]

Limitation Acts.

We may now introduce the Acts for the limitation of actions and suits.

[Limitation Act, 1623.]

[3. By 21 Jac. 1. c. 16, sect. 3, it is enacted that actions upon the case (other than for slander), *actions of account*, and for trespass, *debt*, detinue and replevin for goods or cattle, and of

[*Simpson* v. *Simpson*, 3 L. R. Ir. 308; *Blake* v. *Gale*, 31 Ch. D. 196; *Civil Service Musical Instrument Association* v. *Whiteman*, 68 L. J. Ch. 484; 80 L. T. N.S. 685;] and see *Jorden* v. *Money*, 5 H. L. C. 185; [*Mills* v. *Fox*, 37 Ch. D. 153. It must, however, be borne in mind that where there is a *legal* right to set aside a transaction, as for instance a fraudulent conveyance under the Fraudulent Conveyances Act, 1571 (13 Eliz. c. 5), mere delay to enforce it, unless the delay is such as to cause a statutory bar, is no defence; *Re Maddever*, 27 Ch. D. (C.A.) 523].

(*a*) *Rennie* v. *Young*, 2 De G. & J. 136, see 142. See *ante*, pp. 925 *et seq.*

[(*b*) *Per* L. J. Thesiger in delivering the judgment of the Court of Appeal, *De Bussche* v. *Alt*, 8 Ch. D. (C.A.) 286, 314.]

trespass *quare clausum fregit*, must be brought within six years next after the cause of such actions.]

4. The Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), enacts as follows:— 3 & 4 Will. 4. c. 27.

Sect. 24: "No person claiming any *land* or *rent* in *equity* shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained (*a*), he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at *law* to such estate, interest or right in or to the same as he shall claim therein in equity" (*b*). Lands and rents.

Sect. 25: "When any land or rent shall be vested in a trustee upon *any express trust*, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or *any person claiming through him* (*c*), to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act *at*, *and not before*, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him" (*d*). Express trusts.

Sect. 26: "In every case of a *concealed fraud* (*e*), the right of Fraud.

(*a*) See Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9, which from the commencement of the Act (1st January, 1879), varies the periods within which actions and suits may be brought.

(*b*) See *Scott* v. *Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*c*) As to the meaning of these words, see *Burroughs* v. *M'Creight*, 1 Jon. & Lat. 304; [*East Stonehouse Urban Council* v. *Willoughby*, (1902) 2 K. B. 318, 335].

(*d*) Sums of money and legacies charged on land and secured by an *express trust*, are as from 1st January, 1879, made only recoverable within the time allowed for recovery, had there been no express trust; Real Property Limitation Act, 1874, s. 10; [and as to actions or other proceedings against a trustee or any person claiming through him, commenced after the 1st of January, 1890, and in which the claim is not founded on fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the effect of this section is modified by s. 8 of the Trustee Act, 1888, see *post*, p. 1136. The section "is but a statutory declaration of a law which had always been recognised and administered in Courts of Equity"; *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 403, *per* Kay, L.J.].

[(*e*) As to the meaning of the expression "concealed fraud," see *Willis* v. *Earl Howe*, (1893) 2 Ch. (C.A.) 545, 552. A false assertion of title by a person taking possession of land is not a concealed fraud within the meaning of the section, *per* Lindley, L.J. "The section seems to point to some contrivance by which the real owner has not merely been deprived, but defrauded, in the sense of being induced to believe that he was not owner, and that the person who entered was owner and entitled to enter," *per* Kay, L.J. The "concealed fraud" to which the statute refers must be the fraud of the person who sets up the statute, or of some one through whom he claims: *Re*

any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered" (*a*).

Acquiescence.

Sect. 27: "Nothing in the Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the Act."

[Final extinction of right.]

[Sect. 34: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished" (*b*).]

Arrears of rent or interest.

Sect. 42: "No *arrears* of *rent* or of *interest* in respect of any sum of money *charged upon*, or payable out of, any land or rent, shall be recovered by any action or suit, but within *six years* next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same is payable or his agent."

M'Callum, (1901) 1 Ch. (C.A.) 143, *per* Lord Alverstone, C.J., and Vaughan Williams, L.J. Rigby, L.J., however, expressed the opinion that sect. 26 applies to every case of a "concealed fraud" which deprives the true owner of the possession of land, except as regards a *bonâ fide* purchaser for value, without notice of the fraud at the time of his purchase. As regards restrictive covenants, a title acquired by adverse possession of the land subject thereto, does not destroy the equitable rights against the land of persons entitled to the benefit of the covenants: *Re Nisbet and Potts' Contract*, (1905) 1 Ch. 391.]

(*a*) See *Manby* v. *Bewicke*, 3 K. & J. 342; *Petre* v. *Petre*, 1 Drew. 371; *Vane* v. *Vane*, 8 L. R. Ch. App. 383; [*Lawrance* v. *Lord Norreys*, 39 Ch. D. (C.A.) 213, 224; 15 App. Cas. 210. This enactment is a legislative recognition and expression of previously well settled principles in equity which were and are applicable to all kinds of property, and not to real property only; *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 605, *per* Lindley, L.J.; but it does not, as was said by Field, J., in *Gibbs* v. *Guild*, 8 Q. B. D. 296, 305; *S. C.*, 9 Q. B. D. (C.A.) 59, express the whole doctrine of equity applicable to concealed fraud. The qualification as to reasonable diligence, though appropriate to cases of ejectment, may not be reasonable as to other cases; *Betjemann* v. *Betjemann*, (1895) 2 Ch. (C.A.) 474, 478, 479, *per* Lindley, L.J., and see *ante*, p. 1114].

[(*b*) As to the effect of this section see *Re Jolly*, (1900) 2 Ch. (C.A.) 616; Carson's Real Property Statutes, p. 179, citing *Bolling* v. *Hobday*, 31 W. R. 9; *Re Hazeldine's Trusts*, (1908) 1 Ch. (C.A.) 34.]

5. And the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), enacts, that *from and after* 1*st January* 1879 :— 37 & 38 Vict. c. 57.

Sect. 1. No action or suit shall be brought to recover any land or rent but within *twelve* years from the time when the right first accrued.

Sect. 2. The right, as to *reversions*, *remainders*, and *future estates* shall be deemed to first accrue when they fall into possession (*a*). But if the person entitled to the particular estate on which the future estate was expectant shall not have been in possession when his interest determined, the action or suit must be brought within twelve years from the time the first right accrued to the owner of the particular estate, or within six years from the time when the estate of the person becoming entitled in possession became vested in possession, whichever of those two periods shall be the longer.

Sect. 3. In cases of disability, *six* years from the cesser of the disability or from the death of the person under disability shall be allowed, notwithstanding the expiration of the twelve years (*b*).

Sect. 4. No extension of time shall be allowed for *absence beyond seas* of the person having the right to make the entry, or bring the action, or of any person through whom he claims.

Sect. 5. No action or suit to recover any land shall be brought but within *thirty* years from the time when the right first accrued, notwithstanding the existence of any *disability* or succession of disabilities (*c*).

[Sect. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*d*) or lien, or otherwise charged upon, or payable out of (*e*) any land or rent, at law or in equity, or any legacy, but within twelve years after a present right to receive the same (*f*) shall

[(*a*) Thus in the case of an equitable mortgage or charge of a contingent reversionary interest, time does not begin to run until the interest falls into possession : *Hugill* v. *Wilkinson*, 38 Ch. D. 480 ; see the grounds of this decision explained in *Re Owen*, (1894) 3 Ch. 220, 225 ; and see *Re Hancock*, 57 L. J. Ch. 793 ; 36 W. R. 710 ; 59 L. T. N.S. 197.]

[(*b*) Where time has begun to run against an owner who is under no disability, it is not interrupted by the infancy of his successor in interest, whether legally or equitably entitled : *Garner* v. *Wingrove*, (1905) 2 Ch. 233, *ante*, p. 1113.]

[(*c*) See *Hounsell* v. *Dunning*, (1902) 1 Ch. 512.]

[(*d*) This expression extends to all judgments on covenant, and is not confined to judgments which operate as a charge on land : *Jay* v. *Johnstone*, (1893) 1 Q. B. 25; Ib. (C.A.) 189; and see *Hebblethwaite* v. *Peever*, (1892) 1 Q. B. 124.]

[(*e*) Even though the subject matter of the mortgage is reversionary ; *Kirkland* v. *Peatfield*, (1903) 1 K. B. 756.]

[(*f*) As to the meaning of these words, see *Re Owen*, (1894) 3 Ch. 220, 225 ; *Hornsey Local Board* v. *Monarch Investment Building Society*, 24 Q. B. D. (C.A.) 1. The twelve years in the

have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime" (*a*) there has been a payment or acknowledgment, in which case the time runs from the last payment or acknowledgment (*b*).]

Result of the Acts.

6. It results from these Acts that since 1st January, 1879, *twelve* years' possession is made a statutory bar to suits in *equity* in respect of *equitable* interests, as in the case of actions at law upon *legal rights* (*c*), but in case of *disability* a term of *six* years is allowed next after the cesser of the disability, subject to the proviso that no suit is to be brought after the lapse of thirty years from the accruer of the right, whatever disabilities may have existed.

In case of express trust time runs from conveyance for value only.

7. In cases falling within the 25th section of the Real Property Limitation Act, 1833 (*d*), the effect of that section is that as between the trustee and any person claiming through him, and the *cestui que trust* and any person claiming through him, time does not run until there has been a conveyance to a purchaser for valuable consideration. The trust estate may, therefore, be followed by the *cestui que trust*, notwithstanding acquiescence by him (*e*), not only as against the trustee, but as against all volunteers claiming under him (*f*); but so soon as the estate is conveyed to a purchaser for valuable consideration (as if it be made the subject of a marriage settlement), the time will begin to run (*g*); and a

case of a legacy runs from the death of the testator, not from the expiration of one year after the death: *Waddell* v. *Harshaw*, (1905) 1 I. R. 416.]

[(*a*) A payment made more than twelve years after the cause of action first accrued, but less than twelve years before action brought, is a payment "in the meantime" within the section: *Re Viscount Clifden*, (1900) 1 Ch. 774; but see Carson's R. P. Statutes, p. 200.]

[(*b*) As to payment by specific devisee for life of part of a testator's real estate keeping a creditor's right of action alive against the entirety, see *Roddam* v. *Morley*, 1 De G. & J. 1; *Re Lacey*, (1907) 1 Ch. (C.A.) 330; *Re Chant*, (1905) 2 Ch. 225; and as to the effect of payment of interest by a tenant for life of mortgaged property in keeping the mortgage debt alive against the personal estate of the deceased mortgagor, see *Dibb* v. *Walker*, (1893) 2 Ch. 429; *Leahy* v. *De Moleyns*, (1896) 1 I. R. 206. The payment must be one from which an acknowledgment of liability and promise to pay the balance can be inferred; *Taylor* v. *Hollard*, (1902) 1 K. B. 676.]

[(*c*) The existence of a trust term, the trusts of which never actively arise, and under which possession is never taken, cannot be set up by the person entitled subject to the term as an answer to a defence founded upon the statute; *Twaddle* v. *Murphy*, 8 L. R. Ir. 123.]

(*d*) See *ante* p. 1121, note (*d*).

(*e*) *Browne* v. *Radford*, W. N. 1874, p. 124.

(*f*) *Sturgis* v. *Morse*, 24 Beav. 541; 3 De G. & J. 1; *Heenan* v. *Berry*, 2 Jon. & Lat. 303; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668; *Blair* v. *Nugent*, 3 Jon. & Lat. 658; 9 Ir. Eq. Rep. 400; *Ravenscroft* v. *Frisby*, 2 Coll. 16; *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22; *O'Reilly* v. *Walsh*, 6 Ir. R. Eq. 555; and see *Dixon* v. *Gayfere*, 17 Beav. 421; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246.

(*g*) *Petre* v. *Petre*, 1 Drew. 371.

lease for value is *pro tanto* a conveyance within the meaning of the Act (*a*). No possession, however, by a purchaser for valuable consideration short of the statutory period will be a bar (*b*).

And not even then as against persons under disability, &c.

8. The question whether a lapse of the statutory period from the time of a conveyance for value by a trustee will bar *cestuis que trust* who, by reason of *disability*, or their rights being *reversionary*, would otherwise be entitled to sue after such period, is not free from difficulty. The 25th section of the Real Property Limitation Act, 1833, enacts affirmatively that the right is to be deemed to have accrued *at* the time of conveyance, and this, in strict construction, would seem to work an independent bar. But this section is merely a proviso on the 24th section, which is in effect an enactment *restraining* the right to sue in *equity* within the limits allowed for suits at *law;* and the 25th section would appear to be not a further *restraint* of the right to sue, but an *enlargement*, by way of *modification* of the restriction previously introduced by the 24th section. The decisions and *dicta* accord with this view, and point to the conclusion that a *cestui que trust*, who is a remainderman, or under disability, is entitled to the full statutory period from the accruer of the right in possession, or from the cesser of the disability, as the case may be, notwithstanding the trustee may have conveyed away the estate for value, and the twenty or twelve years, as the case may be, may have elapsed from the date of conveyance, but in no case must the period allowed now exceed thirty years from the accruer of the right in possession (*c*).

Express trusts.

9. The 25th section applies only to *express trusts;* it is therefore necessary to ascertain with precision what is meant by this phrase. Trusts, *as regards the provisions of the statute*, may be considered as divided into express trusts and constructive trusts; the former arising upon the language of some written instrument (*d*), and the latter such as are elicited by the principles of a Court of Equity from the acts of parties.

Word "trust" not necessary to constitute an express trust.

10. It is not necessary to use the word *trust* in order to create

(*a*) *Attorney-General* v. *Davey*, 4 De G. & J. 136; *Attorney-General* v. *Payne*, 27 Beav. 168.

(*b*) *Attorney-General* v. *Flint*, 4 Hare, 147. But see *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330.

(*c*) *Thompson* v. *Simpson*, 1 Dru. & War. 489; *Attorney-General* v. *Magdalen College*, 18 Beav. 239, 250; 6 H. L. Cas. 189, see p. 215; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Shaw* v. *Keighron*, 3 Ir. R. Eq. 574; and see *Butler* v. *Carter*, 5 L. R. Eq. 276; *Quinton* v. *Frith*, 2 Ir. R. Eq. 396.

[(*d*) But whether an express trust within the statute is necessarily confined to one in *writing*, *quære*, *Re Sands to Thompson*, 22 Ch. D. 614, 617, *per* Fry, J., observing on *Petre* v. *Petre*, 1 Drew. 371.]

an express trust within the meaning of the statute (*a*), but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person upon trust to receive the rents and thereout to pay certain annuities, the surplus rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law, in a case falling within the section, will not be barred by any length of possession by the trustee (*b*). [But an executor, in the absence of special circumstances, is not an express trustee for the next of kin (*c*).]

Constructive trusts not saved.

11. But trusts arising by the construction of a Court of Equity from the *acts of parties*, or to be made out by *circumstances*, or to be proved by *evidence*, will not be saved by the clause relating to express trusts, as if the devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal (*d*). So, if the trust fund be lent to A., and thereupon B., as surety, with notice of the trust, gives a mortgage of his estate to secure the fund, here B. is not an express trustee; and if no interest be paid for the statutable period, the *cestui que trust* is barred (*e*). [So where the first mortgagee of a ship sold the ship under the power conferred by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), it was held that he was not an express trustee of the surplus proceeds of sale for the subsequent mortgagee (*f*). And where real estate was conveyed to trustees upon charitable trusts by a deed which was void for non-compliance with the Charitable Uses Act, 1735 (9 Geo. 2. c. 36), sect. 3, the trustees were held not to be express trustees for persons claiming under the grantor (*g*).] But if there

(*a*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 197.

(*b*) *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668; [*Patrick* v. *Simpson*, 24 Q. B. D. 128; *Nugent* v. *Nugent*, 15 L. R. Ir. 321;] and see *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 196; 7 Ir. Eq. Rep. 580; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246, [reversed on other grounds, 1 Ch. D. (C.A.) 385; *Churcher* v. *Martin*, 42 Ch. D. 312, 319]. In *Lord St John* v. *Boughton*, 9 Sim. 223, where there was an express trust to sell and pay debts, the late V. C. E. thought that as *no part of the produce of the sale had been set apart for debts*, the case was not within the exception of the 25th section, but fell under the 40th section (relating to charges, *vide post*, p. 1127), and that if there had been no subsequent acknowledgment of the debt, it could not have been recovered. This, it is conceived, cannot be maintained. However it was a dictum only, as the bonds were directed to be paid on the ground of acknowledgment; see *Watson* v. *Saul*, 1 Giff. 197.

[(*c*) *Re Lacy*, (1899) 2 Ch. 149; and see *Re M'Causland's Trusts*, (1908) 1 I. R. 327.]

(*d*) *Petre* v. *Petre*, 1 Drew. 371; *Re Scott*, 8 Ir. Ch. Rep. 316; *In the matter of P. Dane*, 5 Ir. R. Eq. 498.

(*e*) *Re Scott*, 8 Ir. Ch. Rep. 316.

[(*f*) *Banner* v. *Berridge*, 18 Ch. D. 254; and see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196, 209.]

[(*g*) *Churcher* v. *Martin*, 42 Ch. D. 312.]

be an express trustee, and another person with full knowledge of the trust and in collusion with the trustee, and therefore by active fraud, appropriates the property to his own use, he stands in the place of the trustee, and while the fraud remains concealed the statute does not run (*a*). If a person act as the trustee of a settlement containing express trusts, though he assume the character by mistake, he will be deemed, so far as he acts, an express trustee (*b*). [It has, however, been observed, in reference to these cases, that "the authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts" (*c*).]

Charges.

12. Mere *charges* might have been held to fall under the description of express trusts, but that they are dealt with under a separate section, viz. the 40th of the Real Property Limitation Act, 1833 (for which, as from 1st January, 1879 (*d*), is now substituted the 8th section of the Real Property Limitation Act, 1874), a circumstance which shows that they were meant to be distinguished from express trusts. If, therefore, a testator, having two properties, A. and B., *charged* all his real estate with his debts, and devised estate A. to trustees upon *trust* to pay his debts, the statute as to estate B. [was] made a bar under 3 & 4 Will. 4. c. 27, after twenty years, and under 37 & 38 Vict. c. 57, [is a bar] after twelve years (*e*), but as to estate A.

(*a*) *Rolfe* v. *Gregory*, 4 De G. J. & S. 576.

(*b*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; and see *Smith* v. *Smith*, 10 Ir. R. Eq. 273; 1 L. R. Ir. 206.

[(*c*) *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 401, *per* Kay, L.J. In that case Bowen, L.J., at p. 396, after making an observation to the same effect as that of Kay, L.J., cited above, continued: "First, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58 (see *supra*). This extension of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends. Secondly, the rule as to limitations of time which has been laid down in reference to express trusts, has also been thought appropriate to cases where a stranger participates in the fraud of a trustee; *Barnes* v. *Addy*, 9 L. R. Ch. 244 (see *post*, p. 1159). Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property, and dealt with it in a manner inconsistent with trusts of which he was cognisant; *Lee* v. *Sankey*, 15 L. R. Eq. 204 (and see *M'Ardle* v. *Gaughan*, (1903) 1 I. R. 107). Fourthly, in some other cases, *e.g.* in *Bridgman* v. *Gill*, 24 Beav. 302, by Lord Romilly, and in *Wilson* v. *Moore*, 1 M. & K. 337, by Lord Brougham, language has been employed in regard to the question of limitations of time in certain instances of constructive trust, which can scarcely be reconciled with the language held in *Bonney* v. *Ridgard*, 1 Cox, 145; *Beckford* v. *Wade*, 17 Ves. 87; *Townshend* v. *Townshend*, 1 Bro. C. C. 550, and in other cases."]

[(*d*) See *ante*, p. 1123.]

[(*e*) *Re Stephens*, 43 Ch. D. 39.]

it [did] not, [before 1st January, 1879], begin to run until a conveyance to a purchaser for valuable consideration (*a*); [but by the 10th section of 37 & 38 Vict. c. 57, the time for recovering any money payable out of land is made the same, whether it is secured by an express trust or not]. So, if an estate be devised to A., *charged* with 1000*l.* in favour of B., or "A. *paying* 1000*l.* to B.," [or "on the condition of A. well and truly paying 1000*l.* to B." (*b*),] although a suit may be sustained in equity to have the sum raised on the footing of the trust, yet it is not an express trust within the meaning of the statute, and [an action by B. in such a case would have been barred at the end of twenty years, and will now, under 37 & 38 Vict. c. 57, be barred at the end of twelve years, independently of sect. 10 of that Act (*c*)]. And if a testator charge his debts and direct his executors to raise them by mortgage or otherwise, the direction adds nothing to the charge (which *per se* authorised the raising of the debts by mortgage or otherwise), and no express trust, but only a charge, is created (*d*).

Charge coupled with a duty.

13. But a charge in form may be an express trust in fact. Thus where an estate in Ireland was devised to trustees and their heirs, upon trust to *convey* to J. W. for life, charged with annuities to certain corporations for charitable purposes, although the corporations were interposed as trustees, yet, as the devisees were bound to execute a settlement, so as to secure the annuities and retain the legal estate in the meantime, they were, until the settlement had been executed, trustees for the charities (*e*). So, though a simple charge of the testator's debts fell within the 40th section of the Real Property Limitation Act, 1833, and the creditor was barred after twenty years (*f*), yet, if the will was so worded as to impose on the devisees subject to the charge the *personal obligation* of exerting themselves actively in paying the

(*a*) *Jacquet* v. *Jacquet*, 27 Beav. 332; *Proud* v. *Proud*, 32 Beav. 235.

[(*b*) *Cunningham* v. *Foot*, 3 App. Cas. 974.]

(*c*) *Knox* v. *Kelly*, 6 Ir. Eq. Rep. 279; *Toft* v. *Stephenson*, 7 Hare, 1; *Hodge* v. *Churchward*, 16 Sim. 71; *Francis* v. *Grover*, 5 Hare, 39; *Hughes* v. *Kelly*, 3 Dru. & War. 482; [*Cunningham* v. *Foot*, 3 App. Cas. 974;] and see *Harrison* v. *Duignan*, 2 Dru. & War. 295.

(*d*) *Dickinson* v. *Teasdale*, 31 Beav. 511; 1 De G. J. & Sm. 52. [In applying the statute it is to be borne in mind that in general where a fixed sum of money is charged on land, and to be paid at a fixed time, the money in equity is treated as bearing interest (unless the contrary appears) from the date fixed for payment: *Re Drax*, (1903) 1 Ch. (C.A.) 781.]

(*e*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 182; 7 Ir. Eq. Rep. 580.

(*f*) *Dundas* v. *Blake*, 12 Ir. Eq. Rep. 138, and cases there cited. The 40th section, as from 1st January, 1879, has been repealed by the Real Property Limitation Act, 1874, s. 9. See the 8th section of the latter Act.

debts, it became an express trust, and fell within the exception of the 25th section (*a*).

Charge and express trust in same matter.

14. A charge upon an estate may under the same instrument be a mere charge as between some parties, while it is an express trust within the 25th section as between other parties. If, for instance, an estate be devised to A. and his heirs, subject to a charge of 500*l.* to B. and C. upon certain trusts, this, as between A. and the two trustees, is a mere charge, and would be barred after twenty or twelve years, as the case may be, but, as between the two trustees and their *cestuis que trust*, the charge when raised will be an express trust, and the time of the bar as between them will be extended accordingly (*b*).

Case of charge secured by a term of years.

15. If a *term of years* be limited to the trustees for the purpose of securing the charge, the rights of the *cestuis que trust* will not be barred so long as the term vested in their trustees remains unbarred (*c*).

Mortgage by way of trust.

16. A *mortgage by way of trust for sale* is [for the purpose now under consideration] nothing more than a mortgage with a power of sale, and does not come under the description of an express trust within the meaning of the 25th section (*d*). [A mortgagee, after his mortgage debt has been fully paid, is not an express trustee of the mortgaged property in the interval before reconveyance (*e*).]

Charge must be presently raisable.

17. To make the Act operate as a bar to a charge there must be a *hand to receive*, and capable of signing a receipt; as if 400*l.* be *charged* by deed on an estate, and by the same deed it is assigned to trustees upon trust for A. and B. for their lives, and after the death of the survivor for their children, but no power of signing receipts is given to the trustees, and, on the contrary, the Court collects the intention that the trustees are not to raise the money till after the death of the surviving tenant for life, the statute does not begin to run until the latter period (*f*).

(*a*) *Hunt* v. *Bateman*, 10 Ir. Eq. Rep. 360, and cases there cited; *Watson* v. *Saul*, 1 Giff. 188; and see *Burrowes* v. *Gore*, 6 H. L. Cas. 907.

[(*b*) And see *Re England*, (1895) 2 Ch. 100; Ib. (C.A.) 820, and *ante*, p. 1111.]

(*c*) *Young* v. *Lord Waterpark*, 13 Sim. 202; on appeal, 15 L. J. N.S. Ch. 63; *Cox* v. *Dolman*, 2 De G. M. & G. 592; and see *Ward* v. *Arch*, 12 Sim. 472; [*Williams* v. *Williams*, (1900) 1 Ch. 152].

(*d*) *Locking* v. *Parker*, 8 L. R. Ch. App. 30; [*Re Alison*, 11 Ch. D. (C.A.) 284; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196].

[(*e*) *Sands to Thompson*, 22 Ch. D. 614; and see *ante*, p. 212.]

(*f*) *M'Carthy* v. *Daunt*, 11 Ir. Eq. Rep. 29. Assuming that the trustees could not sign a receipt, the decision was right; but it was a bold step to say that the trustees had not such a power. And see *Attorney-General* v. *Persse*, 2 Dru. & War. 67; *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123; [*Barcroft* v. *Murphy*, (1896) 1 I. R. 590;] and see *post*, p. 1135.

Persons claiming through the trustee.

18. It will be observed that, by the 25th section of the Real Property Limitation Act, 1833, the *cestui que trust*, and any person claiming through him, may enforce the trust against the trustee and *any person claiming through him* (*a*), but *both trustee and cestui que trust* may be ousted by the intrusion of a third title, and if so, the statute will begin to run from the dispossession of the trustee and *cestui que trust*. Thus, in 1810, a legal estate was vested in trustees upon trust for five tenants in common, but from 1819 to the filing of the bill in 1842, four of the tenants in common received their rents to the *exclusion of their co-tenant and of the trustees*, who never executed their duty; and it was held that there had been an ouster of both *trustees* and *cestui que trust*, and that the right of such *cestui que trust* was barred by the statute (*b*).

Possession by one of the *cestuis que trust*.

19. A *cestui que trust* in *actual possession* is *tenant at will* to his trustee (*c*), and the 7th section of the Act 3 & 4 Will. 4. c. 27, enacts that "when any person shall be in possession as *tenant at will*, the right of the person entitled subject thereto to make an entry shall be deemed to have first accrued at the determination of such tenancy, or *at the expiration of one year next after the commencement of such tenancy*, at which time such tenancy shall be deemed to have determined: provided that no *cestui que trust* shall be deemed to be a tenant at will within the meaning of the clause to his trustee." The exception was introduced in relief of the trustee, that he might not be obliged to take active steps lest the tenancy at will should be deemed to have expired, and so the statute should begin to run. In other words, the tenancy should not be determined at the end of one year (*d*). The statute, therefore, does not run against the trustee so long as the *cestui que trust* is in actual possession. [A mortgagor, where the mortgage debt has been fully paid, but no reconveyance has been made, is a tenant at will of the mortgagee, but is not a *cestui que trust* of the mortgagee within the meaning of the proviso, and time therefore runs against the mortgagee, and after more than thirteen years his legal estate will be extinguished (*e*). The proviso, however, extends to an implied, as well as to an express trust (*f*), and to a case where the *cestui que*

(*a*) See cases, *ante*, p. 1124, note (*f*).

(*b*) *Burroughs* v. *M'Creight*, 1 Jon. & Lat. 290; 7 Ir. Eq. Rep. 49; [*Bolling* v. *Hobday*, 31 W. R. 9;] and see *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 198; *Re Bermingham*, 4 Ir. R. Eq. 187; *Knight* v. *Bowyer*, 2 De G. & J. 440.

(*c*) See *ante*, Chap. XXVII. s. 1.

(*d*) See the observations of Wilde, C. J., in *Garrard* v. *Tuck*, 13 Jur. 873.

[(*e*) *Sands to Thompson*, 22 Ch. D. 614; and see *Warren* v. *Murray*, (1894) 2 Q. B. (C.A.) 648, 656, 657.]

[(*f*) *Warren* v. *Murray*, *sup.*; *Drummond* v. *Sant*, 6 L. R. Q. B. 763.]

trust has, by reason of his possession of the trust property, acquired possession of other property not comprised in the trust (*a*).]

And it has been laid down, that if the *cestui que trust* be let into possession as *tenant at will* to the trustee, the tenancy is not determined by the *cestui que trust* sub-letting to an under-tenant, unless the trustee had notice of such under-letting, for, though the general rule is that a tenancy at will is not *assignable*, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (*b*).

But if the *cestui que trust* be not the *actual occupier*, but only in *receipt of the rents and profits*, he is not tenant at will to the trustee, but the possession remains with the trustee, and the *cestui que trust* is the trustee's bailiff or agent for the management of the estate, and therefore if the *cestui que trust* allow any tenant of the trust estate to hold for twelve years, without paying rent or other acknowledgment of title, the statute runs against the trustee through the default of his bailiff or agent (*c*). The trustee, therefore, who puts a *cestui que trust* in receipt of the rents and profits has still a duty to perform, and may be held responsible for a loss accruing through neglect in not looking after his bailiff or agent.

Payment by mistake to person not being *cestui que trust*.

20. If *actual possession* be held by the trustee of an express trust who has the *legal estate*, but who mistakes his *cestui que trust* and pays the rents to a wrong person, the possession of the trustee is the possession of the rightful *cestui que trust*, and the wrongful recipient of the rents does not acquire a title by adverse possession under the statute (*d*); and this principle is of very extensive application, for, as we have seen, where a *cestui que trust* is put into *receipt of the rents and profits*, the *possession* is still that of the trustee, and the *cestui que trust* is regarded in the light of the bailiff or agent of the trustee. But it is always a question for the jury, or the Court sitting as a jury, to say whether the *cestui que trust* was in receipt of the rents as *bailiff* or *agent* of the trustee, or was in receipt of the rents as claiming the beneficial ownership independently of the

[(*a*) *East Stonehouse Urban Council* v. *Willoughby*, (1902) 2 K. B. 318.]

(*b*) *Melling* v. *Leak*, 1 Jur. N.S. 760, *per* Cresswell, J. The *alienee* cannot be deemed tenant at will of the trustees without some acknowledgment by them; *Doe d. Stanway* v. *Rock*, 4 Man. & G. 30.

(*c*) *Melling* v. *Leak*, 16 C. B. 652: 1 Jur. N.S. 759.

(*d*) *Lister* v. *Pickford*, 34 Beav. 576.

trustee. In the former case, the Statute of Limitations would not run, but in the latter case it would (*a*).

Disseisin by *cestui que trust.*

21. If a *cestui que trust* under a will hold adverse possession of an estate supposed to pass, but which did not in fact pass by the will to a trustee, and eventually the true owner is barred, the legal estate gained by the *disseisin* vests in the trustee of the will, under colour of which the possession was taken, and not in the *cestui que trust* (*b*). [And similarly if a grantor, who has no title, grants by deed to A. for life, with remainders over, and A. enters, and acquires a good title against the true owner, A. is estopped as against those in remainder from disputing the validity of the deed (*c*).]

Arrears of rent or interest under 42nd section.

22. The 42nd section of the Real Property Limitation Act, 1833, limiting the recovery of arrears of rent or interest to the last six years only, has no application to cases of express trust within the 25th section, but the *cestui que trust* could, prior to the 1st of January, 1879 (*d*), have recovered from his trustees the whole arrearages from the commencement of the title (*e*).

Subsisting term.

And where there was a subsisting term not barred, upon which the trustee might obtain *possession,* the whole arrearages [could, prior to the 1st of January, 1879, have been] recovered (*f*).

Cox *v.* Dolman.

Thus, in *Cox* v. *Dolman* (*g*), a testator devised his lands to

(*a*) As in *Burroughs* v. *M'Creight*, 1 Jon. & Lat. 290, where the statute was effectually pleaded "not by persons who had placed themselves in the shoes of the trustees, but by persons who, in spite of the trustees, had received the rents for upwards of twenty years for their own benefit," Ib. 305; and see *Cholmondeley* v. *Clinton*, *ante* p. 933; *Parker* v. *Carter*, *ante*, p. 946.

(*b*) *Board* v. *Board*, 9 L. R. Q. B. 48; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; *Anstee* v. *Nelms*, 1 H. & N. 225; [*Dalton* v. *Fitzgerald*, (1897) 1 Ch. 440; 2 Ch. (C.A.) 86, 91, 95, distinguishing *Paine* v. *Jones*, 18 L. R. Eq. 320, and *Re Stringer's Estate*, 6 Ch. D. 1; and observing upon *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89].

[(*c*) *Dalton* v. *Fitzgerald*, (1897) 1 Ch. 440; Ib., 2 Ch. (C.A.) 86.]

[(*d*) When the Real Property Limitation Act, 1874, came into operation.]

(*e*) *Playfair* v. *Cooper*, 17 Beav. 187; *Gough* v. *Bult*, 16 Sim. 323; *Watson* v. *Saul*, 1 Giff. 200; *Sturgis* v. *Morse*, 3 De G. & J. 1; 24 Beav. 541; *Gyles* v. *Gyles*, 9 Ir. Ch. Rep. 135. And see *Wright* v. *Chard*, 4 Drew. 680. [The section has no application to the case of a mortgagor seeking to redeem, and he can only do so on paying all arrears of interest from the date of the mortgage; *Re Lloyd*, (1903) 1 Ch. (C.A.) 385, 402; *Dingle* v. *Coppen*, (1899) 1 Ch. 726; unless the title to the mortgage has been extinguished under sect. 34 of the Real Property Limitation Act, 1833 (*ante*, p. 1122), or the mortgagees have otherwise precluded themselves from asserting any claim; *Re Hazeldine's Trusts*, (1908) 1 Ch. (C.A.) 34.]

(*f*) *Cox* v. *Dolman*, 2 De G. M. & G. 592; *Snow* v. *Booth*, 2 K. & J. 132; 8 De G. M. & G. 69; *Lewis* v. *Duncombe* (No. 2), 29 Beav. 175; *Lawton* v. *Ford*, 2 L. R. Eq. 97; *Earl of Mansfield* v. *Ogle*, 1 Jur. N.S. 414; *Re Wyse*, 4 Ir. Ch. Rep. 297; *Re Bermingham*, 4 Ir. Rep. Eq. 187; 9 Ir. R. Eq. 385; *Re Murphy*, 5 Ir. Rep. Eq. 147.

(*g*) 2 De G. M. & G. 592.

the use of trustees for ninety-nine years upon trust to pay certain annuities, and subject thereto to the use of S. Cox for life, with remainder over; and after the death of S. Cox, one of the annuitants filed a bill to have the arrears of the annuity raised out of the estate. The executors of S. Cox pleaded the statute as a bar to more than six years' arrears, but the Court held that it was the case of an express trust, that the tenant for life had taken possession subject to the trust, and that the term was a subsisting one, upon which the trustees might at any time have recovered, and the plaintiff was declared entitled to the whole arrears, which were to be paid out of the assets of the tenant for life up to the day of his death, and since his death by the remainderman. The direct remedy was, no doubt, to have the whole arrears raised by sale or mortgage of the term, but as the remainderman would be entitled to recover the arrears that accrued in the lifetime of the tenant for life from his estate, the Court, to avoid circuity, decreed payment at once out of the tenant for life's assets.

[23. An acknowledgment by one co-trustee of mortgaged property given to the mortgagee without the consent or knowledge of his co-trustee, will not (whatever may be the law as between co-executors) bind his co-trustee so as to prevent the operation of the statute (*a*). [Acknowledgment by one trustee.]

24. By the Real Property Limitation Act, 1874, sect. 10, after the 31st of December, 1878, "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an *express trust*, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable, if there were not any such trust" (*b*). Thus where an annuity, which was charged upon land, and secured by an express trust, remained unpaid for twenty-five years, and no claim of any sort was made in respect of the annuity during that period, it was held that no arrears of the annuity, accrued before a claim for the annuity was made, could be recovered from the property charged; for the remedy for the arrears was the same as if there had been no express trust, in which case, more than twelve years [Arrears of rent or interest under 37 & 38 Vict. c. 57, s. 10.]

[(*a*) *Astbury* v. *Astbury*, (1898) 2 Ch. 111; and see *Read* v. *Price*, (1909) 1 K. B. 577; 2 K. B. (C.A.) 724, and *ante*, p. 298, note (*c*).]

[(*b*) See *post*, p. 1136.]

having elapsed, they would have been irrecoverable; but it was conceded that as the section refers only to arrears, it could not affect the right to future payments of the annuity, which accordingly remained recoverable by virtue of the express trust (*a*).]

Charities.

25. It was at first doubted whether charities were not altogether unaffected by the Real Property Limitation Act, 1833, inasmuch as, by a special exception in their favour, Courts of Equity did not oppose to charitable, as they did to ordinary equitable claims, a bar by analogy to the old Statute of Limitations, and the Act of 1833 contained no express mention of charities (*b*); but it was afterwards held that they were within the operation of the 24th section, though they might be protected by the 25th section relating to express trusts (*c*); and the law was ultimately so settled in the case of *Attorney-General* v. *Magdalen College* (*d*) on appeal to the House of Lords.

Legacy.

26. A *legacy* cannot be recovered under the Real Property Limitation Act, 1874, after twelve years; [and neither the fact that the executor has assented to the legacy, nor that the legacy is coupled with an *implied* trust, will prevent the operation of the statute (*e*). But if an *express* trust of a legacy is declared, and] the executor by setting the legacy apart has assumed the character of a trustee, this statute does not run (*f*), [though he may be protected by the Trustee Act, 1888, sect. 8 (*g*)]. Where the legacy was coupled with a trust for the separate use of a *feme covert*, the executor, after assent to the trust, was held to be converted into a trustee (*h*); [but by merely signing a residuary account, and so assenting to the bequest of residue, an executor does not constitute himself a trustee of the fund (*i*); and there is no authority for the proposition that when once the debts and funeral and testamentary expenses are paid, the residue is held upon an express trust (*j*)]. Where a legacy was given to A. for life with remainder to his children, and the circumstances were such that during the life of A. there was no hand entitled to

[(*a*) *Hughes* v. *Coles*, 27 Ch. D. 231.]

(*b*) *Incorporated Society* v. *Richards*, 1 Dru. & War. 287, 288.

(*c*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 182; 7 Ir. Eq. Rep. 580.

(*d*) 18 Beav. 223; 6 H. L. Cas. 189; *Attorney-General* v. *Davey*, 19 Beav. 521; 4 De G. & J. 136; *Attorney-General* v. *Payne*, 27 Beav. 168.

[(*e*) *Re Davis*, (1891) 3 Ch. (C.A.) 119; and see *Re Barker*, (1892) 2 Ch. 491; *Re Lacy*, (1899) 2 Ch. 149.]

(*f*) *Phillippo* v. *Munnings*, 2 M. & Cr. 309; *O'Reilly* v. *Walsh*, 6 Ir. R. Eq. 555; [and see *Re Smith*, 42 Ch. D. 302; *Re Swain*, (1891) 3 Ch. 233].

[(*g*) *Re Swain*, *sup.*; *Re Timmis*, (1902) 1 Ch. 176; and see *post*, p. 1141.]

(*h*) *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204.

[(*i*) *Re Rowe*, 58 L. J. Ch. 703; 61 L. T. N.S. 581.]

[(*j*) *Re Mackay*, (1906) 1 Ch. 25.]

receive it, the time was held not to run against the children during the life of A. (*a*). [Where a testator gave a legacy, not payable out of his personal estate, but charged exclusively on a contingent reversion in land, it was held that, the remedy under the *testamentary* charge being sale and not foreclosure, the case did not fall within sect. 2 of the Real Property Limitation Act, 1874 (*b*), but within sect. 8, and that time ran from the date when the legacy was first payable, and not when the reversion fell into possession (*c*).]

Residue or share of residue.

27. The 8th section of the Real Property Limitation Act, 1874, is, as from 1st January, 1879, substituted for the 40th section of the Real Property Limitation Act, 1833, and it is presumed that under the substituted, as under the original section, the limited period will, by a liberal construction of the word *legacy*, be held to be a bar to suits also in respect of a *residue* or share of residue (*d*).

Intestacy, 23 & 24 Vict. c. 38, s. 13.

28. The 40th section of the Real Property Limitation Act, 1833, did not extend to the case of *intestacy*, and by the Law of Property Amendment Act, 1860, sect. 13, no suit or other proceeding can be brought to recover personal estate, or any share thereof, from the personal representative of any *intestate* but within twenty years next after a present right to receive the same (*e*) shall have accrued to some person capable of giving a discharge for or release of the same, unless there has been part payment or some acknowledgment in writing (*f*). The 8th section of the Real Property Limitation Act, 1874, appears not to extend to the case of an *intestacy*, and if so, a legatee will, under the latter section, be barred after twelve years, while his *next of kin* will not be barred until after twenty years (*g*).

Assets subsequently received.

29. The right of the legatee or next of kin may be barred as

(*a*) *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123; see *ante*, p. 1129, note (*f*).

[(*b*) See *ante*, p. 1123.]

[(*c*) *Re Owen*, (1894) 3 Ch. 220.]

(*d*) *Prior* v. *Horniblow*, 2 Y. & C. 201; *Christian* v. *Devereux*, 12 Sim. 264; [*Sutton* v. *Sutton*, 22 Ch. D. (C.A.) 511, 517;] and see *Payne* v. *Evens*, 18 L. R. Eq. 356; *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; [*Re Swain*, (1891) 3 Ch. 233, and *post*, p. 1141; *Bailie* v. *Irwin*, (1896) 2 I. R. 614; *Re Fitzgerald*, (1897) 1 I. R. 556].

[(*e*) A "present right to receive" within the section, means a right in the "person capable of giving a discharge," of recovering payment of the share into his own hands, and therefore the statute will not run as against an executor who could not sue his co-executors at law, notwithstanding that he might have secured the share by a suit against them in equity: *Re Pardoe*, (1906) 1 Ch. 265, but see *S.C.*, (1906) 2 Ch. (C.A.) 340, where an appeal was allowed on the facts.]

[(*f*) In *Re Lacy*, (1899) 2 Ch. 149, *ante*, p. 1126, the statute was held to apply as between an executor and the next of kin claiming under a partial intestacy, the executor not having constituted himself an express trustee.]

[(*g*) See *Sutton* v. *Sutton*, 22 Ch. D. (C.A.) 511, 517; *Bailie* v. *Irwin*, (1896) 2 I. R. 614.]

to assets received more than the prescribed period before the commencement of the suit, but not barred as to assets received since (*a*).

36 & 37 Vict. c. 66, s. 25.

30. By the Supreme Court of Judicature Act, 1873, sect. 25, subsect. 2, it is enacted that "no claim of a *cestui que trust* against his *trustee* (*b*) for any property held on an *express trust*, or in respect of any *breach of such trust*, shall be held to be barred by any statute of limitations." The Real Property Limitation Act, 1874, sect. 10 (*c*), enacts that from 1st January, 1879, no money or legacy charged on any land or rent shall, though *secured by an express trust*, be *recoverable*, except within the time within which it might have been recovered had there been no express trust.

37 & 38 Vict. c. 57, s. 10.

The first-mentioned enactment applies as between *trustee* and *cestui que trust*, while the 37 & 38 Vict. c. 57, sect. 10 applies as between the *land charged* (though the charge be *secured* by way of trust) and the persons entitled to the charge (*d*).

[Trustee Act, 1888.]

[31. The Trustee Act, 1888 (51 & 52 Vict. c. 59), provides by sect. 8 as follows:—

"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the following provisions shall apply:—

"(A) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner, and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

"(B) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been

(*a*) See *Adams* v. *Barry*, 2 Coll. 290; [*Re Johnson*, 29 Ch. D. 964.]

[(*b*) In *Seagram* v. *Tuck*, 18 Ch. D. 296, Kay, J., was of opinion that a receiver appointed by the Court was a trustee of money received by him, so as not to be able to avail himself of the Statute of Limitations.]

[(*c*) See *ante*, p. 1133.]

[(*d*) See *Fearnside* v. *Flint*, 22 Ch. D. (C.A.) 579; *Hughes* v. *Coles*, 27 Ch. D. 231; *ante*, p. 1134. If the charge has not been raised, the trustee of the charge will now be entitled to the benefit of s. 8 of the Trustee Act, 1888, see *infra*.]

against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use (*a*), whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2) No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this section had been pleaded.

"(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

By sub-section 1, "trustee" is to be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds; and the provisions of the Act relating to a trustee are to apply as well to several joint trustees as to a sole trustee (*b*).

[General effect of section 8.]

32. The general effect of the section appears to be that in future, whenever an action is brought by a *cestui que trust* against a trustee or any person claiming through him, whether in respect of land or money, and whether the defendant is sought to be charged under an express or a constructive trust, there the defendant will be entitled to the protection which the section gives, unless the plaintiff can prove either (1) fraud or fraudulent breach of trust, or (2) that at the time of action brought the trust property, which is the subject matter of the action, or the proceeds thereof, is or are still *retained* by the trustee, or (3) that, previously to the bringing of the action, such property or proceeds were received by the trustee, and *converted to his use*. If the plaintiff brings his case within one of these three exceptions,

[(*a*) See *Re Turner*, (1897) 1 Ch. 536.]

[(*b*) A director of a company who misapplies moneys of the company which have come to his hands, is a trustee within s. 8; *Re Lands Allotment Company*, (1894) 1 Ch. (C.A.) 616; and see *Re Sharpe*, (1892) 1 Ch. (C.A.) 154. It has been held that the benefit of the Act does not extend to a trustee under a liquidation; *Re Cornish*, (1896) 1 Q. B. (C.A.) 99; but the Statute of Limitations will run against such a trustee as it would against the bankrupt, see *Re Mansel*, W. N. (1892) p. 32.]

the old law will still apply; if not, the section will take effect (*a*).

[Exceptions from the section.]

33. The first of these three exceptions is confined to fraud to which the trustee was "party or privy," and accordingly a trustee will not be deprived of the benefit of the exception because the plaintiff has been defrauded by some other person in respect of the matter complained of (*b*).

The second exception relates to property, or the proceeds of property, "still retained," and it has been decided that these words must be referred to the point of time when the action in respect of the breach of trust is brought (*c*), and that the exception is confined to cases in which the trustee at the date of the writ has the trust property or the proceeds thereof either actually in his hands or under his control. If at that date, he, or any agent for him, as, for example, a banker or solicitor, has the property so that the trustee can get it, the exception applies, but if the property has been lost, whether by negligence or otherwise, or if money which ought to have been accumulated has been paid away, the exception does not apply (*d*). Accordingly, the established rule, that when a trustee is proved to have trust property in his possession, he must be considered as continuing in possession for the benefit of the *cestui que trust* until he discharges himself by showing that the property has been duly applied in accordance with the trust (*e*), will not assist the plaintiff if the defendant can show that the property at the time of action brought was no longer under his control (*f*).

Where a husband forcibly retained the money of his wife, who did not acquiesce in the retention, the case was held to fall within the second exception (*g*).

In the third exception the expression "converted to his use" deserves consideration. Where money was received by a firm

[(*a*) *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626; *Re Gurney*, (1893) 1 Ch. 590; *Whitman* v. *Watkin*, 78 L. T. N.S. 188.]

[(*b*) *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599; (1895) A. C. 495. In the case of *Re Sale Hotel and Botanical Gardens Co.*, W. N. (1897) p. 174, the word "fraudulent" was held to extend the Act to the case of a promoter of a company receiving a secret profit; but see *S. C.*, in C.A. 46 W.R. 617.]

[(*c*) *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 606, 613; (1895) A.C. 495, 503.]

[(*d*) *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599; *S. C.* in H. L. (1895) A. C. 495; *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626; *Re Page*, (1893) 1 Ch. 304, where the defendant trustee deposed that he had expended the fund in maintaining and educating the plaintiff, but admitted that he had never rendered any account.]

[(*e*) See *Metropolitan Bank* v. *Heiron*, 5 Ex. D. (C.A.) 319, 325, *per* Cotton, L.J.; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 351, *per* Stirling, J.]

[(*f*) See *How* v. *Earl Winterton* (1896) 2 Ch. (C.A.) 626.]

[(*g*) *Wassell* v. *Leggatt*, (1896) 1 Ch 554.]

of solicitors for the purpose of investment, but was never invested, and the firm paid interest on the money as though it were invested, and credited themselves in their books with the interest so paid, Stirling, J., was of opinion (though he did not decide the point) that the money was converted to the use of the firm within the meaning of the section (*a*); but where trust money lent on mortgage was, with the concurrence of the mortgagor, applied in payment of a loan due by him to a bank in which one of the trustees was a partner, it was held that the money could not be treated as converted to the use of that trustee (*b*).

While the old law will still by virtue of the exception contained in the opening clause of the section, govern a large number of cases, the operation of the section will, it would seem, extend principally to cases in which the relief sought against the trustee is in the nature of damages for breach of duty by him in the conduct of the trust, as, for example, where the object of the action is to fix him with the loss arising from an improper investment (*c*), or from neglect to call in trust funds, or otherwise to render him chargeable in respect of property, which he has not, but which he ought to have, received.

[Nature of the protection afforded by the statute.]

34. The consideration of the nature of the protection which the enactment confers is attended with difficulty. "The section," it was said by Lindley, L.J., "is cumbrously worded, and it is difficult to grasp the idea which underlies it," but the short effect of it appears to be that, except in the three specified cases above referred to, "a trustee who has committed a breach of trust is entitled to the protection of the several statutes of limitation as if actions and suits for breach of trust were enumerated in them" (*d*).

[Clause A.]

The wording of clause (A) of sub-sect. 1 is especially perplexing, and it has been doubted whether that clause can have any operation at all. An action by a *cestui que trust* against his trustee is necessarily grounded on the fiduciary relation existing between them, and upon the hypothesis which, in applying the statutes of limitation, the Court is by this Act required to make, viz. that the defendant trustee is not a trustee,

[(*a*) *Moore* v. *Knight*, (1891) 1 Ch. 547; and see *Mara* v. *Browne*, (1895) 2 Ch. 69, 87, 88.]

[(*b*) *Re Gurney*, (1893) 1 Ch. 590; and where trustees who were also beneficiaries received only their own shares, but erroneously paid away a settled share to the tenant for life of it, the Court declined to hold that they had "converted" any part of such share to their use: *Re Timmis*, (1902) 1 Ch. 176.]

[(*c*) *Re Bowden*, 45 Ch. D. 444.]

[(*d*) *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626, 641.]

such an action could never have been brought at all, and consequently no rights and privileges conferred by any statute of limitations could be enjoyed in it. Thus where an action was brought by new trustees to make former trustees liable for losses in respect of investments negligently made on insufficient security more than six years previously, Fry, L.J., held that the case did not fall within clause (A), and in reference to that clause he observed that it was obvious that "if a person had not been a trustee, he could not be sued for a breach of trust"; and, further, that there was "no right or privilege, so far as he was aware, conferred by any statute of limitations in respect of a breach of trust," and that he should have great difficulty in applying the clause to the case before him (*a*). In a more recent case (*b*), Lindley, L.J., observed that although he shared with Fry, L.J., the difficulty presented by the clause, he could not avoid the conclusion that to exclude the operation of it in all cases on the short ground stated by him would be really to deprive it of all meaning whatever. The Legislature appeared to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be taken by the plaintiff against the defendant to which some statute of limitations would be a defence. His Lordship thought that the clause required an answer to the question what action or proceeding, if any, could the plaintiff in that case have brought against the defendant in respect of certain accounts complained of, if the defendant had not been a trustee, but in answering that question he found himself embarrassed by the consideration that an account in equity, excluding all trust, would have no equitable element in it. In the same case, Rigby, L.J., thought that the clause could be construed by supposing the right of action to exist, but excluding the idea of breach of trust, thus treating the trustee as though his "breach of trust were nothing more or less than a breach of duty by reason of some act or omission of his." But this construction is also attended with difficulty. In a recent case where one trustee was claiming to enforce a right of contribution against his co-trustee, it was held by Stirling, J., that as the statutes of limitation would have been defences to such a claim before the Act of 1888 came into operation, clause (A), and not clause (B), was applicable (*c*).

[(*a*) *Re Bowden*, 45 Ch. D. 444; and see *Mara* v. *Browne*, (1895) 2 Ch. 69, 95.]

[(*b*) *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626, 638, 639.]

[(*c*) *Robinson* v. *Harkin*, (1896) 2 Ch. 415.]

It will be observed that clause (B) excepts from its operation actions or proceedings to which no existing statute of limitations applies. The question whether the case was one in which an "existing statute of limitations" was applicable arose in the case of *Re Swain*. The action was brought by persons entitled to shares of residue under a will in respect of a diminution of their shares, alleged to have been caused by improper delay by the executors and trustees in realising the estate, and it was held that the action was not in substance an action for a legacy within sect. 8 of the Real Property Limitation Act, 1874 (*a*), but an action in respect of a breach of trust, and that, therefore, no other statute of limitations being applicable to the case, clause (B) was applicable (*b*). Where trustees were liable to make good income tax which they had neglected to deduct on making payments to annuitants, the section applied so as to limit the liability to payments made within six years (*c*). But where the action was brought against an executor for a devastavit by him, in handing over assets to a beneficiary, without making provision for future liability under a guarantee given by the testator, more than six years having elapsed since the act complained of, the Court held that the claim was barred by the Statute of Limitations, and doubt was expressed whether sect. 8, sub-sect. 1 (B) of the Act of 1888 applied to such a case (*d*). [Clause B.]

The expression trustee "or person claiming through him" has been considered in Ireland, and it has been held that that expression points not to beneficiaries, but to persons deriving property from and subject to the liabilities of the trustee or executor, that is, generally speaking, his executors, administrators, or assigns (*e*).

35. The cases hitherto decided under the section have generally been treated as falling under clause (B), and accordingly, as that clause introduces the analogy of an action of debt for money had and received, the period has been six years (*f*); but in *How* v. *Earl Winterton* (*g*), where the action was for an account, it was [Period of time limited by the statute.]

[(*a*) See *ante*, p. 1123.]

[(*b*) *Re Swain*, (1891) 3 Ch. 233; followed in *Re Timmis*, (1902) 1 Ch. 176, where the action was by beneficiaries entitled in remainder to a share of residue which had been paid away to the tenant for life; and see *Robinson* v. *Harkin*, (1896) 2 Ch. 415.]

[(*c*) *Re Sharp*, (1906) 1 Ch. 793.]

[(*d*) *Lacons* v. *Wormall*, (1907) 2 K. B. (C.A.) 350.]

[(*e*) *Leahy* v. *De Moleyns*, (1896) 1 I. R. 206, 213, 242.]

[(*f*) See *Re Bowden*, 45 Ch. D. 444; *Re Swain*, (1891) 3 Ch. 233; *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626; *Re Fountaine*, (1909) 2 Ch. (C.A.) 382.]

[(*g*) *Ubi sup.*]

observed by Lindley, L.J., that clause (A), if it applied to trustees' accounts at all, assumed that some statutes of limitation would be applicable, and therefore put trustees' accounts on the same footing as other accounts to which the statutes of limitation apply, so that according to the principle of decided cases (*a*), the period, being regulated by the Limitation Act, 1623 (21 Jac. 1. c. 16), as amended first by 9 Geo. 4. c. 14 (Lord Tenterden's Act), and afterwards by sect. 9 of the Mercantile Law Amendment Act, 1856 (19 and 20 Vict. c. 97), would still be six years. And this was acquiesced in by Rigby, L.J., who, however, pointed out that in some cases coming under clause (A) the appropriate statute might be a different one, and the length of period for the running of the statute might be different (*b*).

[Time when beginning to run.]

36. The section has in no way altered the principles which determine the time when a cause of action accrues. When the action is in respect of a breach of trust, time under the statute begins to run when the breach of trust, as by improper investment or otherwise, is committed (*c*), except only in the case of concealed fraud, when time runs from the discovery of the fraud under the doctrine of equity already adverted to (*d*).

Accordingly, where a concealed fraud has been committed by an agent of the trustee, and the trustee, though innocent of any moral complicity in the fraud, has by his conduct rendered himself responsible for the acts of the agent in reference to the transaction, although the trustee himself is within the first exception contained in the section, yet time will not begin to run in his favour until the discovery of the fraud (*e*).

In an action by a deferred annuitant for an account of income which ought to have been accumulated to meet the annuity, inasmuch as the annuitant is not bound to sue before his interest has accrued in possession, the statute will not begin to run until that time, and, if the action is to recover arrears of the annuity, it will not run until the time when a half-yearly payment becomes due (*f*).

Where the claim is by one co-trustee against another for contribution, as the parties are in the position of co-sureties,

[(*a*) See *Knox* v. *Gye*, L. R. 5 H. L. 656; *Foley* v. *Hill*, 1 Ph. 399; and see also *Friend* v. *Young*, (1897) 2 Ch. 421.]

[(*b*) For the special form of order in *How* v. *Earl of Winterton*, see *Re Davies*, (1898) 2 Ch. 142, 144.]

[(*c*) *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 605; *Moore* v. *Knight*, (1891) 1 Ch. 547; *Re Swain*, (1891) 3 Ch. 233.]

[(*d*) See *ante*, pp. 1114, 1121, 1127.]

[(*e*) See *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599; (1895) A.C. 495.]

[(*f*) *How* v. *Earl Winterton*, (1896) 2 Ch. (C.A.) 626.]

time will not begin to run until the claim of the *cestuis que trust* is established by the judgment of the Court (*a*).

By the proviso at the end of clause (B) the statute is not to begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession, and accordingly, it may occur that a tenant for life is barred by the lapse of six years from the time when a breach of trust was committed, but that those in remainder are still entitled to sue (*b*); and it has been held that payment of interest in respect of an improper investment by the trustees to the tenant for life cannot be treated as an admission by them of liability, so as to deprive them of the benefit of the statute (*c*). Where a married woman was entitled under a settlement to an interest during the joint lives of herself and her husband, and was also entitled under a resulting trust to a reversionary life interest after the decease of her husband, it was held that the last mentioned interest did not become an "interest in possession" until the death of the husband, and that therefore the statute did not run as against such interest until that time (*d*).

37. In a recent case, a sum of money was paid, in or before the year 1874, by a client to one of a firm of solicitors for investment; the money was received by the firm, and representations were from time to time made to the client on behalf of the firm to the effect that the investments had been made, and interest was regularly paid to her until 1886, when it was discovered that the money had in fact never been invested. In an action against the representative of one of the partners, who was innocent of the fraud, it was held by Stirling, J., that the decision in *Blair* v. *Bromley* (*e*), which rested on principles of the law of partnership and not those of trust, was applicable to the case, and was unaffected by the provisions of the Act of 1888, and that, in conformity with that decision, the innocent partner was deprived of the benefit of the statute by reason of the representations made, which were binding on him as a partner (*f*).] [Liability arising out of law of agency and concealed fraud.]

Thirdly. We have to inquire *to what extent a Court of Equity,* Account of mesne rents and profits.

[(*a*) *Robinson* v. *Harkin*, (1896) 2 Ch. 415.]

[(*b*) See *Re Somerset*, (1894) 1 Ch. (C.A.) 231; see form of judgment, Seton, 6th ed. p. 1145; *Re Turner*, (1897) 1 Ch. 536; *Want* v. *Campain*, 9 Times L. R. 254; see form of judgment, Seton, 6th ed. p. 1144; *Collings* v. *Wade*, (1896) 1 I. R. 340, 352.]

[(*c*) *Re Somerset*, (1894) 1 Ch. (C.A.) 231.]

[(*d*) *Mara* v. *Browne*, (1895) 2 Ch. 69, *per* North, J.; *S. C.*, (1896) 1 Ch. (C.A.) 199.]

[(*e*) 5 Ha. 542; 2 Ph. 354.]

[(*f*) *Moore* v. *Knight*, (1891) 1 Ch. 547; and see *Mara* v. *Browne*, (1895) 2 Ch. 69, 94; *Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 610; and see the Partnership Act, 1890, ss. 11, 15, &c.]

upon recovery of the estate, will direct an account against the defendant of the *mesne rents and profits.*

The right of the *cestui que trust* to an account of *mesne* rents and profits cannot very well be treated of without entering generally into the principles upon which relief in a Court of Equity, in respect of *mesne* rents and profits, is founded.

An account of rents and profits may be sought in equity, either (I.) *Independently* of relief respecting the *corpus* of the land, or (II.) As *incident* or *collateral* to it.

First. Where the account is sought *independently* of other relief.

Account may be had against an express trustee without reference to the Statutes of Limitation.

1. If the account be sought against an *express trustee*, then, as the Statutes of Limitation do not [unless the case falls within the provisions of sect. 8 of the Trustee Act, 1888, already referred to] run between trustee and *cestui que trust*, it will [independently of that enactment] be directed from the time when the rents were withdrawn (*a*).

Account in equity could not be had in respect of a legal title.

Except where accounts complicated, &c.

Or the plaintiff was an infant.

2. If the claim to the rents rest upon a *legal* title, the plaintiff has then a *legal* remedy, and under the old practice could not have come into a Court of Equity at all (*b*); except in cases where, from the complicated nature of the accounts, or other particular circumstances, a Court of Law would have afforded very inadequate relief (*c*). But an *infant* might have filed a bill for an account upon a legal title (*d*), as every person entering upon an infant's lands is regarded in the light of a bailiff or receiver for the infant (*e*); the rule, however, did not apply where the infant had never had possession, but it had been held by an adverse party (*f*). The jurisdiction against a person entering during the infant's minority remained, though the bill was not filed until after the infant attained twenty-one (*g*). But after six years the Statute of Limitations would be a bar (*h*). And

Or in the case of mines.

(*a*) See *Attorney-General* v. *Brewers' Company*, 1 Mer. 498: *Mathew* v. *Brise*, 14 Beav. 341.

(*b*) *Jesus College* v. *Bloome*, 3 Atk. 262; and see *Dinwiddie* v. *Bailey*, 6 Ves. 136; *Taylor* v. *Crompton*, Bunb. 95; *Lansdowne* v. *Lansdowne*, 1 Mad. 137.

(*c*) See *O'Connor* v. *Spaight*, 1 Sch. & Lef. 309; *Corporation of Carlisle* v. *Wilson*, 13 Ves. 276.

(*d*) *Gardiner* v. *Fell*, 1 J. & W. 22; *Roberdeau* v. *Rous*, 1 Atk. 543; *Yallop* v. *Holworthy*, 1 Eq. Ca. Ab. 7; *Newburgh* v. *Bickerstaffe*, 1 Vern. 295; *Curtis* v. *Curtis*, 2 B. C. C. 631, *per Cur.*

(*e*) *Dormer* v. *Fortescue*, 3 Atk. 130, *per* Lord Hardwicke; *Pulteney* v. *Warren*, 6 Ves. 89, *per* Lord Eldon; *Morgan* v. *Morgan*, 1 Atk. 489; *Lord Falkland* v. *Bertie*, 2 Vern. 342, *per Cur.*; *Doe* v. *Keen*, 7 T. R. 390, *per* Lord Kenyon; *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; *Pascoe* v. *Swan*, 27 Beav. 508; [*Wall* v. *Stanwick*, 34 Ch. D. 763; *Re Hobbs*, 36 Ch. D. 553; and see *ante*, p. 1113.]

(*f*) *Crowther* v. *Crowther*, 23 Beav. 305; *ante*, p. 1113. But see the observations of V.C. in *Quinton* v. *Frith*, 2 Ir. R. Eq. 414.

(*g*) *Blomfield* v. *Eyre*, 8 Beav. 250; *Hicks* v. *Sallitt*, *Wall* v. *Stanwick*, *ubi sup.*

(*h*) *Lockey* v. *Lockey*, Pr. Ch. 518; and see *Knox* v. *Gye*, 5 L. R. H. L. 674.

generally, all persons might have an account upon a legal title in respect of *mines*, which are a species of trade (*a*), but not of *timber*, without praying an injunction (*b*). Timber.

3. Although where a remedy lay at law an account could not be had in equity against the *pernor* of the profits himself, yet after his decease, the party entitled to the profits might have considered himself a *creditor*, and have filed a bill in equity for an *account of the assets* (*c*). Whether after the death of the pernor an account might be had in equity against his executor.

4. Where, as in the preceding cases, a Court of Equity assumed a concurrent jurisdiction with Courts of law, the account was not extended beyond the legal limit of six years, provided the statute were pleaded: it was otherwise, if the defendant did not avail himself of the statute by demurrer, plea, or answer (*d*). The account in these cases confined to the legal limit.

[5. Now, by the Judicature Acts, the several Divisions of the High Court of Justice have co-ordinate jurisdiction, and matters of account are assigned to the Chancery Division of the Court (*e*), and it is conceived that the same limit of time will apply to the account as formerly prevailed in the Court of Chancery. Under the Rules a plaintiff or defendant must plead the Statute of Limitations, if he desires to rely upon it as a defence or in reply (*f*).] [Present practice.] [Statute of Limitations must be pleaded.]

6. It often happens that a legal remedy *did* exist, but has since, by the death of a party or the determination of the estate, become extinguished. In such a case, as the right *was not*, but only *is* without a remedy at law, there seems no ground in general for the interference of a Court of Equity (*g*). Where a legal remedy did exist, but has expired, equity will not assist.

7. But if the remedy was lost through *mistake*, the Court upon that principle may interpose: as where a lease was held for the lives of A. and his two daughters B. and C., and A. afterwards married again, and had another daughter, who was also named Unless there be mistake.

(*a*) *Bishop of Winchester* v. *Knight*, 1 P. W. 406; and see *Pulteney* v. *Warren*, 6 Ves. 89; *Lansdowne* v. *Lansdowne*, 1 Mad. 116; *Parrott* v. *Palmer*, 3 M. & K. 632; [Dan. Ch. Pr. 7th ed. p. 1419].

(*b*) *Jesus College* v. *Bloome*, 3 Atk. 262; *Higginbotham* v. *Hawkins*, 7 L. R. Ch. 676; and see *Pulteney* v. *Warren*, 6 Ves. 89; *University of Oxford* v. *Richardson*, Ib. 701; *Grierson* v. *Eyre*, 9 Ves. 346; but see *Garth* v. *Cotton*, 1 Dick. 211; *Lee* v. *Alston*, 1 B. C. C. 194.

(*c*) *Monypenny* v. *Bristow*, 2 R. & M. 117 (but the bill also prayed delivery of title-deeds); *Gardiner* v. *Fell*, 1 J. & W. 22 (but the plaintiff was also an infant); and see *Thomas* v. *Oakley*, 18 Ves. 186; *Lansdowne* v. *Lansdowne*, 1 Mad. 116.

(*d*) See *Monypenny* v. *Bristow*, 2 R. & M. 125.

[(*e*) 36 & 37 Vict. c. 66, s. 34.]

[(*f*) See Rules of the Supreme Court, 1883, Order XIX., Rule 15.]

(*g*) *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 71, *per* Lord Fitzgibbon; *Hutton* v. *Simpson*, 2 Vern. 722; *Norton* v. *Frecker*, 1 Atk. 525, 526, *per* Lord Hardwicke; and see *Pulteney* v. *Warren*, 6 Ves. 88.

B., and the landlord, on the expiration of the lease by the death of the real *cestui que vie*, did not enter (B. the daughter by the second marriage being mistaken for B. the life named in the lease), Lord Macclesfield said: "Where one has title of entry, and neglects to enter or to bring his ejectment, but sleeps upon it for several years, *as he has no remedy at law for the mesne profits, so neither has he in equity*, for it was his own fault he did not enter, and he shall never come into a Court of Equity for relief against his own negligence, or to make the tenant in possession who held over his lease to be but his bailiff or steward, whether he will or not; but in the present case, *by reason of the circumstance of both daughters being of the same name, and the mistake consequent thereon*, the defendant must account for the *mesne* profits from the expiration of the lease" (*a*).

Or fraud.

8. So equity will relieve where the remedy was prevented by *fraud:* as where A. was entitled to a leasehold estate, but B., concealing the deeds, remained in possession until the term had expired, Lord King directed an account of the rents and profits from the time that A.'s title accrued, on the ground that A. had been kept in ignorance of his just rights through B.'s fraudulent concealment of the deed and counterpart (*b*).

Or some default in the defendant.

9. And generally the Court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through *some default* of the defendant (*c*).

Secondly. An account may be sought as *incident or collateral* to the relief. The doctrines upon this subject were very distinctly laid down by Lord Fitzgibbon, afterwards Lord Clare, in *Barnewall* v. *Barnewall* (*d*).

Plaintiff recovering the estate on an equitable title.

A.—1. "The general rule of equity," he said, "is, that if the suit for recovery of possession be properly cognisable in a Court of *Equity*, and the plaintiff obtains a decree, the Court will direct an account of rents and profits, as incident to such relief."

Where *cestui que trust* follows trust estate into hands of a volunteer claiming under a trustee.

2. In the case of a *cestui que trust*, who is following the trust estate into the hands of a person *claiming through the trustee*, under such circumstances that the defendant is himself to be regarded as a trustee, it is clear that the *cestui que trust*, by

(*a*) *Duke of Bolton* v. *Deane*, Pr. Ch. 516. (Note, in this case Lord Hardwicke thought a remedy still existed at law, *Lormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 190; but Lord Macclesfield was evidently of a different opinion, and so was Lord Fitzgibbon; *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 68.)

(*b*) *Bennett* v. *Whitehead*, 2 P. W. 644; and see *Duke of Bolton* v. *Deane*, Pr. Ch. 516, and *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 66.

(*c*) *Pulteney* v. *Warren*, 6 Ves. 73.

(*d*) 3 Ridg. P. C. 66.

establishing his claim to the land, has thereby established a right to the *mesne* rents and profits from the very commencement of his title (*a*). And *a fortiori* the rule is so where the plaintiff has been under the disability of infancy during the possession of the defendant, because then the latter is regarded as a bailiff or trustee for the former (*b*), or where there has been fraud or suppression on the part of the defendant.

Where plaintiff comes as equitable owner against one in *bonâ fide* adverse possession.

3. Where the case is that of a plaintiff coming forward not strictly as *cestui que trust*, but still as *equitable owner* to recover the estate against one in *bonâ fide adverse possession*, many of the older decisions and *dicta* point to the conclusion that, in the absence of special circumstances, the account will be directed from the time of the accruer of the title (*c*), subject only to the qualification, that by analogy to the legal defence upon the Statute of Limitations, the account will not be carried back beyond six years before the institution of the suit (*d*). The more recent authorities seem, however, to establish that where there is no trust, no infancy, no fraud, and no suppression, where, in short, there is a mere *bonâ fide adverse possession*, the practice of the Court is not to carry back the account beyond the *institution of the suit* (*e*); unless at least there was a demand of possession by the plaintiff or acts equivalent thereto before proceedings were taken, in which case the account will be carried back to the time of the demand or constructive demand (*f*).

Where defendant ignorant of his true character of trustee.

4. In one case, in which the plaintiff was an infant, and the defendant in fact a *trustee*, but *ignorant of his true character*, the account was limited to the filing of the bill, except as to money which had been paid into Court (*g*), but the decision is of doubtful authority (*h*).

(*a*) *Sturgis* v. *Morse*, 3 De G. & J. 1; 24 Beav. 541; *Wright* v. *Chard*, 4 Drew. 673; *Kidney* v. *Coussmaker*, 12 Ves. 158.

(*b*) *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; *Schroder* v. *Schroder*, Kay, 591; *Pascoe* v. *Swan*, 27 Beav. 508; and cases cited *ante*, p. 1144, note (*e*).

(*c*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 183; *S. C.*, 3 Atk. 130, *per* Lord Hardwicke; *Hobson* v. *Trevor*, 2 P. W. 191; *Coventry* v. *Hall*, 2 Ch. Ca. 134.

(*d*) *Reade* v. *Reade*, 5 Ves. 749, 750; *Harmood* v. *Oglander*, 6 Ves. 215; *Drummond* v. *Duke of St Albans*, 5 Ves. 439; *Stackhouse* v. *Barnston*, 10 Ves. 470.

(*e*) *Pulteney* v. *Warren*, 6 Ves. 93, *per* Lord Eldon; *Edwards* v. *Morgan*, M'Clel. 541, see 554, 555; *Hicks* v. *Sallitt*, 3 De G. M. & G. 813; *Thomas* v. *Thomas*, 2 K. & J. 79; *Morgan* v. *Morgan*, 10 L. R. Eq. 99; [but see *Hickman* v. *Upsall*, 4 Ch. D. (C.A.) 144, where the Court of Appeal were of opinion that, in the absence of any special equitable considerations, the account should, by analogy to the legal rule, be carried back for such a period as the Statute of Limitations allowed].

(*f*) *Penny* v. *Allen*, 7 De G. M. & G. 409; and see *Edwards* v. *Morgan*, M'Clel. 554.

(*g*) *Drummond* v. *Duke of St Albans*, 5 Ves. 433, see 439.

(*h*) See *Hicks* v. *Sallitt*, 3 De G. M. & G. pp. 811, 815.

Where there has been *laches* in suing.

5. If the *cestui que trust* or equitable owner be guilty of *laches*, the account will not [generally] be carried further back than to the time of the institution of the suit, for it was the plaintiff's own fault that he did not institute his suit at an earlier period (*a*); and if it be a case of *great laches*, the Court will show its displeasure by not directing an account beyond the date of the decree (*b*).

[But the Court will in its discretion allow the account to be carried back, where the circumstances of the case justify it, and the House of Lords has recently, in a case of great *laches*, carried the account back for six years prior to the institution of the suit (*c*).]

3 & 4 W. 4. c. 27 not material.

6. It would seem that the Real Property Limitation Act, 1833, has no bearing upon the question how far the account should be carried back, for the suit in these cases is not one for recovery of *rent* within the general purview of the Act (*d*); nor is it a suit within the meaning of the 42nd section for the recovery of *arrears of rent*, which must mean arrears of some definite reserved rent, and not *mesne* profits. If there be any Statute of Limitations applicable by analogy it must be the Limitation Act, 1623 (*e*).

How the order for an account is worded.

7. The order to account for *mesne* rents and profits will not, except in a case of gross fraud (*f*), contain the words, "which *without neglect or default*, the defendant might have received," and, on the other hand, a direction to make *just allowances* in taking the account was inserted (*g*).

Who is the person to account.

8. The assignee who has had the perception of the rents and profits will, in the first instance, account for them, not, however, with interest (*h*). But if the assignee be insolvent, the trustee who tortiously assigned will then be answerable for the *mesne* rents and profits personally (*i*). The Court has also allowed distinct bills to be filed, first to recover the estate, and afterwards the *mesne profits* (*j*).

(*a*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 183; *S. C.*, 3 Atk. 130, *per* Lord Hardwicke; *Cook* v. *Arnham*, 2 Eq. Ca. Ab. 235; *Pettiward* v. *Prescott*, 7 Ves. 541; *Bowes* v. *East London Waterworks Company*, 3 Mad. 375; *Pickett* v. *Loggon*, 14 Ves. 215; *Schroder* v. *Schroder*, Kay, 591; [*Smith* v. *Smith*, 1 L. R. Ir. 206;] see *Kidney* v. *Coussmaker*, 12 Ves. 158.

(*b*) *Acherley* v. *Roe*, 5 Ves. 565.

[(*c*) *Thomson* v. *Eastwood*, 2 App. Cas. 215.]

(*d*) *Grant* v. *Ellis*, 9 M. & W. 113.

(*e*) 21 Jac. 1. c. 16; see observations of L. J. Turner, *Hicks* v. *Sallitt*, 3 De G. M. & G. 816.

(*f*) *Stackpole* v. *Davoren*, 1 B. P. C. 9.

(*g*) *Howell* v. *Howell*, 2 M. & Cr. 478. [But the direction is no longer necessary, see Order XXXIII., Rule 8, and Seton, 6th ed. p. 1362.]

(*h*) *Macartney* v. *Blackwood*, 1 Ridg. Lapp. & Sch. 602; [and see *Silkstone and Haigh Moor Coal Co.* v. *Edey*, (1900) 1 Ch. 167].

(*i*) *Vandebene* v. *Levingston*, 3 Sw. 625.

(*j*) *Hall* v. *Coventry*, 2 Ch. Ca. 134; *Wright* v. *Chard*, 4 Drew. 673.

B.—1. "If a man," continued Lord Fitzgibbon, "have a mere *legal* title to the possession, he has no right to come into *equity* for the recovery of it; and if he has originally recovered the possession at *law*, he has no manner of right to proceed by *bill* for an account of rents and profits: as his title to the possession was at law, he must proceed for the whole there" (*a*).

If a person have a legal title he cannot sue in equity either for the estate or the *mesne* rents and profits.

2. Upon this rule it must be remarked, that a *dowress* (*b*) and *infant* (*c*) were allowed to proceed in equity upon their legal title, and incidentally to the relief pray an account of the *mesne* rents and profits. But by the Real Property Limitation Act, 1833, sect. 41, the arrears of dower are recoverable for six years only next preceding the commencement of the suit (*d*). And the account of an infant will be barred, if he do not institute a suit within six years after he has attained his majority (*e*).

Secus, a dowress, or an infant.

C.—1. "If a party," Lord Fitzgibbon proceeded, "be obliged to come into a Court of *Equity* for aid to enable him to prosecute his title at *law*" (as where he could not recover in a legal action by reason of an outstanding term, or because the title-deeds to the estate were in the hands of the defendant), "after possession recovered at *law*, there may be cases in which he may come back for an account of rents and profits in the suit depending in *equity*" (*f*). Or the plaintiff, being obliged to resort to equity on one ground, might, to prevent circuity, have asked complete relief in the first instance in that Court; and if his title were established, an account of the rents and profits would have been consequential upon the relief (*g*).

If a person applied to equity to aid his action at law he might have come back for an account.

Or being obliged to come to equity on one ground, he might have obtained his whole relief there.

2. In these cases the account ought upon principle to be

But the account in equity would be restricted to the legal limit, or to the institution of the suit.

(*a*) *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 66. See also *Dormer* v. *Fortescue*, 3 Atk. 130; *Tilly* v. *Bridges*, Pr. Ch. 252; *Owen* v. *Aprice*, 1 Ch. Rep. 32; *Anon. case*, 1 Vern. 105, contradicted 3 Atk. 129.

(*b*) *Mundy* v. *Mundy*, 2 Ves. jun. 122; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 387; *Wild* v. *Wells*, 1 Dick. 3; *Meggot* v. *Meggot*, 2 Id. 794; *Goodenough* v. *Goodenough*, 2 Id. 795; *Curtis* v. *Curtis*, 2 B. C. C. 620; *Moor* v. *Black*, Cas. *t.* Talbot, 126; and see *Dormer* v. *Fortescue*, 3 Atk. 130; *Pulteney* v. *Warren*, 6 Ves. 89; *Agar* v. *Fairfax*, 17 Ves. 552.

(*c*) See *Dormer* v. *Fortescue*, 3 Atk. 130, 134; *S. C.*, Ridg. Rep. *t.* Hardwicke, 183, 191; *Pulteney* v. *Warren*, 6 Ves. 89; *Newburgh* v. *Bickerstaffe*, 1 Vern. 295.

[(*d*) But the right of a dowress to one-third of the rents and profits, and her right to assignment of dower are separate and independent; if she enjoys the former right, she will not be prejudiced thereby in respect to the latter, but after twelve years the Court might refuse relief on the ground of laches: *Williams* v. *Thomas*, (1909) 1 Ch. (C.A.) 713.]

(*e*) *Lockey* v. *Lockey*, Pr. Ch. 518; and see *Knox* v. *Gye*, 5 L. R. H. L. 674.

(*f*) See *Dormer* v. *Fortescue*, 3 Atk. 124; *S. C.*, Ridg. Rep. *t.* Hardwicke, 176; *Reade* v. *Reade*, 5 Ves. 744.

(*g*) *Townsend* v. *Ash*, 3 Atk. 336; *Edwards* v. *Morgan*, M'Clel. 541; *Reynolds* v. *Jones*, 2 Sim. & St. 206.

restricted to the same period as that for which the *mesne profits* were recoverable at law; for the plaintiff recovers from a *legal* title, and the circumstance of his being obliged to sue in equity ought not to vary his rights; and there is authority to support this view (*a*); but in a later case (*b*), Vice-Chancellor Wood stated the rule to be, that in an adverse suit *in the nature of an ejectment suit* the account is directed only from the filing of the bill; and there may be some difficulty in establishing a distinction between cases where the plaintiff sues upon a mere equitable title and cases where his title is rendered partially equitable, so to speak, by the existence of outstanding terms or estates.

Unless the defendant be guilty of fraud.

3. If the plaintiff has been kept out of the estate by the *fraud, misrepresentation,* or *concealment* of the defendant, the Court will suppose that, had the plaintiff known his just rights, he would have commenced his action at law on the first accruer of his title, and will then decree an account of the *mesne* rents and profits against the defendant from that period (*c*).

SECTION II

THE RIGHT OF ATTACHING THE PROPERTY INTO WHICH THE TRUST ESTATE HAS WRONGFULLY BEEN CONVERTED

General rule.

1. If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphosis can be traced.

Tortious conversion.

In *Taylor* v. *Plumer* (*d*) it was argued that although, where the conversion was *in pursuance of the trust,* the newly acquired property would be bound by the original equity (*e*); yet where the conversion was *tortious*, there, as the property purchased was not in a form consistent with the trust, and the *cestui que trust* would be under no obligation to accept it in lieu of the rightful property, the *cestui que trust* should come in as a general creditor, and not be permitted to assert a specific lien. But the

(*a*) *Reynolds* v. *Jones*, 2 Sim. & St. 206.

(*b*) *Thomas* v. *Thomas*, 3 K. & J. 85.

(*c*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 184, 185; *S. C.*, 3 Atk. 130.

(*d*) 3 M. & S. 562.

(*e*) *Burdett* v. *Willett*, 2 Vern. 638; *Ryall* v. *Rolle*, 1 Atk. 172; *Ex parte Chion*, 3 P. W. 187, note (A); *Waite* v. *Whorwood*, 2 Atk. 159; *Ex parte Sayers*, 5 Ves. 169; *Anon. case*, Sel. Ch. Ca. 57.

distinction was disallowed (*a*); for "An abuse of trust," said Lord Ellenborough, "can confer no rights on the party abusing it, nor on those who claim in privity with him" (*b*).

"Money has no earmark."

2. It was said by Lord King that "*money* has no earmark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realise all his testator's estate, and afterwards die insolvent, yet a Court of Equity could not charge or follow the land" (*c*); and *bank notes* and *negotiable bills* have been represented as possessing the same quality. But the notion seems to have originated from some misconception, and cannot be supported. Lord Mansfield observed: "It has been quaintly said that the reason why money cannot be followed is because it *has no earmark*, but this is not true. The true reason is upon account of the currency of it—it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration: but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note—an action may lie against the finder, it is true, but not after it has been paid away in currency" (*d*). And Lord Ellenborough observed: "The dictum that *money has no earmark* must be understood as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule which applies to every other description of personal property, whilst it remains in the hands of the factor or his general legal representatives" (*e*). The only distinction, then, between *money*, *notes*, or *bills*, and *other chattels*, appears to be this—that the former, for the protection of commerce,

Bank notes and negotiable bills.

(*a*) The same point has been viewed as not maintainable in several *previous* cases, as in *Whitecomb* v. *Jacob*, 1 Salk. 160; *Lane* v. *Dighton*, Amb. 409; *Ryall* v. *Ryall*, Ib. 413; *Balgney* v. *Hamilton*, Ib. 414. *N.B.*—*Wilson* v. *Foreman*, 2 Dick. 593, is misreported; see *Lench* v. *Lench*, 10 Ves. 519. The subsequent cases are *Lord Chedworth* v. *Edwards*, 8 Ves. 46; *Greatley* v. *Noble*, 3 Mad. 79; *Buckeridge* v. *Glasse*, Cr. & Ph. 126; *Murray* v. *Pinkett*, 12 Cl. & Fin. 784; *Sheridan* v. *Joyce*, 1 Jon. & Lat. 401; *Trench* v. *Harrison*, 17 Sim. 111; *Harford* v. *Lloyd*, 20 Beav. 310; *Frith* v. *Cartland*, 2 H. & M. 417.

(*b*) *Taylor* v. *Plumer*, 3 M. & S. 574.

(*c*) *Deg* v. *Deg*, 2 P. W. 414; and so his Lordship seems to have decided in *Cox* v. *Bateman*, 2 Ves. 19; and see *Waite* v. *Whorwood*, 2 Atk. 159; *Whitecomb* v. *Jacob*, 1 Salk. 160.

(*d*) *Miller* v. *Race*, 1 Burr. 457, 459.

(*e*) *Taylor* v. *Plumer*, 3 M. & S. 575.

cannot be pursued into the hands of a *bonâ fide* holder, to whom they have passed in circulation (*a*), whilst other chattels can be recovered even from a purchaser for a valuable consideration, provided he did not buy them in market overt. Money (*b*), notes (*c*), and bills (*d*), may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they passed had express notice of the trust (*e*). And the only difference to be taken between *money* on the one hand, and *notes* and *bills* on the other, is that money is not earmarked, and therefore cannot be traced except under particular circumstances, but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty (*f*).

Trust money mixed with the trustee's money.

3. We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said, that the trust money has, like water, run into the general mass, and become amalgamated, and therefore the *cestui que trust* has no *lien*. But clearly this cannot be maintained, for suppose a trustee, partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a *lien* upon the whole for the amount that was misemployed (*g*). And it follows in the other case, that though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust *in* the general heap, the *cestui que trust* is entitled to take so much *out* (*h*).

Assets employed in trade.

4. Upon a similar principle, if a *surviving partner*, being the executor of a deceased partner, continue the testator's capital

[(*a*) *Collins* v. *Stimson*, 11 Q. B. D. 142.]

(*b*) See *Taylor* v. *Plumer*, 3 M. & S. 575; *Miller* v. *Race*, 1 Burr. 457; *Howard* v. *Jemmet*, 3 Burr. 1369; *King* v. *Eggington*, 1 T. R. 370; *Ryall* v. *Rolle*, 1 Atk. 172; [and see *Patten* v. *Bond*, 60 L. T. N.S. 583, 585; 37 W. R. 373].

(*c*) *Anon. case*, 1 Salk. 126; *S. C.*, 1 Raym. 738; *Miller* v. *Race*, 1 Burr. 457; *Taylor* v. *Plumer*, 3 M. & S. 562.

(*d*) *Bennet* v. *Mayhew*, cited *Pulteney* v. *Darlington*, 1 B. C. C. 232, and *Cator* v. *Earl of Pembroke*, 2 B. C. C. 287; *Frith* v. *Cartland*, 2 H. & M. 417; and see *Ex parte Sayers*, 5 Ves. 169; *Lord Chedworth* v. *Edwards*, 8 Ves. 46; *Ryall* v. *Rolle* 1 Atk. 172; *Raphael* v. *Bank of England*, 17 C. B. 161.

(*e*) *Verney* v. *Carding*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 345.

(*f*) See *Ford* v. *Hopkins*, 1 Salk. 283.

(*g*) *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 17 Ves. 57, 58; *Price* v. *Blakemore*, 6 Beav. 507; *Hopper* v. *Conyers*, 2 L. R. Eq. 549; [and see *Re Pumfrey*, 22 Ch. D. 255; *Re Sloane*, (1895) 1 I. R. 146].

(*h*) See *Pennell* v. *Deffell*, 4 De G. M. & G. 382; *Ex parte Sayers*, 5 Ves. 169; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175; *Frith* v. *Cartland*, 2 H. & M. 417; [*Re Hallett's Estate*, 13 Ch. D. (C.A.) 696].

without authority in his trade, though the capital may consist only of the stock and debts of the partnership, and these may undergo a continual course of change and fluctuation, yet the Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed (*a*).

Money followed through a bank.

5. And so if a trustee pay trust money into a bank to the account of himself, not in any way ear-marked with the trust, and also keep private money of his own to the same account, the Court will disentangle the account, and separate the trust from the private money, and award the former specifically to the *cestui que trust* (*b*). [And the same rule will apply equally in the case of a person occupying a fiduciary position, although not an express trustee, as a factor, or agent (*c*); and has even been applied to the case of a person borrowing money for a specific purpose (*e.g.* for the purchase by him of property to be afterwards mortgaged to the lender), and not applying it for the purpose for which it was advanced (*d*). It was formerly held that] as against the *cestui que trust* the general rule must prevail that the sums drawn out must be attributed to the earliest deposits, according to the order in which they were paid in (*e*); [but where the question is only between the *cestui que trust* and the trustee, the rule has been modified, and so long as the trustee has money of his own standing to the account, drawings by him for his private purposes will be attributed to his private money, leaving the trust money intact (*f*). This follows from the general

(*a*) See *ante*, p. 308.

(*b*) *Pennell* v. *Deffell*, 4 De G. M. & G. 372. The observations of L. J. Knight Bruce, p. 381, are well worth a careful perusal. [*Re Hallett's Estate*, 13 Ch. D. (C.A.) 696; *Birt* v. *Burt*, 11 Ch. D. 773, note; and see *M'Mahon* v. *Featherstonhaugh*, (1895) 1 I. R. 83, where the customer of a deceased stockbroker was held entitled to the benefit of the lien of his bankers on securities lodged by them in court.]

[(*c*) *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696, where the earlier cases are discussed; *Birt* v. *Burt*, 11 Ch. D. 773, note; *Bank of Ireland* v. *Cogry Spinning Co.*, (1900) 1 I. R. 219; but there is no fiduciary relation between banker and customer; *Foley* v. *Hill*, 2 H. L. C. 28; *Marten* v. *Roche*, 53 L. T. N.S. 946; 34 W. R. 253; in the absence of special circumstances; *Ex parte Plitt*, 60 L. T. N.S. 397; 37 W. R. 463.]

[(*d*) *Gibert* v. *Gonard*, 52 L. T. N.S. 54; 33 W. R. 302; 54 L. J. N.S. Ch. 439; and see *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. (C.A.) 264.]

(*e*) *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Frith* v. *Cartland*, 2 H. & M. 417; [*Brown* v. *Adams*, 4 L. R. Ch. App. 764].

[(*f*) *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696; overruling *Pennell* v. *Deffell*, *ubi sup.*, and the other earlier cases; and see *Cory* v. *The Mecca*, (1897) A. C. 286, 295; *Re Hallett & Co.*, (1894) 2 Q. B. (C.A.) 237; *Re Oatway*, (1903) 2 Ch. 356, treating *Brown* v. *Adams*, *ubi sup.*, as being overruled by *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696.]

principle that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally, and in fact, done wrongly; so far as possible the honest intention of drawing out his own money must be attributed to the trustee. Where, however, the trustee has exhausted his own money, and the account at the bank is composed of moneys belonging to different trusts, the general rule will prevail, and the sums drawn out will, in the absence of evidence to the contrary, be attributed to the earliest deposits (*a*).] If trust money be paid into a bank to an account headed in such a way that the banker cannot fail to know, and must be taken to know that it was a trust account, though the bankers are not bound to inquire into the propriety of the trustee's cheques upon that account, yet if the trustee becomes bankrupt and has overdrawn his *private* account, the bank cannot apply the credit of the *trust account* by way of set-off against the debit of the private account (*b*). [But where bankers, without any intention of benefiting themselves, or any reason to suspect that their customer is insolvent or intends to commit a breach of trust, place money which they know to be trust money to his private account which is overdrawn, no trust account having been opened by him with them, they will not thereby become liable to make good to the *cestuis que trust* any loss subsequent on the customer's subsequent insolvency (*c*).

Where a banking company were employed as agents to collect money and to remit it to their employers, and they received the money in cash and placed it with the other cash of the bank, and informed their employers that the money had been remitted, but before it was actually remitted the bank failed, it was held that the money was part of the general assets of the bank, and that the employers of the bank had no priority over the other creditors (*d*); but this case has been disapproved of by the Court of Appeal, and cannot be regarded as law (*e*).

[(*a*) *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696; *Hancock* v. *Smith*, 41 Ch. D. (C.A.) 456; *Re Ulster Building Society*, 25 L. R. Ir. 24, 29; *Re Murray*, 57 L. T. N.S. 223; *Re Stenning*, (1895) 2 Ch. 433; and see *Mutton* v. *Peat*, (1899) 2 Ch. 556, 560, *per* Byrne, J.; *S. C.*, (1900) 2 Ch. (C.A.) 79.]

(*b*) *Ex parte Kingston*, 6 L. R. Ch. App. 632; [and see *Union Bank of Australasia* v. *Murray Aynsley*, (1898) A. C. 693].

[(*c*) *Coleman* v. *Bucks and Oxon Bank*, (1897) 2 Ch. 243; and see *Shields* v. *Bank of Ireland*, (1901) 1 I. R. 222.]

[(*d*) *Ex parte Dale and Company*, 11 Ch. D. 772; and see *Whitecomb* v. *Jacob*, 1 Salk. 160: *Ryall* v. *Rolle*, 1 Atk. 165, 172; *Ex parte Dumas*, 1 Atk. 232; *Scott* v. *Surman*, Willes, 400; *Ex parte Plitt*, 37 W. R. 463; 60 L. T. N.S. 397.]

[(*e*) *Re Hallett's Estate*, 13 Ch. D. (C.A.) 696.]

[Necessity for identification.]

In order, however, that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that into which the money has been converted, and where a transaction has been carried out by a set-off in account so that no cheque, note, coin, or credit has ever passed or existed *in specie*, the doctrine is inapplicable (*a*).

[Trust money employed in business of partnership.]

6. By the Partnership Act, 1890 (*b*), sect. 13, if a partner, being a trustee, improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein, but nothing in the section is to prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

[Different trust funds intermixed.]

7. In a Scotch case, where the funds of two charities had been intermixed and dealt with as a common fund, and part of the trust funds, which, however, could be traced as having originally belonged to one of the charities, had been invested in land which subsequently increased very largely in value, it was held that the profit must be taken to have been made by the whole trust, and must be apportioned between the charities in the proportions in which they were originally entitled to the common fund (*c*).]

Following money into land with reference to the Statute of Frauds.

8. In tracing money into *land*, the principal difficulty in the old cases arose from the Statute of Frauds (*d*), the 7th section enacting that all declarations of trusts of land should be manifested and proved by some writing. It was formerly held that parol evidence, to prove a state of circumstances from which a Court of Equity would elicit a constructive trust, was inadmissible (*e*); but Lord Hardwicke, on the ground that constructive trusts were excepted out of the Statute of Frauds (*f*), ruled that parol evidence might be given (*g*); and Sir T. Clarke, in the leading case of *Lane* v. *Dighton* (*h*) (though had the point been *res integra*, he should have thought the evidence not admissible within the statute), followed the authority of Lord Hardwicke; and whatever doubts might formerly have been entertained upon the subject, the law is now settled (*i*).

[(*a*) *Re Hallett & Co.*, (1894) 2 Q. B. (C.A.) 237; and see *Ex parte Hardcastle*, 44 L. T. N.S. 523; 29 W. R. 615.]

[(*b*) 53 & 54 Vict. c. 39.]

[(*c*) *The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823.]

(*d*) 29 Car. 2. c. 3.

(*e*) See *ante*, p. 188.

(*f*) By the 8th section; see p. 217, *ante*.

(*g*) *Ryall* v. *Ryall*, Amb. 413; and see *Anon. case*, Sel. Ch. Ca. 57.

(*h*) Amb. 409.

(*i*) *Lench* v. *Lench*, 10 Ves. 517; *Hopper* v. *Conyers*, 2 L. R. Eq. 549.

Trustee bound to invest a certain sum, and purchasing at that price.

9. The mere fact that a trustee has trust money in his hands when he makes a purchase, is not sufficient to attach the trust on lands bought by him (*a*). But if a trustee who is under an obligation to lay out money on land, purchase an estate at a price corresponding with the sum to be invested, the Court, independently of positive evidence, may presume the trust money to have been so applied (*b*). But no such presumption can be raised where it can be shown that the trustee, though under such an obligation, was mistaken in the nature of the trust, and acted under a different impression (*c*). And where a tenant for life, with power to sell and invest in the purchase of other land, purchased lands with *borrowed money*, and many years afterwards sold the settled estates, and applied the purchase-money partly in discharge of the debts thus contracted by him, it was held that the purchased lands could not be treated as liable to the trusts of the settled estates (*d*).

Covenant to settle his whole personal estate and a subsequent purchase is made.

10. In *Lewis* v. *Madocks* (*e*), no evidence to connect any particular fund with the estate was necessary, for a person having covenanted on his marriage to settle *all* the personalty he should acquire upon certain trusts, and having afterwards invested parts of his personalty on land, it was clear that the money expended upon the estate was bound by the trust, and could therefore be followed into the purchase.

Whether *cestui que trust* can take the land itself, or has only a lien.

11. Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest (*f*); but where the entire land is clearly the fruit of the trust fund, the *cestui que trust* must upon principle have a right to take the land itself, whether the purchase was or was not of the description authorised by the trust (*g*).

[Trustee may follow trust money though he has concurred in breach.]

[12. A trustee, who has himself concurred in a breach of trust, whereby the trust estate has been improperly expended upon

(*a*) *Sealy* v. *Stawell*, 2 Ir. R. Eq. 326.

(*b*) See *Anon. case*, Sel. Ch. Ca. 57; *Price* v. *Blackmore*, 6 Beav. 507; *Mathias* v. *Mathias*, 3 Sm. & G. 552.

(*c*) *Perry* v. *Phelips*, 4 Ves. 108, see 116, 117.

(*d*) *Denton* v. *Davies*, 18 Ves. 499.

(*e*) 8 Ves. 150; *S. C.*, 17 Ves. 48; [and see *Re Bendy*, (1895) 1 Ch. 109; *Finlay* v. *Darling*, (1897 1 Ch. 719; *Lord Churston* v. *Buller*, 77 L. T. N.S. 45].

(*f*) *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48, see 57; *Price* v. *Blakemore*, 6 Beav. 507; *Scales* v. *Baker*, 28 Beav. 91; *Hopper* v. *Conyers*, 2 L. R. Eq. 549.

(*g*) *Trench* v. *Harrison*, 17 Sim. 111. Lord Manners, in *Savage* v. *Carroll*, 1 B. & B. 265, see 284, seems to have thought otherwise; but this was before *Taylor* v. *Plumer*, p. 1150, *ante*.

buildings upon his co-trustee's property, may, notwithstanding such concurrence, take proceedings against his co-trustee to follow the trust property (*a*).]

13. Where trust money is followed into the hands of a person who, as having received it by collusion, or with express notice of the trust, becomes himself a trustee, he is precluded from pleading the Statute of Limitations (*b*). Statute of Limitations.

[14. It is not a fraudulent preference on the part of a trustee who has misappropriated trust money to make it good on the eve of bankruptcy (*c*). [Repayment of trust money not a fraudulent preference.]

15. Money obtained by fraud cannot be followed into the hands of persons who take it in satisfaction of a *bonâ fide* debt without notice (*d*). But where the payment is made without any legal consideration, as for the purpose of stifling a prosecution, the money may be followed by a person who is not *in pari delicto* by being a party to the illegal act (*e*). [Fraud or illegality.]

16. Where an agent corruptly receives commission, he is accountable as a constructive trustee (*f*), but until some judgment has been obtained against him by the principal, the money cannot be treated as the money of the principal so as to entitle him to follow it into investments made by the agent, and obtain an injunction against his dealing therewith (*g*).] [Corrupt receipt of commission.]

SECTION III

OF THE REMEDY FOR A BREACH OF TRUST AGAINST THE TRUSTEE PERSONALLY

1. We may remark *in limine* that, under the Larceny Act, 1861 (*h*), a breach of trust may be a *criminal* act, and that if a trustee Punishment of fraudulent trustees.

[(*a*) *Carson* v. *Sloane*, 13 L. R. Ir. 139; *Price* v. *Blakemore*, 6 Beav. 507.]

(*b*) *Ernest* v. *Croysdill*, 2 De G. F. & J. 175; 6 Jur. N.S. 740; *Rolfe* v. *Gregory*, 11 Jur. N.S. 97; *S. C.*, 4 De G. J. & S. 576; see *post*, p. 1161.

[(*c*) *Ex parte Stubbins*, 17 Ch. D. (C.A.) 58; *Ex parte Taylor*, 18 Q. B. D. (C.A.) 295; *Ex parte Ball*, W. N. 1886, p. 211; 1887, p. 21; 35 W. R. 264; *New, Prance & Garrard's Trustee* v. *Hunting*, (1897) 1 Q. B. 607; Ib. 2 Q. B. (C.A.) 19; (1899) A. C. (H.L.) 419 (*sub. nom. Sharp* v. *Jackson*); *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. (C.A.) 231; and see *ante*, p. 608.]

[(*d*) *Northern Counties, &c., Insurance Company* v. *Whipp*, 26 Ch. D. (C.A.) 482, 495.]

[(*e*) *Ex parte Wolverhampton Banking Company*, 14 Q. B. D. 32.]

[(*f*) *Ante*, p. 208.]

[(*g*) *Lister & Co.* v. *Stubbs*, 45 Ch. D. (C.A.) 1; and see *Re Thorpe*, (1891) 2 Ch. 360; *Grant* v. *Gold Exploration and Development Syndicate*, (1900) 1 Q. B. (C.A.) 233.]

(*h*) 24 & 25 Vict. c. 96, ss. 80, 86, re-enacting substantially 20 & 21 Vict. c. 54, which had been repealed by 24 & 25 Vict. c. 94. [On a charge against a trustee under this enactment, of misappropriation of trust-money, a

of any property for the benefit of another person, or for any public or charitable purpose, *with intent to defraud*, appropriates the same to his own use or for any other purpose than the legitimate one, he is now to be deemed guilty of a *misdemeanour*, and be liable to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without solitary confinement (*a*). But no prosecution is to be commenced without the sanction of the Attorney-General, or, in the vacancy of that office, of the Solicitor-General; nor, where civil proceedings have been taken, without the sanction of the Court of civil judicature before which the same are pending (*b*). And *no remedy* at law or in equity is to be *affected*, nor is the Act to *prejudice any agreement entered into, or security given by any trustee*, having for its object the restoration or repayment of any trust property misappropriated.

Effect of Act upon civil proceedings.

2. The last mentioned enactment of the statute leaves the remedy of the *cestui que trust* in reference to civil proceedings exactly as it stood before the Act. It relieves him from such obligation, if any, as the statute might have been held to impose, of prosecuting the fraudulent trustee before proceeding to recover his property (*c*); and, notwithstanding the general policy of the law (*d*), may perhaps be held to go as far as to authorise an agreement for the restoration of the trust property, even though the withdrawal of an indictment against the trustee be one of the terms of the arrangement.

Where a solicitor is party to a breach of trust.

3. A solicitor, who *wilfully advises a breach of trust*, is liable to be struck off the roll (*e*). And *a fortiori* a solicitor who,

statement of affairs prepared by him in the course of his bankruptcy, under s. 16 of the Bankruptcy Act, 1883, is admissible in evidence; *Rex* v. *Pike*, (1902) 1 K. B. (C. C. R.) 552.]

[(*a*) Sect. 1 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), provides that where under any enactment in force when the section comes into operation (5th August, 1891) the Court has power to award a sentence of penal servitude, the sentence may, at the discretion of the Court, be for any period not less than three years, and not exceeding five years, or any greater period authorised by the enactment; and further, that, in lieu of a sentence of penal servitude, the Court may award imprisonment for any term not exceeding two years, with or without hard labour.]

(*b*) See *Wadham* v. *Rigg*, 1 Dr. & Sm. 216.

(*c*) As to the necessity for prosecuting before taking civil proceedings in cases of *felony*, see *Cox* v. *Paxton*, 17 Ves. 329; *White* v. *Spettigue*, 13 M. & W. 603; *Scattergood* v. *Sylvester*, 15 Q. B. 506; [*Midland Insurance Company* v. *Smith*, 6 Q. B. D. 561; *Roope* v. *D'Avigdor*, 10 Q. B. D. 412].

(*d*) See *Keir* v. *Leeman*, 9 Q. B. 371; [*Williams* v. *Bayley*, 1 L. R. H. L. 200; *Flower* v. *Sadler*, 10 Q. B. D. (C.A.) 572; *Windhill Local Board* v. *Vint*, 45 Ch. D. (C.A.) 351; *Jones* v. *Merionethshire Building Society*, (1891) 2 Ch. 587; (1892) 1 Ch. (C.A.) 173].

(*e*) *Goodwin* v. *Gosnell*, 2 Coll. 457, see p. 462.

being a trustee, himself commits a *wilful breach of trust*, is amenable to the same penalty (*a*). But a solicitor (in common with any other agent) is not liable as a constructive trustee for the consequences of acts done by him, *pursuant to instructions* from his clients, who are trustees, and exercising their legal powers, unless he either receive some part of the trust property, or assist with knowledge in some dishonest and fraudulent design on the part of his clients (*b*). Thus a testator devised and bequeathed his residuary estate to Crush, Lugar, and Addy, his three trustees and executors, upon trust for his four children, viz. Ann (who married Barnes), Susan (who married the trustee, Addy), and William and Mary. The shares of Ann and Susan were to be held upon trust for their separate use respectively, without power of anticipation, with remainder to their children; and the will contained a power of appointment of new trustees vested in the executors, but there was no authority to diminish their number. Crush renounced and disclaimed, and Clarke was appointed in his place; but Lugar and Clarke both died, and Addy became sole trustee of the trust fund. The shares of Susan and William had been satisfied, and Mary's share was not in question; but as to the share of *Ann*, the wife of Barnes, there being disputes between Addy the trustee, and Barnes, Addy instructed his solicitor, Duffield, to appoint Barnes sole trustee in place of Addy, so far as regarded the share of Ann Barnes. Duffield represented the danger of placing the fund under the power of a single trustee, and advised Addy not to do it; but, as he persisted, he advised him at all events to take a deed of indemnity. Duffield afterwards declined to proceed unless a separate solicitor acted for Mrs Barnes and her children, and Preston was thereupon appointed such solicitor, and he wrote to Ann Barnes a letter explanatory of the risk, but, nevertheless, Ann Barnes wished it to be done. The deed of appointment of Barnes as sole trustee, and the deed of indemnity which had been proposed by Duffield, were then approved by Preston, and executed; and Addy transferred the share of Ann Barnes (amounting, after certain deductions, to 2074*l.* consols) into the name of Barnes, who the next day sold it out, and applied the proceeds in his business, and became bankrupt. The fund having

(*a*) *Re Chandler*, 22 Beav. 253; *Re Hall*, 2 Jur. N.S. 633.

(*b*) *Barnes* v. *Addy*, 9 L. R. Ch. App. 251, *per* Lord Selborne; [and see *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199, reversing North, J., (1895) 2 Ch. 69; *Stokes* v. *Prance*, (1898) 1 Ch. 212, 224; *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 404, 405].

been lost, the children of Ann Barnes filed their bill against the administratrix of Addy (then deceased), and against Duffield and Preston, to compel them to restore the trust fund. Addy's estate was declared liable, but the bill was dismissed as against Duffield and Preston. The plaintiffs appealed from this dismissal, and rested their case on the solicitors being parties to a threefold breach of trust, viz. first, the appointment of a single trustee; secondly, the transfer of the fund into the name of a sole trustee; and, thirdly, the division of the fund, so that there should be a separate trustee of each part. There was no evidence that either Duffield or Preston suspected, or had reason to suspect, the good faith of Barnes, and Lord Selborne and Lord Justice James concurred in the principle above laid down, and dismissed the appeal with costs (*a*). [In a recent case it has been held that in order that a solicitor of a trustee may be debarred from accepting payments from the trustee out of the trust estate in respect of costs properly incurred, notice must be brought home to him that, at the time when he accepted the payments, the trustee had been guilty of such a breach of trust as would altogether preclude him from resorting to the estate for payment of costs (*b*); and solicitors who, without seeking to benefit themselves, have advised trustees to make an investment on a contributory mortgage in breach of trust, will not be postponed or prejudiced in respect of an advance of money on the same security *bonâ fide* made by themselves (*c*).]

Civil proceedings.

4. As regards *civil* proceedings for compensation against the trustee, the *cestui que trust*, in the event of a breach of trust, is entitled to institute proceedings against the trustee to compel a compensation from him personally for the loss which the trust estate has sustained; and if the plaintiff has a vested interest, and has reason to apprehend that the trustee is going abroad, he may obtain a writ of *ne exeat regno* (*d*). [But the breach of trust must be brought home to the trustee, and if there is a doubt whether the trustee has acted honestly and *bonâ fide* in

(*a*) *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; [and see *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 395, 396, 404, 405].

[(*b*) *Re Blundell*, 40 Ch. D. (C.A.) 370.]

[(*c*) *Stokes* v. *Prance*, (1898) 1 Ch. 212.]

(*d*) *Hawkins* v. *Hawkins*, 1 Dr. & Sm. 75. As to the assignment of a right to sue for redress in respect of a breach of trust, see *Hill* v. *Boyle*, 4 L. R. Eq. 260. If a trustee has made default in payment of a trust fund which was in his hands, and was misapplied, he can be attached, though he may have spent the money before the date of the order for payment, and is unable to pay, and such trustee is within the third exception of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4; *Middleton* v. *Chichester*, 6 L. R. Ch. App. 152; and see *post*, p. 1191.

the discharge of his duty, although he may have made mistakes, the doubt should be determined in favour of the trustee (*a*).]

Statute of Limitations.

5. This right to sue was not (previously to the 1st of January, 1890 (*b*)) affected by the Statute of Limitations (*c*). And even a trustee, who was also a *cestui que trust* in remainder, and by whose neglect the tenant for life got possession of the fund, has been allowed, notwithstanding the statute, to recover it from the estate of the tenant for life who wrongfully possessed himself of it (*d*); and a solicitor, who as agent collects debts for his employer under a power of attorney to collect debts and hold the proceeds upon certain trusts, is regarded as a trustee, and cannot [otherwise than under the provisions of the Trustee Act, 1888, sect. 8], plead the statute (*e*). [So directors of a company who have improperly paid dividends out of capital, are not permitted to plead the

[(*a*) *Per* Jessel, M.R., *Re Owens*, 47 L. T. N.S. 61.]

[(*b*) See the Trustee Act, 1888, s. 8, *ante*, p. 1136.]

(*c*) *Phillipo* v. *Munnings*, 2 M. & C. 309; *Browne* v. *Radford*, W. N. 1874, p. 124; *Milnes* v. *Cowley*, 4 Price, 103; *Cator* v. *Croydon Railway Company*, 4 Y. & C. 405; *Downes* v. *Bullock*, 25 Beav. 61; *Clark* v. *Hoskins*, 36 L. J. N.S. Ch. 689; *Butler* v. *Carter*, 5 L. R. Eq. 276; *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 545; *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204; *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514; *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233; *Stone* v. *Stone*, 5 L. R. Ch. App. 74; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246, reversed on other grounds, 1 Ch. D. (C.A.) 385; *Watson* v. *Saul*, 1 Giff. 188; *Harris* v. *Harris* (No. 2), 29 Beav. 110; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175; *Rolfe* v. *Gregory*, 11 Jur. N.S. 98; *S. C.*, 4 De G. J. & S. 576; and see *Bright* v. *Legerton*, 2 De G. F. & J. 606; *Tyson* v. *Jackson*, 30 Beav. 384; *Cresswell* v. *Dewell*, 4 Giff. 460; *Burrowes* v. *O'Brien*, 15 Ir. Ch. Rep. 424; *Burrows* v. *Gore*, 6 H. L. C. 907; [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. (C.A.) 319.] As to the cases of *Dunne* v. *Doran*, 13 Ir. Eq. R. 545, and *Brereton* v. *Hutchinson*, 3 Ir. Ch. Rep. 361, see *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 551. But see *Carroll* v. *Hargrave*, 5 I. R. Eq. 123. As to suits between solicitor and client, see *Re Hindmarsh*, 1 Dr. & Sm. 129.

(*d*) *Butler* v. *Carter*, 5 L. R. Eq. 276.

(*e*) *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233. Solicitors receiving money in the character of agents can in general plead the statute; *Re Hindmarsh*, 1 Dr. & Sm. 129; *Watson* v. *Woodman*, 20 L. R. Eq. 721; [*Dooby* v. *Watson*, 39 Ch. D. 178; *Soar* v. *Ashwell*, (1893) 2 Q. B. 390, 405;] but not so, where they receive moneys bound expressly by a particular trust of which they are conusant: see *Burdick* v. *Garrick*, 5 L. R. Ch. App. 240; [*Re Bell*, 34 Ch. D. 462; *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 396, 397, 405; and where moneys were remitted to an agent abroad, for investment in a specified manner, the agent was held to be an express trustee; *North American Land and Timber Co.* v. *Watkins*, (1904) 1 Ch. 242; 2 Ch. (C.A.) 233; but the fiduciary relation existing between partners, or a surviving partner and the executors of a deceased partner, will not necessarily prevent the statute from being set up as a defence; *Friend* v. *Young*, (1897) 2 Ch. 421; *Knox* v. *Gye*, L. R. 5 H. L. 656; *North American Land and Timber Co.* v. *Watkins*, (1904) 1 Ch. 249; 2 Ch. (C.A.) 233; and see *Power* v. *Power*, 13 L. R. Ir. 281, where it was said that "where there is not merely an agency between the parties, but also a superadded fiduciary relation, the remedy of the principal, who is then also the *cestui que trust*, is not one arising merely from contract, or duty springing from such contract, where a common law liability would alone exist, but is one to be dealt with on the equitable relation of trustee and *cestui que trust*"].

statute (*a*).] And in like manner the personal representative or heir or devisee of a deceased trustee who has committed a breach of trust, or a legatee or next of kin in possession of the assets, with notice of the breach of trust (*b*), [or the executors of a husband who has retained and made himself trustee of separate property of his wife (*c*),] must be answerable in the same way as the testator or intestate would have been (*d*). But though the statute could not be pleaded in bar, yet where the trust fund had no actual existence, but the suit was for damages, gross *laches* would *per cursum cancellariæ* disentitle a plaintiff to relief, the Statute of Limitations leaving it open to a Court of Equity to act upon its own rule as to laches and acquiescence (*e*). [Where a suit is founded on a fraudulent breach of duty committed by a person in the position of a trustee, as where a director receives a bribe to neglect his duty, time will commence to run so soon as the fraud has been discovered (*f*).]

36 & 37 Vict. c. 66, s. 25, sub-s. 2.

6. By the Supreme Court of Judicature Act, 1873, sect. 25, sub-sect. 2, it was expressly enacted that no claim by a *cestui que trust* against his trustee in respect of any breach of an express trust, should be barred by any statute of limitations. But the Real Property Limitation Act, 1874, sect. 10, enacts that from 1st January, 1879, no money or legacy *charged on any land or rent* shall, though *secured by an express trust*, be recoverable but within the time allowed for recovery had there been no express trust (*g*).

37 & 38 Vict. c. 57, s. 10.

[Trustee Act, 1888, s. 8.]

[The provisions of the Trustee Act, 1888, sect. 8, to which reference has already been made (*h*), will not affect cases of the kind now under consideration where the claim of the *cestui que trust* against the trustee is "founded upon fraud or fraudulent breach of trust to which the trustee was party or privy, or is

[(*a*) *Re Flitcroft's case*, 21 Ch. D. (C.A.) 519 ; *Re Sharpe*, (1892) 1 Ch. (C.A.) 154 ; and see *Re Lands Allotment Company*, (1894) 1 Ch. (C.A.) 616 ; *Re Dixon*, (1900) 2 Ch. (C.A.) 561 ; *M'Ardle* v. *Gaughan*, (1903) 1 I. R. 107 ; but directors are not trustees for individual shareholders, and may purchase shares from them without disclosing negotiations for sale of the company's undertaking : *Percival* v. *Wright*, (1902) 2 Ch. 421.]

(*b*) *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514, 521. [But of course the estate of a deceased trustee is not liable for subsequent breaches of trust ; *Re Palk*, W. N. (1892) p. 112.]

[(*c*) *Wassell* v. *Leggatt*, (1896) 1 Ch. 554 ; *Re National Bank of Wales*, (1899) 2 Ch. (C.A.) 629 ; *S. C.*, in H. L. *nom. Dovey* v. *Cory*, (1901) A.C. 477.]

(*d*) *Story* v. *Gape*, 2 Jur. N.S. 706 ; *Obee* v. *Bishop*, 1 De G. F. & J. 137 ; *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 545 ; [*Re Burge*, 57 L. T. N.S. 364]. But see the Irish cases, *Dunne* v. *Doran*, 13 Ir. Eq. Rep. 545 ; *Brereton* v. *Hutchinson*, 3 Ir. Ch. Rep. 361 ; *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123.

(*e*) *Philips* v. *Pennefather*, 8 Ir. R. Eq. 486, *per* Sir Jos. Napier, C.S.

[(*f*) *Metropolitan Bank* v. *Heiron*, 5 Ex. D. (C.A.) 319 ; and see *ante*, p. 1114.]

(*g*) See *ante*, p. 1136.

[(*h*) See *ante*, pp. 1136 *et seq.*]

to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use," and if a claim of that description can be substantiated, the trustee will henceforth, as heretofore, be precluded from pleading the statute; but if not, then it would seem that in general, clause (B) of sub-sect. 1 of that section will be applicable, and that the lapse of six years will be a protection to the trustee, as it would have been in an ordinary action of debt.]

Trust money taken by a firm.

7. Where the trustee is one of a firm, and trust money finds its way into the coffers of the firm, with the *sanction of the partners*, [whether express, or implied from the course of business,] and is misapplied, not only the trustee, but the partners also, are liable (*a*). And if one of a firm of solicitors, in transacting business with trustees, practice a fraud upon the trustees, the co-partners are liable (*b*). [But one of a firm of solicitors has no implied authority to make his partners liable as constructive trustees (*c*), though, of course, if being a trustee he is party, in his capacity of solicitor, to an improper investment of the trust fund, his co-partners may be liable on the ground of negligence (*d*).

[Partnership Act, 1890.]

The Partnership Act, 1890 (*e*), by sect. 11, enacts that "where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss" (*f*); and by sect. 13, that "if a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein: Provided as follows:—(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and (2) Nothing

(*a*) *Eager* v. *Barnes*, 31 Beav. 579; *Blair* v. *Bromley*, 5 Ha. 542; 2 Ph. 534; [*Thorne* v. *Heard*, (1894) 1 Ch. (C.A.) 599, 605; *Rhodes* v. *Moules*, (1895) 1 Ch. (C.A.) 236; and see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 352; *Moore* v. *Knight*, (1891) 1 Ch. 547; see *ante*, p. 1143; *Mara* v. *Browne*, (1895) 2 Ch. 69, 94].

(*b*) *Sawyer* v. *Goodwin*, 36 L. J. N.S. Ch. 578; *Long* v. *Hay*, W. N. 1871, p. 134; [and as to the liability of the representative of a deceased partner, see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 366].

[(*c*) *Mara* v. *Browne*, (1896) 1 Ch. (C.A.) 199.]

[(*d*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 352.]

[(*e*) 53 & 54 Vict. c. 39.]

[(*f*) As to the effect of this enactment, see *Rhodes* v. *Moules*, (1895) 1 Ch. (C.A.) 236.]

in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control." By sect. 5 of the same Act "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."]

Corporation liable for breach of trust.

8. The remedy for a breach of trust lies against a *corporation* as well as against an individual; and a municipal corporation since the Municipal Corporations Act of 1835, has been held liable for a breach of trust committed before the Act (*a*).

Land tortiously sold.

9. If a trustee dispose of the trust estate to a purchaser for valuable consideration *without notice*, the *cestui que trust* may compel the trustee to purchase other lands of equal value to be settled upon the like trusts (*b*), or the *cestui que trust* may at his option take the proceeds of the sale, with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements (*c*).

[Trustee allowing husband to misapply the fund.]

[10. If a trustee for the separate use of a married woman for life allow the husband to get possession of and misapply the trust fund without the wife's knowledge, he is liable for the income which would but for the breach of trust have accrued on the fund, notwithstanding that the married woman had acquiesced in the payment of the income prior to the breach of trust to her husband, for in such a case no assent on her part to the retainer by the husband of the subsequent income can be presumed (*d*).]

Neglect to accumulate.

11. Where a testator had directed an investment in Three per Cent. Consolidated Bank Annuities and an *accumulation* of the dividends, the trustee was decreed to purchase the sum of stock which the fund, if regularly invested, would have produced, and to make good the amount due in respect of subsequent accumulation (*e*).

Covenant to transfer stock.

12. If a settlement contain a covenant for the transfer of stock,

(*a*) *Attorney-General* v. *Corporation of Leicester*, 9 Beav. 546.

(*b*) See *Mansell* v. *Mansell*, 2 P. W. 681; *Vernon* v. *Vaudrey*, Barn. 303; *Macnamara* v. *Carey*, 1 Ir. R. Eq. 23; and see the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

(*c*) See *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35; but see *Denton* v. *Davies*, 18 Ves. 504.

[(*d*) *Dixon* v. *Dixon*, 9 Ch. D. 587.]

(*e*) *Pride* v. *Fooks*, 2 Beav. 430; see *Byrchall* v. *Bradford*, 6 Mad. 13; *S. C.*, Id. 235; and see *ante*, p. 391.

[or the creation of a charge upon property,] and the trustee *neglects to enforce the transfer* (*a*), [or *the due creation of the charge* (*b*),] he is liable for all the consequences.

Neglect to sell.

13. So if there be a trust for sale, and the trustee *neglects to sell* for a great length of time, whereby the property is deteriorated, he is answerable for the loss (*c*).

Policy forfeited.

14. If a trustee suffer a *policy of insurance to become forfeited* through neglect to pay the premiums, he is bound to make good the loss to the *cestui que trust* (*d*); provided, that is, he had funds in hand for payment of the premiums, for if he had none, and could procure none, he would be exempt from liability (*e*). He may, however, either advance money himself, or borrow it from another on the security of the policy, and a *lien* on the policy will be allowed (*f*). If there be no means of keeping up the policy the Court will direct it to be sold or surrendered (*g*).

[Policy improperly given up to husband and surrendered by his mortgagee.]

[15. Where a trustee had neglected to give notice of a settlement affecting a policy to the insurance office, and had, in contemplation of a breach of trust, retired in favour of a single trustee, who allowed the husband to get possession of the policy, and the husband received a bonus and mortgaged the policy, and the mortgagee surrendered it, it was held

(*a*) *Fenwick* v. *Greenwell*, 10 Beav. 412.

[(*b*) *Cleary* v. *Fitzgerald*, 7 L. R. Ir. 229.]

(*c*) *Devaynes* v. *Robinson*, 24 Beav. 86; *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232.

(*d*) *Marriott* v. *Kinnersley*, Taml. 470.

(*e*) So decided, *Hobday* v. *Peters* (No. 3), 28 Beav. 603.

(*f*) *Clack* v. *Holland*, 19 Beav. 273, 276, *per Cur.*; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Johnson* v. *Swire*, 3 Giff. 194; *Todd* v. *Moorhouse*, 19 L. R. Eq. 69. [It has been said that the only cases in which a lien upon the money secured by a policy can be created in favour of a mere stranger, or a part owner, by payment of premiums are the following: 1. By contract with the beneficial owner of the property. 2. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. 3. By subrogation to this right of trustees of some person who has at their request advanced money for the preservation of the property. 4. By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property; *Re Leslie*, 23 Ch. D. 552; and see *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. (C.A.) 234; *Patten* v. *Bond*, 60 L. T. N.S. 583; *Sewell* v. *Bishop*, 62 L. J. Ch. 615, 985; *Re Power's Policies*, (1899) 1 I. R. (C.A.) 6. In *Strutt* v. *Tippett*, 62 L. T. N.S. 475, doubt was expressed by Lindley, L.J., whether this enumeration could be regarded as exhaustive. In the second class of cases the right to indemnity is strictly limited to the trust property. Thus a trustee, who was under a statutory duty to pay the premiums on a policy, out of a fund which was insufficient, but who was not trustee of the policy, was held not entitled to a lien for moneys spent by him in paying a premium on the policy; *Re Earl of Winchelsea's Policy Trusts*, 39 Ch. D. 168.]

(*g*) *Hill* v. *Trenery*, 23 Beav. 16; *Beresford* v. *Beresford*, Ib. 292; [and see *Re Wells*, (1903) 1 Ch. 848, 853].

that, although there were no funds available for keeping up the policy, the original trustee, inasmuch as there was a clear breach of trust in neglecting to give notice to the office and in parting with the possession of the policy, was liable for the amount of the bonus and of the moneys received on the surrender (*a*).]

Neglect to give notice of assignment.

16. If the trustees of a marriage settlement take by assignment *choses in action* of the husband, and *neglect to give notice* of the settlement to the persons in whom the *choses in action* are vested, and on the bankruptcy of the husband the *choses in action*, as left in his order and disposition with the consent of the true owner, become forfeited in favour of the creditors, it is apprehended that the trustees would be liable for their neglect of duty in not having given notice of the settlement, so as to take the property out of the order and disposition of the settlor (*b*).

Registration.

17. So if the trustee of a deed which requires *registration* to protect the property, *neglect to register it*, he is answerable for the consequences (*c*).

Power imperative.

18. A trust is sometimes in the form of a *power imperative*; that is, a power which it is the bounden duty of the trustee to execute, and if through his neglect to execute it a loss arises, he will be held responsible (*d*).

Receipt by person not a trustee, but acting as such.

19. If a person has *assumed to act as trustee*, and having received money in that character misapplies it, he is accountable for the proceeds to the *cestui que trust*, and cannot defend himself by showing that in fact he was not legally a trustee (*e*), or that when he committed the breach he did not know who his *cestui que trust* was (*f*); [and this principle was applied to a case where an agent for an owner in fee, after the death of such owner, continued to receive the rents and pay them into a separate account at his own bank, and stated that he was acting as agent and receiver for the person next entitled (*g*).] But the trustee

[(*a*) *Kingdon* v. *Castleman*, 46 L. J. N.S. Ch. 448.]

(*b*) As to what particulars are within the operation of the clause, see [the Bankruptcy Act, 1883, s. 44; and *ante*, p. 271].

(*c*) *Macnamara* v. *Carey*, 1 Ir. Rep. Eq. 9.

(*d*) *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; and see *ante*, p. 1074.

(*e*) *Rackham* v. *Siddal*, 16 Sim. 297; affirmed on appeal to the extent of the interest of the plaintiff, the tenant for life, 1 Mac. & G. 607; *Pearce* v. *Pearce*, 22 Beav. 248; and see *Derbishire* v. *Home*, 3 De G. M. & G. 80; *Hope* v. *Liddell*, 21 Beav. 183; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Hennessey* v. *Bray*, 33 Beav. 96; *Ex parte Norris*, 4 L. R. Ch. App. 280; *Yardley* v. *Holland*, 20 L. R. Eq. 428; *Smith* v. *Smith*, 10 Ir. Rep. Eq. 273; [*Lyell* v. *Kennedy*, 14 App. Cas. 437; *Soar* v. *Ashwell*, (1893) 2 Q. B. (C.A.) 390, 396, 402, 405].

(*f*) *Ex parte Norris*, 4 L. R. Ch. App. 280.

[(*g*) *Lyell* v. *Kennedy*, 14 App. Cas. 437, 457, where Lord Selborne observed: "A man who receives the money of another on his behalf, and places it specifically to an account

of a devised estate will not be accountable for property comprised in the devise, but the existence of which did not come to his *knowledge*, and which he was not *bound to have discovered* (*a*).

[20. Where a director of a company accepted fully paid up shares from the promoters, under circumstances which were held to amount to a misfeasance on his part, and the shares, which at one time had been worth 80*l.* a share, had become so much depreciated as to be worth only 1*l.* a share, it was held that the director was a trustee of the shares for the company, that restitution of the shares by the director was not sufficient, but that the company might elect to have the value of the shares, and that the value was to be taken at 80*l.* a share, which was to carry interest at 4*l.* per cent. from the date of the transfer to the director (*b*). "A gift by a promoter to a director, whilst there are any questions open between the company and the promoter, must be accounted for by the director to the company for whom he is an agent, and the company has the option of claiming what is given, or its value, *i.e.* the highest value whilst held by the director" (*c*).] [Director accepting shares from promoters.]

21. If an action be brought for an account, and the plaintiff seeks relief against *wilful default*, he must in his pleadings allege some *specific act* of wilful default (*d*), and *pray* consequential relief; and at the hearing must *prove* some act of wilful default, or at least establish a case for inquiry (*e*); and *a fortiori* where, at the original hearing, the common accounts only were directed, it is too late to ask relief on further consideration against any wilful act that may have transpired accidentally in the course of other inquiries (*f*); [and where a plaintiff in an administration action charges trustees with a breach of trust, Wilful default.

with a banker, earmarked and separate from his own moneys, though under his own control, is in my opinion a trustee of the fund standing to that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a court of equity that the money was received in a fiduciary character is enough."]

(*a*) *Youde* v. *Cloude*, 18 L. R. Eq. 634.

[(*b*) *Nant-y-Glo and Blaina Ironworks Company* v. *Grave*, 12 Ch. D. 738.]

[(*c*) *Eden* v. *Ridsdale's Railway Lamp and Lighting Co.*, 23 Q. B. D. (C.A.) 368, 572, *per* Lindley, L.J.; but in considering what is the highest value, the conditions of the market must be regarded, and the holder of a large number of shares will not necessarily be charged with prices which might have been obtainable on sales of smaller quantities: *Shaw* v. *Holland*, (1900) 2 Ch. (C.A.) 305.]

(*d*) *Bond* v. *M'Watty*, 14 Ir. Ch. Rep. 174; *Wildes* v. *Dudlow*, W. N. 1870, pp. 85, 231; [and see *Mayer* v. *Murray*, 8 Ch. D. 424; *Smith* v. *Armitage*, 24 Ch. D. 727].

(*e*) *Sleight* v. *Lawson*, 3 K. & J. 292; [but this general rule does not necessarily apply where the action is grounded on breach of trust: *Re Wrightson*, (1908) 1 Ch. 789].

(*f*) *Coope* v. *Carter*, 2 De G. M. & G. 292; *Askew* v. *Woodhead*, 28 L. T. N.S. 465; 21 W. R. 573.

but at the hearing is content to take a common administration judgment, he will not be allowed afterwards to charge further breaches of trust committed before writ or judgment, either as ground of relief, or for the purpose of removing the trustees from office (*a*)]; and a trustee cannot be declared liable for wilful default upon a *common order* made at chambers for the administration of the testator's estate (*b*), [or upon an originating summons, otherwise than by consent (*c*)]. But if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions (*d*). If relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an inquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further consideration, as before that time the Court was not in a condition to deal with the question (*e*); [and under the modern practice, where the statement of claim alleges wilful default, the Court may at any stage of the proceedings direct accounts and inquiries upon that footing (*f*); and, in the absence of any such allegation, will charge trustees with interest, simple or compound, on balances retained in their hands, and with compound interest where an express trust for accumulation has not been complied with (*g*). But the jurisdiction is discretionary, and the Court in its discretion refused to direct a common account against a defaulting trustee, and simply gave judgment against him for particular amounts admitted to be due (*h*). Where there are allegations of wilful default or improper conduct on the part of the defendants, it is the duty of the plaintiff to be ready at the hearing to prove such allegations, and where the plaintiff was not in a position at the hearing to go into the charges (*i*), the Court would not, unless a strong

[(*a*) *Re Wrightson*, (1908) 1 Ch. 789.]

(*b*) *Re Fryer*, 3 K. & J. 317; *Partington* v. *Reynolds*, 4 Drew. 253; *Re Delevante*, 6 Jur. N.S. 118; but see *Brooker* v. *Brooker*, 3 Sm. & G. 475; [and on taking the common account of their receipts executors can properly be, and are often, charged with a devastavit arising on the accounts themselves; *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 172, *per* Chitty, L.J.].

[(*c*) *Dowse* v. *Gorton*, (1891) A. C. 190, 202, *per* Lord Macnaghten, and see *ante*, p. 420.]

(*d*) *Shaw* v. *Turbett*, 13 Ir. Ch. Rep. 476.

(*e*) *Pattenden* v. *Hobson*, 1 Eq. Rep. 28.

[(*f*) *Job* v. *Job*, 6 Ch. D. 562; *Re Symons*, 21 Ch. D. 757; *Mayer* v. *Murray*, 8 Ch. D. 424; and see *Laming* v. *Gee*, 10 Ch. D. 715.]

[(*g*) *Re Barclay*, (1899) 1 Ch. 674.]

[(*h*) *Campbell* v. *Gillespie*, (1900) 1 Ch. 225.]

[(*i*) *Smith* v. *Armitage*, 24 Ch. D. 727; and see *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 172.]

case were made out for so doing, postpone the inquiry into the conduct of the trustees]. In a *redemption suit* it is not necessary that the plaintiff should charge wilful default (*a*); nor is the case altered if the deed, though in substance a security, be in the form of a deed of trust (*b*). And in a case under the old practice, it was held that where *executors filed a bill* for the administration of their testator's estate, it was competent to a *defendant* to allege by his *answer* a case of wilful default by the executors, and that on proof of it at the hearing, the Court would give the necessary directions without obliging the defendant to file a cross bill (*c*). It is not competent to a remainderman to institute proceedings for relief against wilful default in respect of the *prior life estate*, for he has no interest in the income, but only in the corpus (*d*).

Suit against trustee's personal representative.

22. An executor or administrator of a trustee will be answerable for a breach of trust, though he may have distributed the assets amongst the legatees or next of kin without previous notice of the breach of trust (unless it was done under the sanction of the Court (*e*), or under the provisions of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 29 (*f*)); and the Statute of Limitations affords him no protection (*g*) [unless the nature of the breach of trust is such as to bring the case within the provisions of the Trustee Act, 1888, sect. 8 (*h*)]. The *cestui que trust*, if he has not been lying by while the rights of the defendants have been varied by lapse of time (*i*), may also in lieu, or in aid of proceedings against the trustee, recover the assets directly from the legatees or next of kin amongst whom they have been distributed (*j*).

[Jurisdiction of Court under Judicial Trustees Act, 1896, to relieve trustee from consequences of breach of trust.]

[23. An important extension of the jurisdiction of the Court in cases of breach of trust has been introduced by sect. 3 of the Judicial Trustees Act, 1896 (*k*), whereby it is enacted that, "If it

[(*a*) *Mayer* v. *Murray*, 8 Ch. D. 424.]

(*b*) *O'Connell* v. *O'Callaghan*, 15 Ir. Ch. Rep. 31.

(*c*) *Harvey* v. *Bradley*, 4 L. R. Eq. 13.

(*d*) *Whitney* v. *Smith*, 4 L. R. Ch. App. 513.

(*e*) *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 122; *March* v. *Russell*, 3 M. & Cr. 31; *Low* v. *Carter*, 1 Beav. 423; *Hill* v. *Gomme*, Ib. 540; *Underwood* v. *Hatton*, 5 Beav. 39; *Waller* v. *Barrett*, 24 Beav. 413.

[(*f*) See *ante*, p. 436; and see *Stuart* v. *Babington*, 27 L. R. Ir. 551.]

(*g*) See p. 1157, *ante*.

[(*h*) See *ante*, p. 1136.]

(*i*) *Ridgway* v. *Newstead*, 3 De G. F. & J. 474; *Blake* v. *Gale*, 31 Ch. D. 196; 32 Ch. D. (C.A.) 571; [*Leahy* v. *De Moleyns*, (1896) 1 I. R. 206; *Re Belton's Estate*, (1894) 1 I. R. 537].

(*j*) *March* v. *Russell*, 3 M. & Cr. 31; *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 126; *Underwood* v. *Hatton*, 5 Beav. 38.

[(*k*) 59 & 60 Vict. c. 35. This section came into operation at the passing of the Act (14th August, 1896).]

appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

[Jurisdiction how exercised under the enactment.]

No general rules can be laid down as to the mode in which the Court will exercise its judicial discretion under the section, and each case must be governed by its own circumstances (*a*); but it is clear that, before exercising its discretion, the Court must be satisfied, by proper evidence, that the trustee has acted reasonably as well as honestly (*b*), and that the burden of showing that he acted honestly and "reasonably" lies on the trustee who seeks relief from the Court under the section (*c*). In dealing with the question of reasonableness, the Court will consider whether a prudent man would have disposed of the trust property in the manner complained of, if it had been his own (*d*); and, accordingly, the fact that the trustee relied on the advice of his solicitor, as to the value of property proposed as a security, is not *per se* a ground of excuse, for no prudent man, lending his own money, would rely on a solicitor's advice on a question of value (*e*); and a trustee cannot be considered to have acted "reasonably," if he has never really considered the question whether the security he took was one which in its nature it was prudent and right for him as a trustee to take, or has made the investment without obtaining the consent of the person whose consent was required by the settlement (*f*). And the Court will not favour the application of a trustee, who, in making an investment of trust funds upon mortgage, has omitted to obtain a valuation in accordance with the requirements, formerly of sect. 4 of the Trustee Act, 1888, or now of sect. 8 of the Trustee Act, 1893 (*g*); as such

[(*a*) *Re Turner*, (1897) 1 Ch. 536.]

[(*b*) *Re Turner*, (1897) 1 Ch. 536; *Re Stuart*, (1897) 2 Ch. 583.]

[(*c*) *Re Stuart*, (1897) 2 Ch. 583. Trustees are not bound specially to plead the Act, though it may be desirable for them to do so: *Singlehurst* v. *Tapscott Steamship Co.*, W. N. (C.A.) (1899) 135.]

[(*d*) *Re Turner*, (1897) 1 Ch. 536; and see *Re Grindey*, (1898) 2 Ch. (C.A.) 593.]

[(*e*) *Re Stuart*, (1897) 2 Ch. 583; and see *Re Turner*, (1897) 1 Ch. 536.]

[(*f*) *Chapman* v. *Browne*, (1902) 1 Ch. (C.A.) 785.]

[(*g*) *Re Stuart*, (1897) 2 Ch. 583; see *ante*, pp. 374 *et seq.*, as to the statutory requirements. In the case referred to, an application on further consideration of an administration action was entertained, although no application had

omission goes far to show that the trustee, although he may have acted "honestly," has not acted "reasonably" (*a*).

Where one of the trustees is a solicitor, and the other is not, the non-professional trustee will not be excused if he concurs in an improper investment in reliance on the superior knowledge of his co-trustee, though he may, in such a case, be entitled to be indemnified by his co-trustee against the resulting loss (*b*); nor will a trustee be excused, if, relying on his co-trustee, who is one of a firm of solicitors, he permits trust moneys, pending the settlement of questions, to be received by the co-trustee, and paid by him into the banking account of his firm (*c*); and a trustee who relies entirely on his co-trustee, and accepts his statements without inquiry, cannot be regarded as acting "honestly" (*d*). Where trustees, erroneously assuming that they had a power of sale, sold settled leaseholds, and thereby diminished the income of the tenant for life, who was entitled to enjoyment in specie, but the sale would have been a proper one if the trustees had in fact possessed a power of sale, the Court, on evidence that they had acted honestly and reasonably, held them entitled to be relieved from liability (*e*); and where, on the construction of a will, executors and trustees reasonably thought that it was not their duty to call in an outstanding debt, they were relieved from liability under the section; and the smallness of the amount of the debt was treated as a circumstance in their favour, in considering whether they ought to have obtained the directions of the Court (*f*).

Where trustees, upon distribution of their trust fund, paid a share to their solicitor, who stated that he was assignee (as in fact he was), but did not produce the assignment to him (which would have shown the existence of a prior assignment), they were held not entitled to relief, as it was their duty to inquire into the alleged title, and having failed in this, they could not shield themselves behind the fraud of their solicitor (*g*).

Where the trustees of a fund, acting under the erroneous advice of their solicitors, who treated the matter as governed by an Act which was not in force at the time when the title to the fund

been made to vary the finding in the certificate as to the impropriety of the investments by the trustee, and the resulting loss.]

[(*a*) *Re Dive*, (1909) 1 Ch. 328; and see *Shaw* v. *Cates*, (1909) 1 Ch. 389, as to the duties of trustees acting without such a valuation.]

[(*b*) *Re Turner*, (1897) 1 Ch. 536.]

[(*c*) *Wynne* v. *Tempest*, W. N. 1897, p. 43.]

[(*d*) *Re Second East Dulwich &c. Building Soc.*, 68 L. J. Ch. 196; 47 W. R. 408.]

[(*e*) *Perrins* v. *Bellamy*, (1899) 1 Ch. (C.A.) 797.]

[(*f*) *Re Grindey*, (1898) 2 Ch. (C.A.) 593.]

[(*g*) *Davis* v. *Hutchings*, (1907) 1 Ch. 356.]

attached, made a distribution which was not in fact authorised by law, they were not excused, and it was held that a trustee does not entitle himself to relief by merely showing that he has acted reasonably and honestly, but must show that *under all the circumstances* he ought fairly to be excused for his breach of trust (*a*).

[Case of executor.] The section applies to a devastavit by an executor, but in such a case, the Court bears in mind that a prudent and reasonable executor ought to advertise for claims under the Law of Property Amendment Act, 1859 (*b*), as soon as possible (*c*).

Where an executor, having good reason to suppose that the estate was solvent and of large amount, paid an immediate legacy to the testator's widow, and also sums on account of income to maintain the widow and family, and it subsequently transpired that, owing to large defalcations which had been committed by the testator, the estate was in fact insolvent, the executor, although he had unduly delayed the advertisements for creditors, was relieved by the Court in respect of payments made before, but not after the issue of the writ in an action to recover the amount of the defalcations (*d*). And where an executor, acting honestly and reasonably, has refrained from suing for a debt due to the estate, *bonâ fide* believing such debt to be irrecoverable, he ought to be excused from the consequences of such a mere technical breach of trust (*e*).

Where executors, during five years' administration of a considerable estate, paid various sums to their solicitors, in reliance on their statements that such sums were required for different purposes, to which they were in great measure applied, but on the bankruptcy of the solicitors there was a deficit, the executors, having acted honestly and reasonably, were held excused by the Court (*f*).]

Breach of trust an equitable debt only.

24. The *debt* constituted by a *breach of trust* is, even after it has been established by a decree, an *equitable* debt only, and until the Bankruptcy Act, 1869, would not have supported a petition in bankruptcy (*g*).

[(*a*) *National Trustees Company of Australasia* v. *General Finance Company of Australasia*, (1905) A.C. (P.C.) 373. This case was decided under a Victorian statute, substantially identical in terms with sect. 3 of the Act of 1896.]

[(*b*) 22 & 23 Vict. c. 35, see *ante*, p. 436.]

[(*c*) *Re Kay*, (1897) 2 Ch. 518.]

[(*d*) *Re Kay*, (1897) 2 Ch. 518.]

[(*e*) *Re Roberts*, 76 L. T. N.S. 479; see *Re Barker*, 77 L. T. N.S. 712; 46 W. R. 296.]

[(*f*) *Re Lord De Clifford's Estate*, (1900) 2 Ch. 707.]

(*g*) *Ex parte Blencowe*, 1 L. R. Ch. App. 393. See the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, and *Ex parte Sturt & Co.*, 13 L. R. Eq. 309; [and see now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6; which, although not specially mentioning equitable debts, includes them].

Breach of trust constitutes simple contract debt, unless the trustee has covenanted.

The claim of the *cestui que trust* is in general a *simple contract debt*, and therefore, until the Administration of Estates Act, 1833, making a person's whole real and personal estate liable to his simple contract debts, it was recoverable, not from the real, but only from the personal estate. But if the trustee sign the trust deed, and engage under his hand and seal, by words that amount to a covenant at law, to execute the trust, then the breach of trust becomes a specialty debt (*a*).

Retainer by personal representative of insolvent trustee.

25. If a [sole] trustee die insolvent and indebted to the trust estate, the personal representative of the trustee has a *right of retainer* in respect of the debt to the trust as against other creditors, and on the *cestuis que trust* requiring him to exercise such right of retainer, he is bound to do so (*b*). [But as the right to retain only exists when the person to sue and the person to pay are the same, there will be no such right of retainer if the trustee who has died indebted to the estate has left a co-trustee surviving him (*c*). And for the like reason, where an executor is *cestui que trust* of a debt, he cannot retain, because his trustee is the proper person to sue for the debt (*d*).]

Immaterial whether trustee was gainer or loser by the breach of trust.

26. In awarding compensation to the *cestui que trust* against the trustee, the Court pays no regard to the circumstance whether the trustee *derived any actual advantage or not*, but proceeds upon the principle that the trustee, who deviates from the line of his duty, is under an obligation to make good the loss to the *cestui que trust* (*e*); and if a trustee be guilty of misconduct, and a loss follows, the Court does not acquit him because the loss was more immediately caused by some event wholly beyond the control of the trustee, such as fire, lightning, or other accident (*f*), [or because of conduct in the nature of contributory negligence on the part of the *cestui que trust* (*g*)]. "Although," said Lord Cottenham, "a personal representative acting *strictly* within the line of his duty, and exercising reasonable care and diligence,

(*a*) See *ante*, pp. 228 *et seq.*

(*b*) *Sander* v. *Heathfield*, 19 L. R. Eq. 21; [*Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Faithfull*, 57 L. T. N.S. 14; *Re Sutton*, 57 L. T. N.S. 14. But see *ante*, p. 1071, as to the right of the creditors to have the estate administered in bankruptcy.]

[(*c*) *Re Dunning*, 54 L. J. N.S. Ch. 900; 33 W. R. 760.]

[(*d*) *Re Hayward*, (1901) 1 Ch. 221.]

(*e*) See *Dornford* v. *Dornford*, 12 Ves. 129; *Raphael* v. *Boehm*, 13 Ves. 411; *S. C.*, Ib. 590, 591; *Moons* v. *De Bernales*, 1 Russ. 305; *Adair* v. *Shaw*, 1 Sch. & Lef. 272; *Lord Montford* v. *Lord Cadogan*, 17 Ves. 489; *Scurfield* v. *Howes*, 3 B. C. C. 90; but see *Attorney-General* v. *Greenhouse*, 1 Bligh, N.S. 57-59.

(*f*) See *Caffrey* v. *Darby*, 6 Ves. 496; *Cocker* v. *Quayle*, 1 R. & M. 535; *Fyler* v. *Fyler*, 3 Beav. 568; *Kellaway* v. *Johnson*, 5 Beav. 324; *Munch* v. *Cockerell*, 5 M. & Cr. 212; *Gibbins* v. *Taylor*, 22 Beav. 344.

[(*g*) See *Magnus* v. *Queensland National Bank*, 37 Ch. D. (C.A.) 466.]

will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities, not authorised, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive" (*a*).

Case of trustee bringing a profit as well as a loss to the trust.

27. And a trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of a trust fund, cannot *set off against his liability* a *gain* which has accrued to another portion of the trust fund through another distinct and wholly unconnected breach of trust (*b*); and even in the *same matter*, where executors were directed to convert the testator's property and invest it in Government or real securities, and they allowed the tenant for life for eleven years to receive 10 per cent. on an Indian loan, and then invested the capital in the purchase of Bank Annuities, and the stock purchased was considerably more than could have been purchased with the same capital at the end of one year from the testator's death, they were not only made liable for the excess of interest paid to the tenant for life, but were disallowed their claim to set off against their liability the accidental advantage accruing to the trust from their *laches* in making the investment, and the depreciation of the funds during the interim (*c*).

Trustee not chargeable with imaginary values.

28. A defaulting trustee will not be charged with *imaginary values* (*d*); and, being regarded as a mere stakeholder, he will not be liable for more than he has actually received (*e*), except in cases of very supine negligence, or wilful default (*f*).

[Liable for value of new allotted shares.]

[29. Where a trustee neglected to get in certain gas shares which formed part of the trust estate, and new shares were allotted in respect of the old gas shares, and were taken up by the person who had been allowed to hold the original shares, it was held that the trustee must make good the value of the new

(*a*) *Clough* v. *Bond*, 3 M. & Cr. 496; [and see *Re Brogden*, 38 Ch. D. (C.A.) 546, 567].

(*b*) *Wiles* v. *Gresham*, 2 Drew. 258, see p. 271.

(*c*) *Dimes* v. *Scott*, 4 Russ. 195; and see *Fletcher* v. *Green*, 33 Beav. 426; [*Re Barker*, 77 L. T. N.S. 712; 46 W. R. 296].

(*d*) *Palmer* v. *Jones*, 1 Vern. 144.

(*e*) *Harnard* v. *Webster*, Sel. Ch. Ca. 53.

(*f*) *Pybus* v. *Smith*, 1 Ves. jun. 193, *per* Lord Thurlow; *Palmer* v. *Jones*, 1 Vern. 144, *per* Lord Nottingham.

shares, less the amount of calls paid upon them, for they were an accretion to and, as such, part of the trust (*a*). And where a *cestui que trust*, by means of an appointment which was a fraud upon the power under which it purported to be made, received the surrender value of a policy belonging to the trust, his estate, after his death, was held liable not merely for the sum so received, but for the sum which would have been received under the policy if it had been kept on foot (*b*). [Improper surrender of policy.]

30. Where trust money is invested on an improper security, the liability of the trustee to make good the loss occasioned to the trust estate by the improper investment is not conditional upon an option being given to him of taking to the security (*c*); and new trustees, to whom such security has been transferred by the trustee who made the investment, can realise under the power vested in them by the transfer, and hold him liable for the deficiency, and may be justified in so realising without notice to him. "The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will be best done by realising the security, and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security" (*d*). In applying these principles, however, the provisions of sect. 9 of the Trustee Act, 1893 (*e*), already referred to (*f*), must be borne in mind. [Improper security.]

If trust money be advanced on an insufficient security, the Court will not, in an action instituted by one trustee against his co-trustees in the absence of the *cestuis que trust*, order the securities to be realised merely to ascertain the deficiency, for the *cestuis que trust* may prefer either to retain the securities or proceed to a foreclosure, and they cannot in their absence be deprived of their rights (*g*).]

31. Where *co-trustees* are *jointly* implicated in a breach of trust, the *cestui que trust*, though he obtains a decree against the trustees jointly, may have process of execution against any one Co-trustees guilty of breach of trust are severally responsible for the whole loss.

[(*a*) *Briggs* v. *Massey*, 50 L. J. N.S. Ch. 747; varied on app. 51 L. J. N.S. Ch. 447.]

[(*b*) *Re Deane*, 42 Ch. D. (C.A.) 9.]

[(*c*) *Re Salmon*, 42 Ch. D. (C.A.) 351; and see *Re Massingberd's Settlement*, 63 L. T. N.S. 296, C.A., and *ante*, p. 391. Where the *cestui que trust* is an infant, it matters not whether the improper investment was authorised or unauthorised; *Head* v. *Gould*, (1898) 2 Ch. 250, per Kekewich, J.]

[(*d*) *Per* Fry, L.J., 42 Ch. D. (C.A.) 371.]

[(*e*) 56 & 57 Vict. c. 53.]

[(*f*) *Ante*, p. 378.]

[(*g*) *Butler* v. *Butler*, 5 Ch. D. 554; 7 Ch. D. (C.A.) 116; and see *Jackson* v. *Dickinson*, (1903) 1 Ch. 947, 951.]

of them separately (*a*); for as regards the remedy of the *cestui que trust* there is no *primary* liability, but each trustee is responsible for the entirety of the loss incurred (*b*). However, where the trustees are *in pari delicto*, the decree is usually *enforced* against the trustees equally (*c*); and in one case, where a trustee had refused to accept the office unless another should be named with him, and the trust money be divided between them, so that each might be responsible for a moiety only, and this was accordingly done, but the trust deed was drawn in the usual form as if they were joint trustees of the whole sum, it was held, upon the insolvency of one of the trustees, that the co-trustee should not be answerable for more than the moiety paid to himself, the division of the trust money having been, Sir J. Leach observed, "a term in the creation of the trust" (*d*).

[Acceptance of compromise from one trustee.]

[Where a plaintiff has recovered judgment for a specified sum in an action against trustees for breach of trust, the acceptance by him of a payment by one trustee, by way of compromise, does not operate as a release *pro tanto* of the others; and consequently the plaintiff may, notwithstanding such compromise, prove in the bankruptcy of another trustee for the full amount (*e*).

[Joint judgment against partners no merger of separate liability.]

32. Where trust property is misappropriated by a firm so that the partners are jointly and severally liable to make good the loss, and the firm is adjudicated bankrupt on a judgment debt recovered against the firm by the owner of the trust property, the several liability of the partners is not, solely by reason of the creditor having recovered a joint judgment, merged in such judgment so as to preclude proof by him against the separate estates (*f*).]

Liability for the costs of suit.

33. Where the defendants are involved in a breach of trust, the Court decrees *costs* against them *jointly*, and does not distinguish between the relative culpabilities of the defendants (*g*). But where the plaintiff, in pursuance of the decree, recovered *all*

(*a*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Walker* v. *Symonds*, 3 Sw. 74, 75; *Attorney-General* v. *Wilson*, Cr. & Ph. 28, *per* Lord Cottenham; *Taylor* v. *Tabrum*, 6 Sim. 281; *Fletcher* v. *Green*, 33 Beav. 426; and see *Ex parte Angle*, Barn. 425; *Re Chertsey Market*, 6 Price, 278, 279; *Ex parte Norris*, 4 L. R. Ch. App. 280; [*Ex parte Craven*, W. N. 1885, p. 21].

(*b*) See *Wilson* v. *Moore*, 1 M. & K. 146; *Lyse* v. *Kingdon*, 1 Coll. 188; *Richardson* v. *Jenkins*, 1 Drew. 477; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 206; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123; [*Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 358].

(*c*) *Rehden* v. *Wesley*, 29 Beav. 215, *per* M.R.

(*d*) *Birls* v. *Betty*, 6 Mad. 90.

[(*e*) *Edwards* v. *Hood Barrs*, (1905) 1 Ch. 20.]

[(*f*) *Re Davison*, 13 Q. B. D. 50; and see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 353.]

(*g*) *Lawrence* v. *Bowle*, 2 Ph. 140; 1 C. P. Coop. *t.* Cott. 241.

the costs from a *single co-defendant*, the latter obtained an order in the same cause upon a motion (which, however, was not opposed) for contribution by the other defendants (*a*).

Liability and contribution as between the trustees themselves, or between them and other parties.

34. Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate (*b*); and this claim of the innocent trustee (though formerly only a simple contract debt as between himself and his co-trustee, even where the breach of trust as between them and the *cestuis que trust* was a specialty debt) is now in such cases by the effect of the Mercantile Law Amendment Act, 1856 (*c*), a specialty debt also (*d*). If all the trustees be equally guilty, then (unless the transaction was vitiated by not only constructive, but such actual fraud that the Court will hold itself entirely aloof (*e*),) in accordance with the established doctrine of equity (*f*), an *apportionment* or *contribution* amongst the trustees may be compelled, which under the old practice was not allowed in the same suit, but on a bill filed for the purpose (*g*). [In working out the right to

(*a*) *Pitt* v. *Bonner*, 1 Y. & C. C. C. 670.

[(*b*) Thus where trustees bought shares in breach of trust, and the surviving trustee (who had done his best to get rid of the shares) was made to pay a call, he could recover contribution from the representative of the deceased trustee: *Jackson* v. *Dickinson*, (1903) 1 Ch. 947.]

(*c*) 19 & 20 Vict. c. 97.

(*d*) *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Priestman* v. *Tyndall*, 24 Beav. 244.

(*e*) See *Lingard* v. *Bromley*, 1 V. & B. 114; *Tarleton* v. *Hornby*, 1 Y. & C. 336; *Attorney-General* v. *Wilson*, Cr. & Ph. 28.

[(*f*) *Bacon* v. *Camphausen*, 58 L. T. N.S. 851, citing *Dering* v. *Earl of Winchelsea*, 1 Cox, 318, and *Stirling* v. *Forester*, 3 Bligh, 575.]

(*g*) *Fletcher* v. *Green*, (No. 2), 33 Beav. 513; *Attorney-General* v. *Daugars*, 33 Beav. 624, *per Cur.*; *Coppard* v. *Allen*, 2 De G. J. & S. 177, *per* L. J. Turner; *Ex parte Shakeshaft*, 3 B. C. C. 198, *per* Lord Thurlow; *Lingard* v. *Bromley*, 1 V. & B. 114; *Perry* v. *Knott*, 4 Beav. 180, *per* Lord Langdale; and see *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 122; *Pitt* v. *Bonner*, 1 Y. & C. C. C. 670; *Ex parte Burton*, 3 M. D. & De G. 373; *Baynard* v. *Woolley*, 20 Beav. 583; *Jesse* v. *Bennett*, 6 De G. M. & G. 609; and see *Wilson* v. *Goodman*, 4 Hare, 54; *Paull* v. *Mortimer*, W. N. 1873, p. 199; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179; [*Ramskill* v. *Edwards*, 31 Ch. D. 101; *Wynne* v. *Tempest*, (1897) 1 Ch. 110]. But see now the Judicature Act, 1873, s. 24, sub-s. 3, and the 11th, 48th, and following rules, and rule 55 of Order XVI. of the rules of the Supreme Court, 1883; [and *Butler* v. *Butler*, 14 Ch. D. 329; and *Sawyer* v. *Sawyer*, 28 Ch. D. (C.A.) at p. 601, where an inquiry was directed how and in what proportions as between the trustees the sum to be paid to the plaintiffs should be borne and paid. The plaintiff in an action against a surviving trustee for breach of trust cannot be required to make the representatives of the co-trustee defendants, as they can, when necessary, be added under rule 11; *Re Harrison*, (1891) 2 Ch. 349. An action

contribution, the co-trustees are, it seems, regarded by the Court as being in the position of co-sureties for the amount of the loss to the trust estate, and, accordingly, time under any statute of limitations will not begin to run, as between the co-trustees, until the extent of their liability has been ascertained in course of law, as, for example, by judgment against them in an action by the *cestuis que trust* (*a*).

[One of the trustees indirectly gaining by breach not primarily liable.]

35. If a breach of trust be committed from which one of the trustees derives indirectly a personal benefit, the other trustees who were parties to the breach have no equity against the trustee deriving the benefit to make him primarily liable for the breach (*b*).

[Nor an *acting* trustee.]

If one of the trustees has the active management of the trust, and, acting honestly though erroneously, commits a breach of trust which leads to loss, he is not bound to indemnify his co-trustees who were passive in the matter, and who, by doing nothing, neglected their duty more than the active trustee (*c*); but where the acting trustee is the solicitor for the trust, or derives any personal benefit from the breach of trust, he may be compelled to indemnify his co-trustees (*d*) against the loss occasioned to the trust estate (*e*), and even where no actual loss has been incurred, against the costs of an action caused by his

for breach of trust cannot in general be maintained against the executors of one of two trustees who was not the last survivor, but either the representatives of the last survivor must be added as defendants, or new trustees must be appointed and added: *Re Jordan*, (1904) 1 Ch. 260. As Order XI., rule 1 does not mention an action for contribution, neither a writ nor a third party notice by one trustee for contribution against his co-trustee can be served out of the jurisdiction: *M'Cheane* v. *Gyles*, (1902) 1 Ch. (C.A.) 287; and see *S. C.*, (1902) 1 Ch. 911, showing that a co-trustee out of the jurisdiction could not be added as co-defendant against the wish of the plaintiff].

[(*a*) *Robinson* v. *Harkin*, (1896) 2 Ch. 415, where Stirling, J., referred to and applied to the case of co-trustees the principles of *Dering* v. *Earl of Winchelsea* (1 Cox. 318; 2 Bos. & P. 270) and *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514.]

[(*b*) *Butler* v. *Butler*, 5 Ch. D. 554; 7 Ch. D. (C.A.) 116; and see *Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685, 703.]

[(*c*) *Bahin* v. *Hughes*, 31 Ch. D. (C.A.) 390, where Fry, L.J., observed that in his judgment the Courts ought to be very jealous of raising an implied liability of the kind under consideration, "because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the *cestuis que trust* having the benefit of several acting trustees, each trustee would be looking to the other for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts"; and see *Bacon* v. *Camphausen*, 58 L. T. N.S. 851; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 365; *Robinson* v. *Harkin*, (1896) 2 Ch. 415, 425; *Head* v. *Gould*, (1898) 2 Ch. 250.]

[(*d*) *Lockhart* v. *Reilly*, 25 L. J. N.S. Ch. 697; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Bahin* v. *Hughes*, 31 Ch. D. (C.A.) 390; *Re Turner*, (1897) 1 Ch. 536; *Head* v. *Gould*, (1898) 2 Ch. 250.]

[(*e*) *Re Linsley*, (1904) 2 Ch. 785.]

negligent conduct (*a*). An executor who has been decreed to make good the loss incurred by his wilful default in not getting in part of the assets from the trustee of a settlement who has been allowed to retain and misappropriate them, is not thereby precluded from subsequently recovering from the trustee the amount misappropriated by him (*b*).]

The gainer by the breach of trust is ultimately liable.

36. As between the trustees and a *third* person who has *reaped the benefit* of the breach of trust, though the trustees must make the disbursement in the first instance to the injured party, the loss will eventually be cast on the person who was the gainer by the breach of trust (*c*). But the circumstance that the breach of trust was committed at the instance of a *cestui que trust* will not *per se* impose upon him the obligation of indemnifying the trustee generally. Thus in *Raby* v. *Ridehalgh* (*d*), where the *cestuis que trust*, the tenants for life, had instigated the breach of trust, L.J. Turner asked: "Has the Court in a suit of this nature ever gone the length of ordering the *cestuis que trust* personally to recoup the trustee?" and the Court directed the tenants for life to account to the trustee only for the *money which had been received* by them under the breach of trust, and this has since been followed by other decisions (*e*).

The interest of parties committing a breach of trust may be impounded to compensate the trust, or indemnify the trustee.

37. If a *cestui que trust*, whether tenant for life, or other person having a partial interest, be responsible for having joined in a breach of trust, all the benefit that would have accrued to him, either directly or derivatively (*f*), either from that trust fund, or any other estate comprised in the same settlement (*g*), may be

[(*a*) *Re Linsley*, (1904) 2 Ch. 785.]

[(*b*) *Scotney* v. *Lomer*, 29 Ch. D. 535, *vide ante*, p. 883.]

(*c*) *Trafford* v. *Boehm*, 3 Atk. 440; *Greenwood* v. *Wakeford*, 1 Beav. 580; *Booth* v. *Booth*, 1 Beav. 125; *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; *S. C.*, 2 Mer. 3; *Birks* v. *Micklethwait*, 33 Beav. 409; and see *Howe* v. *Earl of Dartmouth*, 7 Ves. 150, 151; *Jacob* v. *Lucas*, 1 Beav. 436; *Lincoln* v. *Wright*, 4 Beav. 432; *Tickner* v. *Old*, 18 L. R. Eq. 422; *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363; *Hobday* v. *Peters* (No. 2), 28 Beav. 354; *Fetherstone* v. *West*, 6 Ir. R. Eq. 86; [and see *Moxham* v. *Grant*, (1900) 1 Q. B. (C.A.) 88, where directors, who had *bonâ fide* made a payment *ultra vires* to the shareholders, and were ordered to replace the money, were held entitled to be indemnified by the shareholders; and see *Towers* v. *African Tug Company*, (1904) 1 Ch. (C.A.) 558].

(*d*) 7 De G. M. & G. 108.

(*e*) *Brown* v. *Maunsell*, 5 Ir. Ch. Rep. 351; *Bentley* v. *Robinson*, 9 Ir. Ch. Rep. 479: and see *Walsham* v. *Stainton*, 1 H. & M. 337; [*Butler* v. *Butler*, 5 Ch. D. 554; 7 Ch. D. (C.A.) 116; *Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685, 699, 705, 708; as to the effect in this respect of s. 45 of the Trustee Act, 1893, see *post*, p. 1181].

(*f*) *Jacubs* v. *Rylance*, 17 L. R. Eq. 341; [*Doering* v. *Doering*, 42 Ch. D. 203].

(*g*) *Woodyatt* v. *Gresley*, 8 Sim. 183; *Ex parte Mitford*, 1 B. C. C. 398; see *Priddy* v. *Rose*, 3 Mer. 105; *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583; *Lincoln* v. *Wright*, 4 Beav. 432, *per* Lord Langdale; *Fuller* v. *Knight*, 6 Beav. 205; *M'Gachen* v. *Dew*, 15 Beav. 84; *Vaughton* v. *Noble*, 30 Beav. 34.

stopped by the *cestuis que trust*, or other persons having a similar equity, as against him, his assignees in bankruptcy (*a*), or judgment creditors (*b*), or general creditors (*c*); and (except so far as the defence of purchase for value without notice may be applicable) against *all* who claim under him (*d*), until the amount impounded, with the accumulations thereon (*e*), has compensated the trust estate for the loss for which that *cestui que trust* is responsible. [And even an estate *legally* vested in the wrongdoer by the settlement (being an instrument *inter vivos*) may, by virtue of an implied contract, be made available for repairing the breach of trust (*f*); but the doctrine cannot be extended to a *legal* devisee, as there no contract can be implied, and in the absence of contract a Court of Equity has no control over the estate (*g*).] And the rule was held to apply to a *feme covert* entitled to her separate use [with no restraint on anticipation, where she had full knowledge of all the circumstances, and acted independently in the transactions which constituted the breach of trust, but she was not held liable merely because she acquiesced in or approved of the breach of trust, without taking part in it (*h*); and, previously to the enactment to be presently referred to (*i*), she could not be made liable] where her power of anticipation was restrained (*j*).

[*Cestui que trust* in default under covenant.]

[On an analogous principle, where a *cestui que trust* is in default under a covenant by him in the trust instrument for payment of money, the trustees are entitled as against him to retain the trust property until the default is made good (*k*), and it would seem that this right exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the Court (*l*).

[Where co-trustee is also a *cestui que trust*.]

38. Where a trustee who is a party to a breach of trust, is also

(*a*) *Ex parte Turpin*, 1 D. & C. 120; *Ex parte Smith*, 1 Deac. 143; *Ex parte King*, 2 M. & A. 410; *Prime* v. *Savell*, W. N. 1867, p. 227; *Jacubs* v. *Rylance*, 17 L. R. Eq. 341; see *Smith* v. *Smith*, 1 Y. & C. 338; *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583; [*Corr* v. *Corr*, 3 L. R. Ir. 435; and see *Re Carew*, (1896) 1 Ch. 527, 535; *S. C.*, 2 Ch. (C.A.) 311].

(*b*) *Kilworth* v. *Mountcashell*, 15 Ir. Ch. Rep. 565.

(*c*) *Williams* v. *Allen* (No. 2), 32 Beav. 650.

(*d*) *Woodyatt* v. *Gresley*, 8 Sim. 180; *Priddy* v. *Rose*, 3 Mer. 86; *Cole* v. *Muddle*, 10 Hare, 186; [*Doering* v. *Doering*, 42 Ch. D. 203;] and see *Morris* v. *Livie*, 1 Y. & C. C. C. 380; [*Re Hervey*, 61 L. T. N.S. 429].

(*e*) *Ex parte King*, 2 M. & A. 410.

[(*f*) *Woodyatt* v. *Gresley*, 8 Sim. 180.]

[(*g*) *Egbert* v. *Butter*, 21 Beav. 560; *Fox* v. *Buckley*, 3 Ch. D. (C.A.) 508; and see *Re Brown*, 32 Ch. D. 597; *Ex parte Barff*, De Gex, 613.]

[(*h*) *Sawyer* v. *Sawyer*, 28 Ch. D. (C.A.) 595; *Mara* v. *Browne*, (1895) 2 Ch. 69, 92; and see *ante*, pp. 985, 986.]

[(*i*) See *post*, p. 1181.]

(*j*) See *ante*, pp. 985 *et seq.*, 1017; [and *Hale* v. *Sheldrake*, 60 L. T. N.S. 291].

[(*k*) *Re Weston*, (1900) 2 Ch. 164.]

[(*l*) *Ibid.*]

a beneficiary, the *whole* of his beneficial interest (*a*), whether acquired before or after the breach of trust was committed, must, it would seem, as between himself and his co-trustee who is in *pari delicto*, be applied in making good the loss, and this would at all events appear to be so where such trustee and beneficiary has, as between himself and his co-trustee, derived an exclusive benefit from the breach of trust (*b*).

39. Now by the Trustee Act, 1893 (*c*), sect. 45, it is enacted as follows :— [Trustee Act, 1893, sect. 45.]

"(1) Where a trustee commits a breach of trust at the instigation or request or with the consent *in writing* of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a *married woman* entitled for her *separate use* and restrained from *anticipation* (*d*), make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate *by way of indemnity to the trustee* or person claiming through him." The section applies to breaches of trust committed as well before as after the passing of the Act, but not so as to prejudice any question in an action or other proceeding which was pending on 24th December, 1888, and is pending at the commencement of the Act.

[Complicity in *breach of trust* necessary to bring case within the section.]

In order to bring a case within the section, there must be complicity on the part of the *cestui que trust* in a *breach of trust*. "The section," as was said by Lindley, L.J., "ought not to be construed as if the word 'investment' had been inserted instead of 'breach of trust'" and, "in order to bring a case within this section, the *cestui que trust* must instigate, or request, or consent in writing to some act or omission, which is itself a breach of trust, and

[(*a*) See, however, *Birks* v. *Micklethwait*, 33 Beav. 409 ; *Prime* v. *Savell*, W. N. 1867, p. 227, where the lien of the co-trustee appears to have been limited to the amount of the contribution.]

[(*b*) *Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685. The decision in this case seems to involve the principle that a trustee who is party to a breach of trust cannot, as between himself and his co-trustee, take anything out of the trust fund until he has repaired his breach of trust. This principle, however, is not in terms enunciated. In his judgment (at p. 707) Kay, L.J., after an examination of all the authorities, said : "On the whole, I think the weight of authority is in favour of holding that a trustee, who, being also a *cestui que trust*, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received. I think that the plaintiff must be treated as having received such an exclusive benefit."]

[(*c*) 56 & 57 Vict. c. 53, replacing s. 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59).]

[(*d*) Where the feme is only entitled in reversion, with a general power of appointment by will, the enactment is not applicable : *Willett* v. *Findlay*, 29 L. R. Ir. 156, 497.]

not some act or omission, which only becomes a breach of trust by reason of want of care on the part of the trustees" (*a*); and in the same case it was said by Davey, L.J., that "it is not, of course, necessary that the beneficiary should know the investment" which is the subject of complaint "to be in law a breach of trust; but he must, I think, know the facts which constitute the breach of trust" (*b*). Thus where the tenant for life knew the property on mortgage of which the trustees were making an investment, but was not informed of the valuations which had been made, and was not, so far as appeared, acquainted with the rental value, it was held that the case did not fall within the section (*c*).

[Complicity must be actual, not constructive only.]

It is further to be observed that the section does not make the *cestui que trust* responsible for a breach of trust simply because he had actual or constructive notice of it, and consequently a *cestui que trust* cannot be brought within the section by merely showing that he had constructive notice through his solicitor of facts constituting or evidencing the breach of trust (*d*).

[Consent in writing.]

It has been held that the words "in writing," in the commencement of the section, refer only to the word "consent," and not to the words "instigation" or "request," and consequently, in order that the provisions of the section may be available, it is not necessary to prove an instigation or request in writing (*e*).

[Right of trustee prevails over subsequent assignment by *cestui que trust*.]

The effect of the section is not to curtail the previously existing rights and remedies of trustees, or to alter the law, except by giving greater power to the Court. The discretion given to the Court is judicial, and if, prior to the passing of the Act, the Court would, in a proper case, enforce the equity of the trustee, and impound the interest of a beneficiary in the hands of an assignee, then the Court would be bound to do the same in a similar case after the Act (*f*). Accordingly, the right of the trustee to have the interest of the *cestui que trust* impounded will prevail as against an innocent assignee for value of the

[(*a*) *Re Somerset*, (1894) 1 Ch. (C.A.) 231, 265.]

[(*b*) *S. C.*, (1894) 1 Ch. 274. It might perhaps in some cases be difficult to define precisely the facts which constitute the breach of trust, but it is apprehended that a good test would be whether facts were known to the *cestui que trust* which would be sufficient to bring home to the mind of a man of ordinary intelligence the fact that the trustee was being invited to depart from the line of his duty.]

[(*c*) *Re Somerset*, (1894) 1 Ch. (C.A.) 231; and see *Mara* v. *Browne*, (1895) 2 Ch. 69, 93, *per* North, J.; *S. C.*, (1896) 1 Ch. (C.A.) 199; *Bolton* v. *Curre*, (1895) 1 Ch. 544.]

[(*d*) *Re Somerset*, (1894) 1 Ch. (C.A.) 231, 266, 267.]

[(*e*) *Griffith* v. *Hughes*, (1892) 3 Ch. 105; *Re Somerset*, (1894) 1 Ch. (C.A.) 231, 266; *Mara* v. *Browne*, (1895) 2 Ch. 69, 92.]

[(*f*) *Bolton* v. *Curre*, (1895) 1 Ch. 544, 549, *per* Romer, J.; *Fletcher* v. *Collis*, (1905) 2 Ch. (C.A.) 24.]

interest, claiming under an assignment made subsequently to the commission of the breach of trust (*a*), or as against a trustee in bankruptcy (*b*).

[Case of married woman restrained from anticipation.]

In applying the section to the case of a married woman who is restrained from anticipation, the Court, it is apprehended, will in the first place consider whether, having regard to all the facts of the case, the discretion ought to be exercised against the *feme*, and having arrived at a conclusion in the affirmative, will disregard the existence of the restraint altogether. Where the trustee, without dishonesty, has committed a breach of trust for the benefit of other persons, standing on a footing of equality with himself as regards knowledge of the facts which constitute the breach of trust, the Court leans towards exercising the power in favour of the trustee (*c*); but, on the other hand, it would seem that the Court will not forget (though the trustee may have forgotten) that the restraint on anticipation is designed for the special protection of the *feme*, and that the existence of it imposes a special obligation on the trustee towards her (*d*). In *Griffith* v. *Hughes* (*e*) the trustee, at the verbal request of a married woman, a tenant for life restrained from anticipation, who was being pressed by her creditors, advanced 80*l.* out of the trust funds to her on a promissory note signed by her, her husband, and his brother, and it was held that the trustee, having paid the 80*l.* into Court, would be entitled to resort by way of indemnity to the income payable to the *feme*. In two other cases Romer, J., declined to exercise the discretion adversely to the *feme*, grounding his decision in the one case mainly on the deliberate character of the breach of trust on the part of the trustee (*f*), and in the other on the want of complicity on the part of the *feme* (*g*), and a similar course on the last mentioned ground was adopted by North, J. (*h*).

[Extent of liability of *cestui que trust* under the section.]

It was said in a recent case (*i*) by Kay, L.J., that the section "does not define the extent of the liability of a concurring beneficiary," but "is rather addressed to describe the cases in which the Court may, if it shall think fit, impound all or any part of the interest of the beneficiary by way of indemnity to the trustee, and

[(*a*) *Bolton* v. *Curre*, (1895) 1 Ch. 544.]

[(*b*) *Fletcher* v. *Collis*, (1905) 2 Ch. (C.A.) 24.]

[(*c*) See *Griffith* v. *Hughes*, (1892) 3 Ch. 105.]

[(*d*) See *Bolton* v. *Curre*, *sup.*; *Ricketts* v. *Ricketts*, 64 L. T. N.S. 263.]

[(*e*) (1892) 3 Ch. 105.]

[(*f*) *Ricketts* v. *Ricketts*, 64 L. T. N.S. 263.]

[(*g*) *Bolton* v. *Curre*, (1895) 1 Ch. 544.]

[(*h*) *Mara* v. *Browne*, (1895) 2 Ch. 69, 93.]

[(*i*) *Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685, 707; and see *Mara* v. *Browne*, (1895) 2 Ch. 69, 92, 93.]

also to provide that consent of a beneficiary for this purpose must be given in writing." In the same case Lindley, L.J., intimated that a remainderman who induced the trustees to commit a breach of trust for the benefit of the tenant for life, perhaps his own father or mother, and personally derived no benefit from the breach of trust, could not resist the claim of the trustees to have the loss made good out of his interest. His lordship added that the section seemed to be based on that view of the law, and that if the section had been applicable, it would have been just to impound the whole of the beneficial interest of the plaintiff, a co-trustee as well as a beneficiary, who had concurred in a breach of trust (*a*).

[Procedure.] At the trial of an action against a tenant for life and executors of deceased trustees in respect of a breach of trust, leave was given to the executors, without going into evidence, to apply in chambers with reference to enforcing their right to indemnity against the tenant for life, under sect. 45 of the Trustee Act, 1893, on the ground, as alleged in their defence, that the breach of trust had been committed at her instigation (*b*).]

Bankruptcy of the trustee.

40. If the trustee become *bankrupt*, the loss may be proved against his estate (*c*), and without proceeding in equity to establish the breach of trust (*d*). If interest would have been decreed in equity against the trustee himself, it will constitute part of the debt in the proof against his estate in the hands of his trustee in bankruptcy (*e*), and if the breach of trust was *a sale of stock*, the *cestui que trust* may, at his option, prove for the proceeds of the sale, or for the value of the stock at the date of the bankruptcy (*f*), and if a debtor to the trust be bankrupt, and entitled himself to a *reversionary* interest in the debt, the trustee of the settlement may nevertheless prove for the whole debt, without any set-off for the reversionary interest, for if such a set-off were allowed it would diminish what the tenants for life would have to receive (*g*). [If the breach of trust

[(*a*) *Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685, 700.]

[(*b*) *Re Holt*, (1897) 2 Ch. 525; Seton, 6th ed. pp. 1125, 1147, 1153; and see *Molyneux* v. *Fletcher*, (1898) 1 Q. B. 648, 656.]

(*c*) *Keble* v. *Thompson*, 3 B. C. C. 112; *Moons* v. *De Bernales*, 1 Russ. 301; *Dornford* v. *Dornford*, 12 Ves. 127; *Ex parte Shakeshaft*, 3 B. C. C. 197; *Bick* v. *Motley*, 2 M. & K. 312; *Lincoln* v. *Wright*, 4 Beav. 427; [Bankruptcy Act, 1883, s. 37].

(*d*) *Ex parte Norris*, 4 L. R. Ch. App. 280.

(*e*) *Dornford* v. *Dornford*, 12 Ves. 127; *Bick* v. *Motley*, 2 M. & K. 312; *Moons* v. *De Bernales*, 1 Russ. 301.

(*f*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Ex parte Gurner*, 1 M. D. & De G. 497; and see *Ex parte Moody*, 2 Rose, 413; *Ex parte Stuteley*, 1 M. D. & De G. 643.

(*g*) *Ex parte Stone*, 8 L. R. Ch. App. 914.

was an improper investment, and the *cestui que trust* has adopted the investment by entering into a compromise in respect to it, the proof must be for the damages which the trust estate has sustained by reason of the improper investment, namely, the difference between the total sum invested and the assessed value of the amount received under the compromise (*a*).] And if a trustee prove for the whole debt, he may still retain any beneficial interest of the bankrupt in the trust estate by way of lien or set-off in further discharge of the debt (*b*), [for the trustee cannot be allowed by proving in bankruptcy to prejudice the *cestuis que trust* (*c*).] But if an executor, who represents the absolute ownership of the personal estate, and has therefore an absolute power over the debts due to his testator, prove for the whole debt, it is deemed a waiver of any lien which the executor might otherwise have had upon the bankrupt's interest in such personal estate (*d*); and if the bankrupt, in whose hands the trust fund was, be one of the trustees, and indebted to the trust estate, and also have a *present* beneficial interest in the trust, proof cannot be made for the whole amount, but only for the balance, after setting off the bankrupt's beneficial interest against the debt due from him (*e*). [And where a defaulting trustee, who is also a beneficiary, has become bankrupt, and a composition has been paid in respect of the amount misappropriated by him, and the debt due from him has therefore gone, it is not competent for the existing trustees to retain his share to make good the loss to the estate (*f*).

[Where one trustee, debtor to the estate, a bankrupt, but balance due to both trustees on the accounts.]

41. If one of two trustees becomes bankrupt and is a debtor to the trust estate, and a balance is found due to the two trustees in taking their accounts, the balance will not be set off against the debt of the bankrupt trustee to the prejudice of the solvent trustee, but an account will be directed, so as to ascertain how much of the balance is due to the solvent trustee and how much to the bankrupt trustee, and the set-off will be confined to the latter amount (*g*).]

Trustee a partner and lending the trust money to the firm with notice.

42. If the trustee was *one of a bankrupt firm*, to which the trust money had been lent, proof may be made either against the *joint estate* of the firm, or the *separate estate* of the bankrupt

[(*a*) *Re Lake*, (1903) 1 K. B. 439.]

(*b*) *Ex parte Dicken*, Buck, 115.

[(*c*) *Per* Lord Chelmsford, L.C., *Stammers* v. *Elliott*, 3 L. R. Ch. App. 200.]

(*d*) *Stammers* v. *Elliott*, 3 L. R. Ch. App. 195.

(*e*) *Ex parte Turner*, 2 De G. M. & G. 927; *Ex parte Bishop*, 8 L. R. Ch. App. 718.

[(*f*) *Re Sewell*, (1909) 1 Ch. 806.]

[(*g*) *M'Ewan* v. *Crombie*, 25 Ch. D. 175; and see *ante*, p. 788.]

trustee, and of any other of the partners who may have constituted themselves trustees or taken an active part in the breach of trust (*a*); but not [in general] against both the joint and separate estates (*b*). [Where, however, the trust fund was handed by the trustee to his firm for investment, and they misappropriated the fund and became bankrupt, so that there were distinct liabilities, namely, the liability of the firm arising out of the contract entered into or implied when the money was handed to them for investment, and the separate liability of the trustee arising out of the contract entered into or implied when he accepted the trusts, it was held that under Sched. II., Rule 18 of the Bankruptcy Act, 1883, proof might be made against the joint estate of the firm as well as the separate estate of the defaulting trustee (*c*).] If the bankrupt has laid out the trust money on a mortgage, the *cestui que trust* is not put to his election whether he will prove for the debt and abandon the mortgage, or take the mortgage and abandon the debt, but may prove for the debt, and have the benefit of the mortgage also (*d*); and if the trust money had been invested, but improperly, the *cestui que trust* has a right to elect to prove for the money and interest, *or* for the value of the securities and profits (*e*).

Trustee not a partner and lending money to the firm or the partners.

43. If the trustee was *not one of the firm*, but he lent the trust fund to the bankrupt *firm*, proof can be made as for an ordinary debt against the joint estate. If the trustee lent the money, not to the firm, but to *one of the members* of the firm, and the partners had *no notice* of the source from which it came, proof can only be made against the separate estate of the partner who received, though the money may, in fact, have been applied to partnership purposes (*f*). But if the other partners had notice of the source of the money, proof can be made against the joint estate of the firm (*g*), but not, it seems, against the separate estate of each partner (*h*), unless the firm by their

(*a*) *Ex parte Heaton*, Buck, 386; *Ex parte Watson*, 2 V. & B. 414; *Smith* v. *Jameson*, 5 T. R. 601; *Ex parte Bolland*, 1 Mont. & Mac. 315; *Ex parte Poulson*, De Gex, 79; *Ex parte Barnewall*, 6 De G. M. & G. 801.

(*b*) *Ex parte Barnewall*, 6 De G. M. & G. 795.

[(*c*) *Re Parkers*, 19 Q. B. D. 84.]

(*d*) *Ex parte Biddulph*, 3 De G. & Sm. 587; *Ex parte Geaves*, 8 De G. M. & G. 291; 25 L. J. N.S. Bank. 53.

(*e*) *Re Montefiore*, 9 Jur. 562.

(*f*) *Ex parte Apsey*, 3 B. C. C. 265; *Ex parte Wheatley*, Cooke's Bankrupt Law, 534, 8th ed.

(*g*) *Ex parte Peele*, 6 Ves. 603; *Ex parte Clowes*, 2 B. C. C. 595; and see *Ex parte Burton*, 3 M. D. & De G. 364; *Ex parte Bolland*, 1 Mont. & Mac. 315.

(*h*) *Ex parte Beilby*, 1 Gl. & J. 167; and see *Ex parte Burton*, 3 M. D. & De G. 364; *Ex parte Woodin*, 3 M. D. & De G. 399; [and the provisions of the Partnership Act, 1890, referred to *ante*, p. 1155].

dealings with the *cestuis que trust* constituted themselves trustees *directly* for them (*a*). Nor can proof be made, on the mere ground of *notice*, for the *profits* made by the *use* of the money; for the partners in the firm are regarded not as *actual* but only as *constructive* trustees, that is, having notice of the trust, they are accountable for the money, but not being clothed with any special duty, they do not come within the rule that "a trustee shall not profit by his trust" (*b*).

Apportionment between tenant for life and remaindermen of amount recovered from bankrupt trustee.

44. It was held by Lord Romilly, M.R., that where a trustee had proved against a bankrupt's estate for 6,985*l.* 19s. 7d. *principal* money made away with by the bankrupt, and for 2,744*l.* 9s. 11d. *interest* (which should have been paid to the tenant for life), making together a sum total of 9,730*l.* 9s. 6d., all dividends received under the bankruptcy should first make up the lost capital, and that the tenant for life had no lien for his lost income, but was entitled only to the interest of the capital sums received by way of dividend under the bankruptcy (*c*). The natural course would have been to apportion the fund as between the tenant for life and remaindermen according to their respective losses, as otherwise it would work occasionally a great hardship. Suppose, for instance, the tenant for life, though entitled for the last ten years, had received nothing, and then died before the dividend was paid. The whole would go to the remainderman, and the executor of the tenant for life would receive nothing, though a large part of the dividend was recovered in respect of the life estate (*d*).

Since these remarks were written, the case has in effect been overruled. In *Cox* v. *Cox* (*e*), A. covenanted on his marriage that his executors, within three months after his death, should pay to the trustees a sum of 6,000*l.* with interest, from his death, at 4 per cent., to be held in trust for his widow for life, with remainder to the children. A. died in 1862, and his estate was administered by the Court. The assets were insufficient to satisfy the principal and interest, and the question was, how the amount recovered was to be dealt with as between the tenant for life and the remainderman, and V. C. Sir W. James said: "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his

(*a*) *Ex parte Woodin*, 3 M. D. & De G. 399.

(*b*) *Stroud* v. *Gwyer*, 28 Beav. 130, see 141; and see *Ex parte Burton*, 3 M. D. & De G. 364.

(*c*) *Re Grabowski's Settlement*, 6 L. R. Eq. 12.

(*d*) See *Innes* v. *Mitchell*, 1 Ph. 710, and *Turner* v. *Newport*, 2 Ph. 14, which were not cited to M.R.

(*e*) 8 L. R. Eq. 343; and see *Re Tinkler's Estate*, 20 L. R. Eq. 456.

estate and interest than the other suffers from the default of the obligor. Assuming that 5,500*l.* is the sum that will be recovered, a calculation must be made back, What principal, if invested on the day of the obligor's death (the date from which the interest was to run) at 4 per cent. (*a*), would amount with interest to the sum so recovered? Interest at 4 per cent. on this principal, or in other words the difference between the principal and the amount, will then go to the tenant for life, and the rest must be treated as principal."

[Of proceeds of sale of mortgaged property.]

[In cases of this description two different modes of apportionment have been adopted by different judges. In the case of *Re Moore*, where money had been properly invested upon mortgage, but the interest fell into arrear, the mortgaged property was ultimately realised, and the proceeds being insufficient to pay the principal and interest, it was held that the proceeds were apportionable between capital and income in the ratios of the capital sum originally invested and the actual arrears of simple interest on the mortgage (*b*). The principle of this decision has been subsequently followed (*c*); and has recently been approved by the Court of Appeal (*d*). On the other hand, in the case of *Re Foster* (*e*), it was held that the proceeds of realisation of the mortgaged property ought to be added to the amount of the moneys received by the tenant for life, and that this aggregate fund ought to be divided between the tenant for life and remainderman in proportion to the amounts which they ought to have received if the security had been sufficient—the tenant for life giving credit for what he had actually received; and in a recent case where the loss arose in respect of an unauthorised investment made in breach of trust, it was held that the case must be treated on the footing that there ought now to be a specified sum of consuls in settlement, and accordingly that the tenant for life was entitled to such a proportion of the amount realised by the unauthorised investment added to the income he received therefrom during its continuance, as the dividends he would have received from the authorised investment during the same period bore to the capital value of the authorised investment added to those dividends, the tenant for life being liable to bring

[(*a*) As to the rate of interest, see *ante*, p. 397.]

[(*b*) *Re Moore*, 54 L. J. N.S. Ch. 432, *per* Pearson, J.]

[(*c*) See *Re Barker*, W.N. (1897) 154, *per* Stirling, J.; *Lyon* v. *Mitchell*, W.N. (1899) 27, *per* North, J.; *Re Alston*, (1901) 2 Ch. 584, *per* Kekewich, J.; *Stewart* v. *Kingsale*, (1902) 1 I. R. 496, *per* M. R. of Ireland.]

[(*d*) *Re Atkinson*, (1904) 2 Ch. (C.A.) 160.]

[(*e*) 45 Ch. D. 629, *per* Kay, J.]

into account all income he received from the unauthorised investment, although not liable to refund (*a*). In a subsequent case a question arose as to the date from which the account should be taken. The full income had been paid to the deceased tenant for life, although it was then known that the security was insufficient, and it was held that the account ought to be taken from the date when it was first ascertained that the security was insufficient, to the date of realisation, the result being that the estate of the deceased tenant for life would not get anything, inasmuch as the apportioned sum would be less than the amount she had received (*b*).

Where a will contained a provision that no property not actually producing income should entitle any party to the receipt of income, it was held that, as this clause was intended for the protection of the remaindermen, and not to take from the tenant for life that which according to the rules of the Court was income, a sum arising from the realisation of a security for a debt, in respect of which no interest had been paid, and which sum was less than the capital amount of the debt, ought to be apportioned between capital and income in the proportions of what was due in respect of capital and what was due in respect of income (*c*).]

How far trust debt barred by the bankrupt's certificate.

45. The original trust debt was formerly barred by the certificate of the bankrupt, though no proof was made, and the *cestui que trust* did not know of the misapplication of the trust fund (*d*). But it was the duty of the trustee to see that *some person* proved on behalf of the trust, and if he did not, he was liable in equity for this neglect of duty: and, though he had obtained his certificate, he was held responsible personally for the amount that might have been received by way of dividend (*e*). And a demand in respect of a breach of trust was held to be equally barred by the trustee's discharge under the Insolvent Acts, provided the liability was duly mentioned in the schedule (*f*).

Proof where one of several trustees is bankrupt.

46. If the bankrupt was one of two *co-trustees*, who were jointly implicated in a breach of trust, then proof may be made against the bankrupt's estate for the whole money lost, though he was not the party benefited by the breach of trust (*g*); and though the other trustee be living and solvent (*h*); or, at the same time that

[(*a*) *Re Bird*, (1901) 1 Ch. 916.]

[(*b*) *Re Phillimore*, (1903) 1 Ch. 942.]

[(*c*) *Re Hubbuck*, (1896) 1 Ch. (C.A.) 754; *Re Lewis*, (1907) 2 Ch. 296; for form of order see Seton, 6th ed. p. 1686.]

(*d*) *Ex parte Holt*, 1 Deac. 248.

(*e*) *Orrett* v. *Corser*, 21 Beav. 52; and see *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 521.

(*f*) *Thompson* v. *Finch*, 22 Beav. 316; on appeal, 8 De G. M. & G. 560.

(*g*) *Ex parte Shakeshaft*, 3 B. C. C. 197.

(*h*) *Ex parte Beilby*, 1 Gl. & J. 167.

proof is made against the estate of one who is a bankrupt, legal proceedings may be taken against the solvent trustee, for *proof* under a bankruptcy is not *payment* (*a*). And the proof against the bankrupt will not be precluded by a *bond* given not to sue the other trustee, reserving the right against all other parties (*b*), though [an absolute or unqualified] *release* to the other trustee, being an extinguishment of the debt, would prevent any subsequent proof (*c*).

Contribution.

47. Where the whole debt is proved against the estate of the bankrupt trustee, the trustee in bankruptcy may afterwards take proceedings, and compel contribution from the other trustee (*d*), even where the bankrupt trustee himself could not, from his fraudulent conduct, have obtained such relief (*e*).

Co-trustees bankrupts.

48. So if two co-trustees be bankrupts, proof may be made against the estate of each (*f*); but of course more than 20*s.* in the pound cannot be received in the whole.

Trust money authorised to be employed in trade.

49. Where a testator has *authorised the employment of his estate in trade*, if the firm in which it was employed become bankrupt, proof cannot be made against the estate of the bankrupts in respect of the money so employed; for it is not a debt of the firm, but merely capital brought into it: but, when the joint creditors have been satisfied, the trustee member of the firm may, as one of the partners, establish a balance, if there be one, against the separate estates of the co-partners (*g*).

32 & 33 Vict. c. 71.

50. Under the Bankruptcy Act, 1869 (*h*), a bankrupt after, and notwithstanding his order of discharge, remained liable to his *cestui que trust* for a breach of trust. [The enactment was held to apply to the breach of a constructive trust as well as to that of an express trust (*i*), and the liability of a defaulting trustee to contribute, where his co-trustee had made good a breach of trust, was a "liability incurred by means of a breach of trust" within the Act, from which the bankrupt trustee was not released by the discharge (*j*).

(*a*) *Ex parte King*, 1 Deac. 164, &c.

(*b*) *Ex parte King*, 1 Deac. 164, &c.

(*c*) See *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 479; [*Re E. W. A.*, (1901) 2 K. B. 642; distinguishing *Ex parte Good*, 5 Ch. D. 46].

(*d*) See *Ex parte Shakeshaft*, 3 B. C. C. 197; *Lingard* v. *Bromley*, 1 V. & B. 114; [*Chillingworth* v. *Chambers*, (1896) 1 Ch. (C.A.) 685; *Robinson* v. *Harkin*, (1896) 2 Ch. 415].

(*e*) See *Muckleston* v. *Brown*, 6 Ves. 68; *Joy* v. *Campbell*, 1 Sch. & Lef. 335, 339; *Ottley* v. *Browne*, 1 B. & B. 360.

(*f*) *Keble* v. *Thompson*, 3 B. C. C. 112; *Ex parte Poulson*, De Gex, 79.

(*g*) *Scott* v. *Izon*, 34 Beav. 434; and see *M'Niellie* v. *Acton*, 2 Eq. Rep. 21.

(*h*) 32 & 33 Vict. c. 71, s. 49.

[(*i*) *Emma Silver Mining Company* v. *Grant*, 17 Ch. D. 122.]

[(*j*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.]

But now under the Bankruptcy Act, 1883 (*a*), the liability of a bankrupt to his *cestui que trust* continues after his discharge only in cases where the breach of trust is *fraudulent*. Costs which a trustee is ordered to pay in an action relating to a fraudulent breach of trust by him, though consequential on his breach of trust, are not "a debt or liability incurred by means of any fraudulent breach of trust" within the meaning of sect. 30, sub-sect. 1 of the Act of 1883 (*b*). [46 & 47 Vict. c. 52.]

In *Cobham* v. *Dalton* (*c*), it was held under the Act of 1869 (*d*), that as a breach of trust gives rise to a debt which may be proved for in the bankruptcy of the trustee, a defaulting trustee was protected against all proceedings for the breach of trust until after his discharge, but it has recently been observed in the Court of Appeal that, in arriving at this conclusion, the Court overlooked the punitive character of sect. 4 of the Debtors Act, 1869 (*e*), and it was held, under the corresponding provision of the Act of 1883 (*f*), that the Court has jurisdiction to order a writ of attachment to issue against a defaulting trustee notwithstanding his bankruptcy (*g*).]

Imprisonment under Debtors Act, 1869.

51. The Debtors Act, 1869 (*h*), abolishes arrest and imprisonment for debt, but excepts, amongst other things, default by a trustee or person acting in a fiduciary capacity (*i*), and ordered to pay by a Court of Equity (*j*) any sum *in his possession or under his control*. [A trustee who has once had trust funds in his possession is treated by a Court of Equity as still having

[(*a*) 46 & 47 Vict. c. 52, s. 30.]

[(*b*) *Re Greer*, (1895) 2 Ch. 217. Mere negligence by a trustee by reason whereof his co-trustee is enabled to appropriate trust money is not a fraudulent breach of trust; *Re Smith*, (1893) 2 Ch. (C.A.) 1, see *infra*.]

[(*c*) 10 L. R. Ch. App. 655; and see *Emma Silver Mining Company* v. *Grant*, 17 Ch. D. 122; *Cooper* v. *Prichard*, 11 Q. B. D. (C.A.) 351; *Nowell* v. *Nowell*, W. N. 1876, p. 248.]

[(*d*) 32 & 33 Vict. c. 71, s. 12.]

[(*e*) See *infra*.]

[(*f*) 46 & 47 Vict. c. 52, s. 9.]

[(*g*) *Re Smith*, (1893) 2 Ch. (C.A.) 1.]

(*h*) 32 & 33 Vict. c. 62, s. 4.

[(*i*) The term "person acting in a fiduciary capacity" means a person standing in a fiduciary relation towards any other person, whether such other person is, or is not, the plaintiff or one of the plaintiffs in the action in which the order for payment has been made; *Marris* v. *Ingram*, 13 Ch. D. 338. An auctioneer is within the term as to the proceeds of the sale of property received by him; *Crowther* v. *Elgood*, 34 Ch. D. (C.A.) 691; and so is the London agent of a country solicitor who has been ordered to pay money into court in an action against him for an account of his agency; *Lichfield* v. *Jones*, 36 Ch. D. 530 (and see *Re Hickey*, 35 W. R. 53); and a receiver, notwithstanding he has been discharged; *Re Gent*, 40 Ch. D. 196; but the term is not applicable to the case of a partner who receives assets of the firm on account of himself and his co-partners; *Piddocke* v. *Burt*, (1894) 1 Ch. 343.]

[(*j*) Under s. 76 of the Judicature Act, 1873, the words "the High Court of Justice" should be read in substitution for the words "a Court of Equity"; *Marris* v. *Ingram*, 13 Ch. D. 338.]

them in his possession until he has properly discharged himself, and it is not necessary, to bring a trustee within the exception, that he should have the trust funds in his actual possession, or under his control, at the time when the order is made. Thus if an order be made upon a trustee to repay a sum which he had previously misappropriated and spent, he may be attached for neglecting to obey the order (*a*), and it makes no difference that the trustee has ceased to be a trustee in the interval between the commission of the wrongful act and the making of the order for payment (*b*). An executor, who is a debtor to his testator's estate, is deemed in equity to have paid the debt to himself as executor, and to have the money in his possession in a fiduciary character as assets; and where an order for payment is made against him in an administration action, he is liable to attachment for disobedience; but the Court in its discretion will not make an order for attachment against him if his conduct is free from all moral blame (*c*). So where two trustees, A. and B., received a sum of money and placed it in a bank to their joint account, but made payable to the cheque of A. alone, who drew it out and misapplied it, and thereupon B. was ordered in a suit to make it good, it was held that B. on non-payment was liable to be attached and sent to prison (*d*). And a debtor who has admitted that a sum of money due from him is in his hands, and has submitted to an order directing that he holds such sum upon certain trusts, is liable to attachment (*e*); and in the case of an administratrix, the fact that she is a married woman will not protect her, the order against her being personal in respect of her office (*f*). But it must be shown that the money has been in the trustee's possession or under his control, and therefore] a trustee who had been ordered to pay a sum of money which he had *neglected* only in breach of his duty to recover, was held not to fall within the exception, and could not therefore be arrested and imprisoned (*g*); [and where an order directed payment of a sum composed of principal and interest, not distinguished, no attachment could be issued, because so much as represented interest could not be said to have been in the possession or under the control of the

[(*a*) *Middleton* v. *Chichester*, 6 L. R. Ch. App. 152; *Marris* v. *Ingram*, 13 Ch. D. 338; *Re Knowles*, 52 L. J. N.S. Ch. 685; 48 L. T. N.S. 760; *Re Smith*, (1893) 2 Ch. (C.A.) 1.]

[(*b*) *Re Strong*, 32 Ch. D. (C.A.) 342.]

[(*c*) *Re Bourne*, (1906) 1 Ch. (C.A.) 697.]

[(*d*) *Evans* v. *Bear*, 10 L. R. Ch. App. 76.]

[(*e*) *Preston* v. *Etherington*, 37 Ch. D. (C.A.) 104.]

[(*f*) *Re Turnbull*, (1900) 1 Ch. 180.]

(*g*) *Ferguson* v. *Ferguson*, 10 L. R. Ch. App. 661.

trustee (*a*); and for the like reason an attachment never goes in respect of costs given against a trustee (*b*); and there must be evidence showing that the money has been actually received, a mere constructive receipt not being sufficient (*c*); and so where the order was for payment of the existing market value of lands improperly sold, as the difference between such value and the amount produced by the sale never came to the trustee's hands (*d*).

[Trustee becoming bankrupt.]

Where a trustee disobeyed an order to pay money into Court and was afterwards bankrupt, it was held that sect. 9 of the Bankruptcy Act, 1883, providing that, after the making of a receiving order, no creditor shall have any remedy against the person or property of the debtor, applied so as to suspend the jurisdiction of the Court to order attachment to issue against him (*e*); but in a more recent case Chitty, J., declined to follow this decision, and held that, the proceeding being not merely civil, but of a punitive and disciplinary character, the Bankruptcy Act had not taken away the jurisdiction (*f*); and this view has since been upheld by the Court of Appeal in the case already referred to (*g*).

[Release of debtor.]

The jurisdiction being punitive, there cannot be a second punishment for the same offence, and therefore if the debtor is by mistake released before the expiration of the year, a second order for attachment for the same default cannot be made, though perhaps an order for re-arrest might be made under the original order for attachment (*h*).

[Form of judgment.]

A judgment that the plaintiff "do recover" from the defendant a sum of money, and not in the usual form for payment of the money to the plaintiff by the defendant, cannot be followed up by the usual four-day order fixing a time for payment (*i*).

[Service on debtor.]

A writ of attachment against a trustee, for disobedience to an order directing him to pay money into Court, will not be granted unless the order has been personally served upon him, or it is shown to the satisfaction of the Court that he is evading service (*j*).

[(*a*) *Re Hickey*, 55 L. T. N.S. 588; 35 W. R. 53; and see Seton, 6th ed. pp. 200, 441.]

[(*b*) *Re Greer*, (1895) 2 Ch. 217, 222, *per* Chitty, J.]

[(*c*) *Re Fewster*, (1901) 1 Ch. 447, where a master's certificate founded on an affidavit by defendants setting forth an account of the personal estate come to their hands, &c., "or to the hands of any person or persons by their order, &c.," was held insufficient; and see *Re Wilkins*, W.N. (1901) 202.]

[(*d*) *Re Walker*, 38 W. R. 766; 60 L. J. N.S. Ch. 25; 63 L. T. N.S. 237; and see *Cronin* v. *Twinberrow*, W. N. 1887, p. 201.]

[(*e*) *Re Simes*, 38 W. R. 570; 62 L. T. N.S. 721.]

[(*f*) *Re Edge*, 63 L. T. N.S. 762, following *Re Wray*, 37 Ch. D. 138, 143.]

[(*g*) *Re Smith*, (1893) 2 Ch. (C.A.) 1, see *ante*, p. 1192.]

[(*h*) *Church's Trustee* v. *Hibbard*, (1902) 2 Ch. (C.A.) 784.]

[(*i*) *Re Oddy*, (1906) 1 Ch. (C.A.) 93.]

[(*j*) *Re Tuck*, (1906) 1 Ch. (C.A.) 692.]

[Debtors Act, 1878.]

52. By the Debtors Act, 1878 (41 & 42 Vict. c. 54), the Court is empowered among other things "to inquire into the case of a defaulting trustee, and to grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process, or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder." Under this section the Court has refused to issue a writ of attachment against a defaulting trustee, where it appeared that he was unable to pay, and that no good purpose could be served by sending him to prison (*a*). But as the Debtors Act, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, was intended for the *punishment* of a fraudulent or dishonest debtor, and as it was not intended by the Act of 1878 to get rid of the penal clauses of the previous Act, but only to give the judges a judicial discretion to deal with exceptional cases, the Court ought, in the case of a dishonest debtor, to send him to prison, unless it is satisfied that he has no means of satisfying the debt (*b*); and in a recent case in which the Court was not satisfied that the debtor was unable to pay, Kay, J., observed: "I think that this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, even though he is unable to pay, and for the purpose of teaching other trustees the same lesson" (*c*).

But where there had been no actual fraud or embezzlement, but only an erroneous application of the trust funds, the Court, upon the trustee undertaking to execute a charge upon all the property to which he was or might become entitled, declined to attach him for having failed to comply with an order for payment of the trust fund into Court (*d*); and where the defaulting trustee had not been guilty of any dishonesty, and the moneys appeared to have been applied on behalf of the *cestui que trust*, under a mistaken view, in payment of debts of a class which were not within the terms of the trust, the Court exercised its discretion in favour of the trustee (*e*); and so where the trustee had merely

[(*a*) *Street* v. *Hope*, 10 Ch. D. 286, n.; *Barrett* v. *Hammond*, 10 Ch. D. 285.]

[(*b*) *Marris* v. *Ingram*, 13 Ch. D. 338.]

[(*c*) *Re Knowles*, 52 L. J. N.S. Ch. 685; 48 L. T. N.S. 760.]

[(*d*) *Holroyde* v. *Garnett*, 20 Ch. D. 532.]

[(*e*) *Earl of Aylesford* v. *Earl Poulett*, (1892) 2 Ch. 60, 63, where it was considered open to question whether the defendant, as a peer, was privileged from arrest.]

been guilty of negligence in trusting too much to a dishonest co-trustee, but was not himself guilty of any dishonesty (*a*).]

In assigning to the *cestui que trust* the foregoing remedies against the trustee, it must be understood that the *cestui que trust* has not himself *concurred* in the breach of duty, or subsequently *acquiesced* in it, and, *a fortiori*, has not executed a formal *release* or *confirmation*.

I. *Of concurrence.*

Concurrence of the *cestui que trust* in the breach of trust.

1. If a *cestui que trust concur* in the breach of trust, he is for ever estopped from proceeding against the trustee for the consequences of the act (*b*), [whether he did or did not derive benefit by the breach (*c*)], and *a fortiori*, a *cestui que trust*, who is also a trustee, cannot hold his co-trustee responsible for any act in which they both joined (*d*).

Ignorance.

2. But persons cannot be held to have concurred in a breach of trust who had not the means of knowing that the acts to which they were parties involved a breach of trust (*e*).

Femes covert and infants cannot concur.

3. And persons cannot *concur* in a breach of trust, who, as *femes covert* (*f*) and infants (*g*), have no legal capacity to consent to the transaction.

Except guilty of actual fraud.

4. But neither coverture nor infancy will be a protection from a charge of *fraud*, and therefore if a *feme covert* (*h*) or

[(*a*) *Re Smith*, (1893) 2 Ch. (C.A.) 1.]

(*b*) *Brice* v. *Stokes*, 11 Ves. 319, and *Walker* v. *Symonds*, 3 Sw. 64, *per* Lord Eldon; *Wilkinson* v. *Parry*, 4 Russ. 272; *Cocker* v. *Quayle*, 1 R. & M. 535; *Nail* v. *Punter*, 5 Sim. 555; [*Crichton* v. *Crichton*, (1896) 1 Ch. (C.A.) 870]; *Newman* v. *Jones*, Rep. *t.* Finch, 58; and see *Fellows* v. *Mitchell*, 1 P. W. 81; *Booth* v. *Booth*, 1 Beav. 125; *Langford* v. *Gascoyne*, 11 Ves. 336; *White* v. *White*, 5 Ves. 555; *Re Chertsey Market*, 6 Price, 280, 284; *Baker* v. *Carter*, 1 Y. & C. 255; *Byrchall* v. *Bradford*, 6 Mad. 13; *Morley* v. *Lord Hawke*, cited in *Small* v. *Attwood*, 2 Y. & J. 520; *Fyler* v. *Fyler*, 3 Beav. 550; *Griffiths* v. *Porter*, 25 Beav. 236; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74; *Ex parte Barnewall*, 6 De G. M. & G. 801; [*Evans* v. *Benyon*, 37 Ch. D. (C.A.) 329; *Chillingworth* v. *Chambers*, (1896) 1 Ch. 685; *Crichton* v. *Crichton*, *ubi sup.*].

[(*c*) *Fletcher* v. *Collis*, (1905) 2 Ch. (C.A.) 24.]

(*d*) *Butler* v. *Carter*, 5 L. R. Eq. 281, *per Cur.*

(*e*) *Buckeridge* v. *Glasse*, Cr. & Ph. 135, *per* Lord Cottenham; [and see *Crichton* v. *Crichton*, (1896) 1 Ch. (C.A.) 870].

(*f*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 80; *Underwood* v. *Stevens*, 1 Mer. 717; *Smith* v. *French*, 2 Atk. 243; *Needler's case*, Hob. 225; *Lench* v. *Lench*, 10 Ves. 517, *per* Sir W. Grant; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 639, 640, *per* Lord Eldon; and see *Parkes* v. *White*, 11 Ves. 221; *Bateman* v. *Davis*, 3 Mad. 98; *Creswell* v. *Dewell*, 4 Giff. 460; and see *ante*, p. 1180.

(*g*) See *ante*, pp. 37, 38; and *Wilkinson* v. *Parry*, 4 Russ. 276.

(*h*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 82, *per* Lord Hardwicke; and see *Savage* v. *Foster*, 9 Mod. 35; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 640; *Vandebende* v. *Levingston*, 3 Sw. 625; *Evans* v. *Bicknell*, 6 Ves. 181; *Jones* v. *Kearney*, 1 Dru.

infant (*a*), *draw in* a trustee to commit a breach of trust, such *feme covert* or infant cannot afterwards call the trustee to account for having violated his duty.

Separate use.

5. A *feme covert* will be bound by her concurrence in a breach of trust as to any fund which is settled to her *separate use* where there is no *restraint against anticipation* (*b*), and such *feme covert*, if she execute a deed, will not be allowed to controvert the statements of facts contained in the deed (*c*). But she will not be estopped upon the ground of concurrence where the act was not voluntary, but her judgment was misled, or she was under undue influence (*d*). And [independently of the provisions of sect. 45 of the Trustee Act, 1893, already considered (*e*)], a *feme covert* has no power to concur in any act as to a fund settled to her separate use, where there is a *restraint against anticipation* (*f*).

Power of appointment.

And her concurrence will not operate beyond the interest settled to her separate use, though she have a *power of appointment* in addition; as if a *feme* be tenant for life to her separate use, with a power of appointing the *corpus* by *will*, though her concurrence would affect the life interest, it does not prevent the appointees under the will from holding the trustees responsible (*g*). [But if the trustees, by reason of any engagement entered into by the *feme covert*, have a right to be indemnified out of her estate, they may, in accordance with the decisions already referred to (*h*), be entitled to resort to the appointed fund as part of the *feme's* assets for their indemnity (*i*).]

II. *Of acquiescence.*

Acquiescence of *cestui que trust.*

1. Again, a *cestui que trust*, though he did not *concur* at the

& War. 166; *Davies* v. *Hodgson*, 25 Beav. 187; *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35; *Re Lush's Trusts*, 4 L. R. Ch. App. 591; *Green* v. *Lyon*, 21 W. R. 695, reversed on the facts, Ib. 830; *Arnold* v. *Woodhams*, 16 L. R. Eq. 33, *per Cur.*; [*Cahill* v. *Cahill*, 8 App. Cas. 437; see *S. C.*, *nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361].

(*a*) See the cases *ante*, p. 40, note (*e*).

(*b*) See *ante*, pp. 985, 986, 1180.

(*c*) *Keays* v. *Lane*, 3 Ir. R. Eq. 8, *per Cur.*

(*d*) *Whistler* v. *Newman*, 4 Ves. 129; *Hughes* v. *Wells*, 9 Hare, 773; and see *Walker* v. *Shore*, 19 Ves. 393.

[(*e*) See *ante*, pp. 1182 *et seq.*]

(*f*) *Cocker* v. *Quayle*, 1 R. & M. 535; *Walrond* v. *Walrond*, Johns. 24; *Leedham* v. *Chawner*, 4 K. & J. 465; *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *M'Gill*, 8 W. R. 290; *Fletcher* v. *Green*, 33 Beav. 426; *Arnold* v. *Woodhams*, 16 L. R. Eq. 29; [*Stanley* v. *Stanley*, 7 Ch. D. 589; *Heath* v. *Wickham*, 3 L. R. Ir. 376; 5 L. R. Ir. 285; *Lady Bateman* v. *Faber*, (1897) 2 Ch. 223; (1898) 1 Ch. (C.A.) 144;] and see *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156; *Derbishire* v. *Home*, 3 De G. M. & G. 102, 113.

(*g*) *Kellaway* v. *Johnson*, 5 Beav. 319.

[(*h*) *Ante*, pp. 996 *et seq.*, 1180.]

[(*i*) See *Williams* v. *Lomas*, 16 Beav. 1.]

time, may debar himself from relief by having *acquiesced* (*a*) in the breach of trust subsequently (*b*).

Whether mere knowledge and abstinence from suing a bar in cases of breach of trust.

2. How far the *mere knowledge* of a right to sue in respect of a breach of trust, and the abstaining from suing will, without any other act, constitute *laches* in the eye of a Court of Equity, and disentitle the plaintiff to relief, as in the particular instances of purchases by trustees, &c., above referred to (*c*), was formerly very uncertain; but it seems to be now settled that gross *laches*, as for twenty years, will disentitle a *cestui que trust* to relief (*d*). But of course mere knowledge without suing for a few years, as for three years (*e*), [four years (*f*),] ten years (*g*), [or twelve years (*h*),] will not destroy the right to impeach the transaction. And where there is an express trust for *successive incumbrancers* on a limited interest, as a life estate, the subsequent incumbrancers are not chargeable with *laches* so long as the whole beneficial interest is absorbed by the prior incumbrancers (*i*).

No bar where notice of breach of trust is constructive only.

3. A *cestui que trust*, who does not actually know, is not to be affected with knowledge of a breach of trust because he *might by inquiry have ascertained the fact*, for it is not *his* duty but that of the trustee to see that the trust fund is in a proper state (*j*).

Ward of Court.

4. A settlement by a ward of Court, under the direction of the Court, of funds stated to represent the *infant's fortune*, will not operate as a confirmation of past breaches of trust (*k*).

Fluctuating body, as parishioners or creditors.

5. It seems that a public and fluctuating body, as *parishioners*, may be bound by acquiescence (*l*). But it is almost unnecessary

[(*a*) As to the meaning of acquiescence, see *ante*, pp. 1119, 1120.]

(*b*) *Harden* v. *Parsons*, 1 Eden, 145; *Thompson* v. *Finch*, 22 Beav. 324, *per* M.R.; *Griffiths* v. *Porter*, 25 Beav. 241, *per* M.R.; *Walker* v. *Symonds*, 3 Sw. 63, *per* Lord Eldon; *Hope* v. *Liddell*, 21 Beav. 183; *Brice* v. *Stokes*, 11 Ves. 326; *Macdonnell* v. *Harding*, 7 Sim. 190; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Lincoln* v. *Wright*, 4 Beav. 432; *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459; *Farrant* v. *Blanchford*, 1 De G. J. & S. 107; *Rutherfoord* v. *Maziere*, 13 Ir. Ch. Rep. 204; *Stevens* v. *Robertson*, 37 L. J. N.S. Ch. 499; *Sleeman* v. *Wilson*, 13 L. R. Eq. 36; *Philips* v. *Pennefather*, 8 I. R. Eq. 474; [*Re Hulkes*, 33 Ch. D. 552].

(*c*) See *ante*, pp. 576 *et seq.*

(*d*) *Bright* v. *Legerton* (No. 1), 29 Beav. 60; 2 De G. F. & J. 606; *Hodgson* v. *Bibby*, 32 Beav. 221; and see *Browne* v. *Cross*, 14 Beav. 105; *Payne* v. *Evens*, 18 L. R. Eq. 356; *Re M'Kenna*, 13 Ir. Ch. Rep. 239; *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175. But see *Knight* v. *Bowyer*, 2 De G. & J. 443; [*Thomson* v. *Eastwood*, 2 App. Cas. 215].

(*e*) *Hanchett* v. *Briscoe*, 22 Beav. 496.

[(*f*) *Re Jackson*, 44 L. T. N.S. 467.]

(*g*) *Farrant* v. *Blanchford*, 11 W. R. 178; [*Re Cross*, 20 Ch. D. (C.A.) 109].

[(*h*) *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. (C.A.) 196.]

(*i*) *Knight* v. *Bowyer*, 2 De G. & J. 421, see 443.

(*j*) *Thompson* v. *Finch*, 22 Beav. 325-327; 8 De G. M. & G. 560; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 73.

(*k*) *Zambaco* v. *Cassavetti*, 11 L. R. Eq. 439.

(*l*) See *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 92; *Re*

to repeat, that acquiescence cannot be objected against a class of persons, as parishioners or creditors, *with the same degree of force* as against a single individual (*a*).

Satisfaction in part for a breach of trust.

6. A *cestui que trust* who, knowing that his trustee has committed a breach of trust, gets what he can from the wreck of the property, and with that view receives from the trustee *part* of the relief to which he is entitled, does not thereby *waive his right to the full* relief to which he is entitled (*b*).

[Creditor's right not affected by not pressing for payment.]

[7. A creditor who merely abstains from calling upon the executors to realise the testator's estate for the purpose of paying his debt is not thereby deprived of his right to sue the executors for *devastavit*. To deprive him of his right, he must, either by his conduct or by express authority, have misled the executors into parting with the assets available for payment of his claim (*c*).]

Acquiescence by reversioner.

8. As to acquiescence by a *cestui que trust* while his interest is *reversionary*, L.J. Turner observed: "Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not distinct propositions. They constitute but one proposition, and that proposition is that the *cestui que trust assented to the breach of trust*. A *cestui que trust* whose interest is reversionary is not bound to *assert his title* until it comes into possession; but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of *assent to a breach of trust*. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case" (*d*). But he afterwards added that he was not prepared to say that, where the trust was definite and clear, a breach of trust could be held to have been sanctioned or concerned in by the *mere knowledge and non-interference* of the *cestui que trust* before his interest had come into possession (*e*). The above doctrines were approved by L. C. Campbell, with the further remark that it

Chertsey Market, 6 Price, 280, 284; *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 108; *Attorney-General* v. *Scott*, 1 Ves. 415; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 150.

(*a*) See *ante*, pp. 584, 1116.

(*b*) *Thompson* v. *Finch*, 22 Beav. 316; 8 De G. M. & G. 560; [*Re Cross*, 20 Ch. D. (C.A.) 109, 122].

[(*c*) *Re Birch*, 27 Ch. D. 622.]

(*d*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 72.

(*e*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74.

was easy to conceive cases in which, from great lapse of time, the facts from which the consent of the *cestui que trust* was to be inferred might and ought to be presumed (*a*).

[And where a trustee misappropriated a fund of consols, and applied it in discharge of a debt of his own which bore interest at 5 per cent., paid interest at that rate to the tenant for life (who made no claim against him), and subsequently restored the capital in full, it was held that he had discharged himself, and that the *cestuis que trust* in remainder were not entitled to attribute to capital the excess of interest over the amount which would have been produced if the fund had been invested in authorised securities (*b*).] [Restitution as affecting reversioners.]

III. *Of Release and Confirmation.*

1. Lastly, a *cestui que trust* may preclude himself from his remedy against the trustee by executing a formal *release* of the breach of trust, or giving validity to the transaction by an express *confirmation* (*c*). And if the *cestui que trust* release the principal in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been secondarily liable (*d*). Release and confirmation by *cestui que trust.*

[But a release in respect of a transaction which a Court of Equity would hold to be not merely avoidable but *void*, will not bind the *cestui que trust* executing the release. Thus where on the footing of a supposed illegitimacy the title of the *cestui que trust* to a legacy was disputed and denied by the trustee, and the *cestui que trust* was thereby induced to accept from the trustee a smaller sum than that to which he was entitled, and by deed to release the trustee from the payment of the legacy, it was held that, the question of the legitimacy of the *cestui que trust* being entirely irrelevant, the transaction was absolutely unmeaning and void, and the release was set aside and relief granted after a long lapse of time (*e*).] [Release in respect of a void transaction invalid.]

2. Under the head of release, we may notice the subject of *waiver*. "As to *waiver*," said Sir W. Grant, "it is difficult to say precisely what is meant by that term. With reference to Waiver.

(*a*) Ib. 77; and see *Taylor* v. *Cartwright*, 14 L. R. Eq. 176.

[(*b*) *Slade* v. *Chaine*, (1908) 1 Ch. (C.A.) 522.]

(*c*) *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459; *French* v. *Hobson*, 9 Ves. 103; *Wilkinson* v. *Parry*, 4 Russ. 272; *Aylwin* v. *Bray*, cited in *Small* v. *Attwood*, 2 Y. & J. 517; *Cresswell* v. *Dewell*, 4 Giff. 465, *per Cur.*

(*d*) *Thompson* v. *Harrison*, 2 B. C. C. 164; see *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 478.

[(*e*) *Thomson* v. *Eastwood*, 2 App. Cas. 215, 234, 247.]

the legal effect, a *waiver* is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere *waiver* signifies nothing more than an expression of intention not to insist upon the right, which in *equity* will not without consideration bar the right, any more than at *law* an accord without satisfaction would be a plea. If there be a consideration, however slight, I do not know that the Court would not consider it a sufficient foundation for a release, or what is equivalent to a release" (*a*).

It would seem, therefore, that waiver is some positive act which, if supported by valuable consideration, though slight, will be taken in equity to constitute a release; but, if it be merely an expression of intention not to insist on the right, and there is an absence of consideration, it is no waiver in the sense of a release (*b*).

Requisites for valid acquiescence, release, or confirmation.

Acquiescence, and release and confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions :—

a. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant; and, as regards infants, the Court continues its protection even after they have attained twenty-one, till such time as they have acquired all proper information (*c*); and infants on coming of age must, in the case of a formal release being executed by them, *where it is required* have *proper legal advice* (*d*). However, a *feme covert* is clearly *sui juris* as regards property settled to her *separate use*, [or belonging to her as her separate property under the Married Women's Property Acts,] where there is *no restraint against anticipation* (*e*); [and her covenant not to sue may, in some cases,

(*a*) *Stackhouse* v. *Barnston*, 10 Ves. 466.

(*b*) See *Farrant* v. *Blanchford*, 11 W. R. 178.

(*c*) See *Walker* v. *Symonds*, 3 Sw. 69; *Hicks* v. *Hicks*, 3 Atk. 274; *Osmond* v. *Fitzroy*, 3 P. W. 131; *Hylton* v. *Hylton*, 2 Ves. 547; *Kilbee* v. *Sneyd*, 2 Moll. 233; *March* v. *Russell*, 3 M. & Cr. 42, 44; *Bateman* v. *Davis*, 3 Mad. 98; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; *Kay* v. *Smith*, 21 Beav. 522; *Aveline* v. *Melhuish*, 2 De G. J. & S. 288; *Chambers* v. *Crabbe*, 34 Beav. 457; *Sercombe* v. *Sanders*, 34 Beav. 382; *Turner* v. *Collins*, 7 L. R. Ch. App. 329; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15.

(*d*) *Lloyd* v. *Attwood*, 3 De G. & J. 615.

(*e*) See *ante*, p. 974; and *Jones* v. *Higgins*, 2 L. R. Eq. 538; *Taylor* v. *Cartwright*, 14 L. R. Eq. 175. The dictum of Lord Hardwicke in *Smith* v. *French*, 2 Atk. 245, and the view of Sir J. Romilly, M.R., in *Davies* v. *Hodgson*, 25 Beav. 187, are opposed to the current of authority.

have the effect of a release (*a*).] But where a *feme covert* is entitled to separate estate *with a clause against anticipation*, it is difficult to see how she can be affected by acquiescence (*b*). In a case in 1853 (*c*), however, Lord Justice Turner intimated his leaning to be in favour of the affirmative; but the language of Lord Justice Knight Bruce, in the case alluded to, was more guarded. The restraint on anticipation can impose no fetter as respects *income accrued due before the acts of acquiescence* relied upon (*d*). If a suit be instituted for relief against a breach of trust, the *Court* has jurisdiction to *sanction a compromise* on behalf of a married woman even though her interest be *reversionary* (*e*).

β. The *cestui que trust* must be fully cognisant of all the facts and circumstances of the case (*f*); [and if the release is executed by the *cestui que trust* in ignorance of his rights, it may be set aside after the death of the trustee, and after a long interval, as, for instance, twenty years (*g*)].

γ. The *cestui que trust* must not only be acquainted with the *facts*, but also to a certain extent apprised of the *law*, or how those facts would be dealt with if brought before a Court of Equity (*h*).

δ. The release must not be wrung from the *cestui que trust* by distress or terror (*i*).

[(*a*) *Sprange* v. *Lee*, (1908) 1 Ch. 424.]

[(*b*) Though she may be by a consent in writing under s. 45 of the Trustee Act, 1893.; see *ante*, p. 1181.]

(*c*) *Derbishire* v. *Home*, 3 De G. M. & G. 80; and see *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156; *Davies* v. *Hodgson*, 25 Beav. 186, 187; *Clive* v. *Carew*, 1 J. & H. 205; [*Heath* v. *Wickham*, 3 L. R. Ir. 376, 390, where the *dictum* of L. J. Turner was doubted].

(*d*) *Rowley* v. *Unwin*, 2 K. & J. 138; [*Hood Barrs* v. *Heriot*, (1896) A. C. 174].

(*e*) *Wall* v. *Rogers*, 9 L. R. Eq. 58.

(*f*) *Adams* v. *Clifton*, 1 Russ. 297; *Walker* v. *Symonds*, 3 Sw. 1; *Randall* v. *Errington*, 10 Ves. 423; *Buckeridge* v. *Glass*, Cr. & Ph. 126; *Bennett* v. *Colley*, 2 M. & K. 232, *per* Lord Brougham; *Vyvyan* v. *Vyvyan*, 30 Beav. 65; *Eaves* v. *Hickson*, 30 Beav. 142; *Farrant* v. *Blanchford*, 11 W. R. 178; 1 De G. J. & S. 119; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74; *Strange* v. *Fooks*, 4 Giff. 408; and see *Earl of Chesterfield* v. *Janssen*, 2 Ves. 146, 149, 152, 158; *Roche* v. *O'Brien*, 1 B. & B. 339, and the cases there cited; *Bowes* v. *East London Water Works Company*, 3 Mad. 375; *M'Carthy* v. *Decaix*, 2 R. & M. 615; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; *Munch* v. *Cockerell*, 9 Sim. 339; 5 M. & Cr. 179; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Downes* v. *Bullock*, 25 Beav. 62; *Lloyd* v. *Attwood*, 3 De G. & J. 650.

[(*g*) *Re Garnett*, 31 Ch. D. (C.A.) 1.]

(*h*) *Cockerell* v. *Cholmeley*, 1 R. & M. 425, *per* Sir J. Leach; *M'Carthy* v. *Decaix*, 2 R. & M. 615; *Marker* v. *Marker*, 9 Hare, 16; *Burrows* v. *Walls*, 5 De G. M. & G. 254: *Re Saxon Life Assurance Society*, 2 J. & H. 412; *Strange* v. *Fooks*, 4 Giff. 408; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15; but see *Stafford* v. *Stafford*, 1 De G. & J. 202, and the observations at p. 583, *ante*.

(*i*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209, see 226; and see *Earl of Chesterfield* v. *Janssen*, 2 Ves. 149, 158.

SECTION IV

OF THE MODE AND EXTENT OF REDRESS IN BREACHES OF TRUST COMMITTED BY TRUSTEES OF CHARITIES

I. Of the *mode* of redress against trustees of charities.

Ordinary mode of redress in case of breach of trust by charitable trustees.

1. The regular and ordinary course of proceeding is by way of *information* (1), or action in the nature of an information (*a*), in the name of the Attorney-General: the King is *parens patriæ*, and it is the duty of the Crown Officer, the Attorney-General, to see that justice is administered to every part of His Majesty's subjects. *Relators*, joined as co-plaintiffs under the recent practice, need not be personally interested (*b*). They are required merely because the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, and unless some person were made responsible, proceedings might be instituted very oppressive to individuals (*c*).

Statute of Charitable Uses.

2. In the reign of Elizabeth an Act was passed, commonly called the *Statute of Charitable Uses* (*d*), by which the Court of Chancery was empowered to issue commissions to certain persons, including the bishop of the diocese, who were authorised, after summoning a jury of the county where the property was situate, to inquire into any abuse or misapplication of the trust estate. Many of these proceedings were so little consonant with justice, and on appeal to the Lord Chancellor, were found at once so puzzling, and so far from accomplishing the object in view, that at length the practice of issuing commissions fell into disuse, and

[(*a*) See Rules of Court, 1883, Order I., Rule 1.]

(*b*) *Attorney-General* v. *Vivian*, 1 Russ. 226.

(*c*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 48, *per* Lord Redesdale.

(*d*) 43 Eliz. c. 4, [repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42)].

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(1) Where the management of no charity *revenue* is concerned, as in a suit instituted by parishioners for the mere purpose of setting aside the nomination of a clerk to the bishop by the trustees of the advowson, the Attorney-General need not be a party; it is the simple case of *cestuis que trust* calling upon the trustees to exercise the legal right; and [under the old practice] the suit was not by information, but by bill; see *Attorney-General* v. *Parker*, 1 Ves. 43; *S. C.*, 3 Atk. 576; *Attorney-General* v. *Foster*, 10 Ves. 335; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Davis* v. *Jenkins*, 3 V. & B. 151; *Inhabitants of Clapham* v. *Hewer*, 2 Vern. 387; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 149; *Prestney* v. *Corporation of Colchester*, 21 Ch. D. 111.

people again resorted to the original process by way of information (*a*).

52 Geo. 3. c. 101. (Romilly's Act).

3. After commissions had ceased to be issued, the legislature endeavoured to provide a remedy, not as before, by creating a new jurisdiction, but by giving liberty to proceed under the old jurisdiction of Chancery in a summary mode. By the Charities Procedure Act, 1812 (52 Geo. 3. c. 101), commonly called *Sir Samuel Romilly's Act*, and intituled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes," it was enacted that "in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity should be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition" to the Court, stating such complaint and praying such relief as the nature of the case might require, such petition to be heard in a summary way upon affidavits or such other evidence as should be produced; and it was provided that every such petition should be signed by the persons preferring the same in the presence of and be attested by the *solicitor or attorney* concerned for such petitioners, and should be allowed by the *Attorney or Solicitor-General*, and such allowance should be certified by him before any such petition should be presented.

Strictures on the Act.

4. These enactments, though penned by a very able hand, have been strongly reprobated as very loosely and obscurely worded—as tending rather to increase than diminish the expense of the application—in short, as having produced more mischief than benefit. "It was a wise saying," observed Lord Redesdale, "that the farthest way about was often the nearest way home, and he believed that these summary proceedings would be not always the *nearest* or at least not the *best* way home" (*b*).

Construction of the Act.

5. Upon the construction of this statute the following points have been resolved:—

Interest.

a. Although the Act authorises *any* two or more persons to present the petition, the words must be understood to mean any persons *having an interest* (*c*): and the Court is bound to see not only that the petitioners are possessed of a clear interest, but

(*a*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 61, 62, *per* Lord Redesdale.

(*b*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 49.

(*c*) *Re Bedford Charity*, 2 Sw. 518, *per* Lord Eldon.

that they prove themselves to be possessed of the interest they allege in their petition (*a*).

Breach of trust.

β. It has been said that the body of the statute is to be governed by the preamble, and therefore that the Act will not authorise a petition for any other purpose than relief against a breach of trust (*b*). But this narrow construction gives no force to the words of the Act, "*or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes*"; and the doctrine has since been called into question, and may be considered as overruled (*c*).

Plain and simple cases only within the Act.

γ. The provision extends only to *plain and simple* cases for the opinion or direction of the Court (*d*), not where a question is to be discussed adversely who are to be entrusted with the administration of the charity estate (*e*), or who are entitled to the benefit of it (*f*), or whether the trustees or governors of the charity have or have not, by the constitution of it, a certain authority, as of removing a master (*g*), or where any stranger is interested (*h*) (for the right of a third person cannot be disposed of on petition (*i*)), or where the relief which is sought is directed against the *assets* of a deceased trustee (*j*), or where the object of the application is not to have the existing charity regulated, but to

(*a*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 91, *per* Lord Eldon.

(*b*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 66, 67, 81, *per* Lord Redesdale; and see *Re Clarke's Charity*, 8 Sim. 42.

(*c*) *Re Upton Warren*, 1 M. & K. 410: *Re Parke's Charity*, 12 Sim. 332; *Re Manchester New College*, 16 Beav. 610; *Re Hall's Charity*, 14 Beav. 115; and see *Re Slewringe's Charity*, 3 Mer. 707; *Ex parte Rees*, 3 V. & B. 12; *Re Clarke's Charity*, 8 Sim. 34; *Re Phillipott's Charity*, 8 Sim. 381; and cases in note to *Re Hall's Charity*, 14 Beav. 120.

(*d*) *Corporation of Ludlow* v. *Greenhouse*, 1 Mad. 92, reversed in D. P. 1 Bligh, N.S. 17, see 66, 81, 89; *Re Phillipott's Charity*, 8 Sim. 381; *Ex parte Brown*, G. Coop. 295; *Ex parte Skinner*, 2 Mer. 456, 457, *per* Lord Eldon; and see *Re Chertsey Market*, 6 Price, 277.

(*e*) *Re West Retford Church and Poor-lands*, 10 Sim. 101; *Re Phillipott's Charity*, 8 Sim. 381.

(*f*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 66; *Re Manchester New College*, 16 Beav. 610; *Re Clarke's Charity*, 8 Sim. 34.

(*g*) *Attorney-General* v. *Corporation of Bristol*, 14 Sim. 648; and see *Re Manchester New College*, 16 Beav. 610; *Attorney-General* v. *East Retford Grammar School*, 17 L. J. N.S. Ch. 450; but see *Re Fremington School*, 10 Jur. 512; 11 Jur. 421; *Re Phillips's Charity*, 9 Jur. 959.

(*h*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 66, *per* Lord Redesdale; *Ex parte Rees*, 3 V. & B. 10; *Re Manchester New College*, 16 Beav. 610; but see *Re Upton Warren*, 1 M. & K. 410; [*Re Hospital for Incurables*, 13 L. R. Ir. 361, where the Court adjudicated on the conflicting claims of two charities arising under the same instrument].

(*i*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 93, *per* Lord Eldon.

(*j*) *Ex parte Skinner*, Wils. 15, *per* Lord Eldon; *Re Saint Wenn's Charity*, 2 S. & S. 66.

have the funds diverted to some other charitable purpose (*a*). The Court has jurisdiction, however, under the Act, to settle a scheme of the charity (*b*), or to alter a scheme previously settled by decree (*c*), or to appoint new trustees (*d*), or where parishes have been divided to apportion the charities amongst the districts (*e*), or to direct a sale of the charity estate in a proper case (*f*), and generally the Court, as between the trustees and *cestuis qui trust* of the charity, exercises a discretion as to whether it can put in operation the powers given by the Act with benefit to the charity (*g*).

Allowance.

δ. The allowance "by the Attorney or Solicitor-General" must be construed with reference to the previous law upon the subject, and must therefore be taken to mean, not by the Attorney or Solicitor-General, indifferently, but by the Attorney-General, when there is such an officer, and in the vacancy of that office, by the Solicitor-General (*h*).

Want of signature.

ε. If the petition be not signed by the Attorney-General or Solicitor-General, or if, after signature, it be not duly served, an order made by the Court under the Act will be an absolute nullity (*i*), and the petition may be taken off the file for irregularity (*j*).

Caution in signature.

ζ. As the intention of the legislature was to guard the charity fund from abuse, and with that view to prevent proceedings from being instituted, as they frequently were before, for no other reason than because it was known that the costs would be paid out of the charity estate, the Attorney-General, or, in the vacancy of that office, the Solicitor-General, ought not to sanction the

(*a*) *Re Reading Dispensary*, 10 Sim. 118.

(*b*) *Re Royston Free Grammar School*, 2 Beav. 228; *Re Berkhampstead Free School*, 2 V. & B. 134; *Re Shrewsbury Grammar School*, 1 Mac. & G. 324; 1 Hall & Tw. 401.

(*c*) *Attorney-General* v. *Bishop of Worcester*, 9 Hare, 328.

(*d*) *Bignold* v. *Springfield*, 7 Cl. & Fin. 71.

(*e*) *Re West Ham Charities*, 2 De G. & Sm. 218.

(*f*) *Re Parke's Charity* 12 Sim. 329; *Re Ashton Charity*, 22 Beav. 288; *Re Overseers of Ecclesall*, 16 Beav. 297; *Re Lyford's Charity*, Ib. note; [*Re Stockport Ragged Industrial and Reformatory Schools*, (1898) 2 Ch. (C.A.) 687;] *Re Alderman Newton's Charity*, 12 Jur. 1011 (the case of an exchange); *Re Sowerby's Charity*, 26th Jan., 1849, before the V.C. of England (the case of a willing purchaser); *Suir Island Female Charity School*, 3 Jon. & Lat. 171. As to the jurisdiction of the Court generally to sell charity lands, see *ante*, p. 634.

(*g*) *Re Manchester New College*, 16 Beav. 610.

(*h*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 51, 52, 82, *per* Lord Redesdale; *Ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*i*) *Attorney-General* v. *Green*, 1 J. & W. 305.

(*j*) *Re Dovenby Hospital*, 1 M. & Cr. 279. [As to the title of the petition, see Seton, 6th ed. p. 1301.]

petition with his signature but upon as much deliberation as if the relief were sought by way of information (*a*).

Attorney-General must be a party.

η. The Attorney-General by his *allocatur*, or allowance, of the petition, is not *functus officio*, and precluded from all future control, but must be made a party to any subsequent proceedings under the petition, as he would have been to all proceedings by way of information (*b*).

May correct his judgment.

θ. The Attorney-General, as representing the person of the King in his character of *parens patriæ*, is bound to see justice done, not only to the plaintiff in the petition, but also to the trustees and other defendants, and therefore is not estopped by his *allocatur* of the petition from afterwards correcting his judgment, but may support or oppose the views of the petitioners, as in his discretion he may think fit (*c*).

Motion.

ι. When the *jurisdiction* of the Court has been once attracted by the petition, a subsequent order may be made upon motion without the expense of a further petition (*d*).

Acts appointing Commissioners of inquiry.

6. Under powers given by 58 Geo. 3. c. 91, and 59 Geo. 3. c. 81, certain *commissioners of inquiry into charities* were appointed, and by 58 Geo. 3. c. 91, it was enacted, that when it appeared to such commissioners of inquiry that the directions or orders of a Court of Equity were requisite for remedying any *neglect, breach of trust, fraud, abuse, or misconduct* in the management of any trust created for charitable purposes, &c., it should be lawful for the said commissioners to certify the particulars of such case to the Attorney-General. The labours of these commissioners of inquiry proved very valuable, and many informations were filed in consequence of certificates made by them; but their powers after being frequently continued, expired in 1837.

16 & 17 Vict. c. 137.

7. By the *Charitable Trusts Act*, 1853, great additional facilities have been afforded for detecting and remedying breaches of trust in charity matters.

Powers of inquiry.

Commissioners are thereby appointed (*e*), to whom are confided powers of inquiry (*f*) similar to those given to the commissioners appointed by the Acts of George III., and also a similar power

(*a*) *Ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*b*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 51, 65, 82, 83, *per* Lord Redesdale; *Attorney-General* v. *Stamford*, 1 Ph. 737; and see *Re Chertsey Market*, 6 Price, 271; *Attorney-General* v. *Haberdashers' Company*, 15 Beav. 397.

(*c*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 43-52.

(*d*) *Re Slewringe's Charity*, 3 Mer. 707; *Ex parte Friendly Society*, 10 Ves. 287; *Re Chipping Sodbury School*, 5 Sim. 410.

(*e*) 16 & 17 Vict. c. 137, s. 1.

(*f*) Ib. sects. 9 to 14.

of certifying cases to the Attorney-General as fit for his interference (*a*).

New jurisdiction at chambers.

In cases of charities the incomes of which *exceed* 30*l.* *per annum*, the same jurisdiction is given in charity cases (after the *previous sanction of the Charity Commissioners*) to the Chancery Judges at *chambers* as was before the Act exercisable by the Court of Chancery, or the Lord Chancellor entrusted with the custody of lunatics, in a suit regularly constituted, or upon petition; but the Judge may direct a suit or petition to be instituted or presented (*b*). And the provisions of the Act in respect of charities whose incomes exceed 30*l.* per annum, are applicable to charities within the *city of London*, the income whereof is *less than* 30*l.* *per annum* (*c*).

Jurisdiction of Courts of Bankruptcy and County Courts.

Where the incomes of charities do *not exceed* 30*l.*, since extended to 50*l.* (*d*), *per annum*, the *District Courts of Bankruptcy and County Courts*, with the *previous sanction of the Charity Commissioners*, are armed with the same jurisdiction as the Court of Chancery had (*e*); and with the permission of the Commissioners to be applied for within one month after the making of the order (*f*), an *appeal* is allowed to the Court of Chancery (*g*).

Necessity for previous consent of Charity Commissioners before taking proceedings.

The Act contains a special provision that no suit, petition, or other proceeding (*h*) not being an application "in any suit or matter

(*a*) 16 & 17 Vict. c. 137, s. 20.

(*b*) Ib. s. 28. [On a summons under the section the Court has jurisdiction to decide whether or not the property is held on a charitable trust; *Re Norwich Town Close Estate Charity*, 40 Ch. D. (C.A.) 298.]

(*c*) Ib. s. 30.

(*d*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 11.

(*e*) 16 & 17 Vict. c. 137, s. 32.

(*f*) Ib. s. 39.

(*g*) Ib. s. 40.

[(*h*) The words "suit or other proceeding" do not include an action at law, or for the enforcement of any right not relating to the administration of the trusts of the charity. Thus, the sanction of the Charity Commissioners was held not to be requisite, where the Governors of an Endowed School commenced an action against the master to restrain him from presenting himself at the school, or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the Governors; *Holme* v. *Guy*, 5 Ch. D. (C.A.) 901; or where the master of a school brought an action to restrain the managers from dismissing him, and ejecting him from the school-house, and the question was raised whether the managers had been properly appointed; *Rendall* v. *Blair*, 45 Ch. D. (C.A.) 139 (*per* Bowen and Fry, L.JJ., Cotton, L.J., dissenting and agreeing with Kay, J., *contra*); or where a schoolmaster claimed an injunction to restrain two of the trustees or managers from removing him from his office until after the holding of a meeting of the three trustees, and until he should have had an opportunity of being heard at such meeting in reply to any charges made against him; *Fisher* v. *Jackson*, (1891) 2 Ch. 84; and so the sanction of the Charity Commissioners is not required where the application is not to administer the trusts of the charity, but to determine whether there has been a valid dedication of the property to charitable purposes: *Re Shum's Trust*, W.N. (1904) 146. But the words include a mandamus to compel the rendering of

actually pending," shall be commenced or taken without an authority previously obtained from the Charity Commissioners (*a*). It was at first held that where money had been paid into Court under the Trustee Relief Act (10 & 11 Vict. c. 96) (*b*), or under a Railway Act (*c*), no such suit or matter was pending as to obviate the necessity of previously obtaining the concurrence of the Charity Commissioners. But it was afterwards decided by the Court of Appeal, that in such cases the previous sanction of the Charity Commissioners is unnecessary, and that the object of the provision was merely to stop the enormous abuses existing in reference to proceedings in charity matters, and the words *suit or matter actually pending* were held to mean pending at the time of the *application*, and not at the passing of the Act (*d*). It has, however, been held since the decision of the Court of Appeal, that a petition for the appointment of new trustees under a scheme previously settled by the final order of the Court requires the sanction of the Commissioners (*e*).

The Act contains other provisions (*f*) of a *preventative* rather than a *remedial* kind.

Board authorised to give advice.

By the 16th section, for instance, the Board has power to

proper accounts; *Attorney-General* v. *Dean and Canons of Manchester*, 18 Ch. D. 596; and an action by a school board to recover sums received by the official trustees of charitable trusts in respect of the income of an endowment transferred to them: *Llanbadarnjawr School Board* v. *Official Trustees of Charitable Trusts*, (1901) 1 K. B. (C.A.) 430. And as to what cases fall within the section, see *Brittain* v. *Overton*, 25 Ch. D. 41, n.; *Benthall* v. *Earl of Kilmorey*, 25 Ch. D. (C.A.) 39.]

(*a*) 16 & 17 Vict. c. 137, s. 17. [But this provision does not apply to the charities exempted from the Act by s. 62; v. *ante* p. 644, or to places of religious worship falling under s. 9 of the Places of Worship Regulation Act, 1855 (18 & 19 Vict. c. 81), now extended by s. 4 of the Charitable Trusts (Places of Worship) Act, 1894 (57 & 58 Vict. c. 35); *Glen* v. *Gregg*, 21 Ch. D. (C.A.) 513; and see *Attorney-General* v. *Sidney Sussex College*, 15 W. R. 162; 21 Ch. D. (C.A.) 514, note. The authority of the Commissioners must be given formally in the manner directed by the Act, and a letter signed by the secretary of the board stating that "they were prepared to issue their certificate authorising the proceedings"; that "any difficulty in the application to the Court would probably be obviated by the production of the letter," and that "the certificate would be prepared and issued in due course," was held by Fry, J., in a pressing case of an application for an injunction to be insufficient; *Thomas* v. *Harford*, 48 L. T. N.S. 262.]

(*b*) *Re Markwell's Legacy*, 17 Beav. 618; *Re Skeetes*, 1 Jur. N.S. 1037. [The Act of 10 & 11 Vict. c. 96, has now been replaced by s. 42 of the Trustee Act, 1893; see *ante*, p. 424.]

(*c*) *Re London, Brighton and South Coast Railway Company*, 18 Beav. 608.

(*d*) *Re Lister's Hospital*, 6 De G. M. & G. 184; *Re St Giles and St George, Bloomsbury*, 25 Beav. 313; *Braund* v. *Earl of Devon*, 3 L. R. Ch. App. 800; [*Re William of Kyngeston Charity*, 30 W. R. 78].

(*e*) *Re Jarvis's Charity*, 1 Dr. & Sm. 97; and see *Re Bingley School*, 2 Drew. 283; *Re Ford's Charity*, 3 Drew. 324; both, however, decided previously to the appeal decisions on p. 1207, note (*h*).

(*f*) See *ante*, pp. 634, 639, *et seq.*, for powers of sale, leasing, &c., given by the Acts.

entertain applications for their *opinion or advice*, and persons acting in accordance therewith are indemnified.

Provisions for vesting land, stock, &c.

By the 48th section, *lands* belonging to any charity might be vested in the secretary of the Board as a corporation sole by the name of the *Treasurer* of Public Charities; and by the 51st section, annuities, stocks, shares, or securities held for any charity may be vested in the *Official Trustees* of charitable funds; and by the 54th and following sections, the Board have power, when the ordinary jurisdiction is insufficient for the purpose, to approve provisionally of *new schemes* of charities, *varying from the original endowment*, but which are to be submitted annually to Parliament for its ratification.

Charitable Trusts Act, 1855.

8. By the *Charitable Trusts Act*, 1855 (18 & 19 Vict. c. 124), sect. 15, the name of the Treasurer of Public Charities is abolished, and the secretary of the Board for the time being is styled the *Official Trustee* of charity *lands*, [who is empowered to take and hold all such interest in land as in pursuance of an order of the Board is conveyed to or vested in him by any deed or assurance or otherwise (*a*); and by the 18th section, and the Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), sect. 4, the *Official Trustees* of charitable *funds* are to have perpetual succession, and are to consist of such officers of the Board as the Board with the approval of the Treasury from time to time appoint].

Charitable Trusts Act, 1860.

9. By the *Charitable Trusts Act*, 1860 (23 & 24 Vict. c. 136), the Charity Commissioners are enabled by sect. 2 to make such orders as may be made "by any judge of the Court of Chancery sitting at *Chambers* (*b*) or by any *County Court* or *District Court of Bankruptcy* (*c*), for the appointment or removal of any schoolmaster or schoolmistress or other officer" of a charity, or "for or relating to the assurance, transfer, or payment of any real or personal estate" belonging to the charity, or for the establishment of any scheme. But, by sect. 4, no such order is to be made where the charity income exceeds 50*l.*, except on the application of the majority of the trustees; and no trustee is to be removed on the ground only of religious belief; and by sect. 5, the Commissioners are not to make orders in any case, which by reason of its contentious character, or otherwise, may be considered by them more fit to be heard by the judicial Courts (*d*).

[(*a*) 50 & 51 Vict. c. 49, s. 5.]

(*b*) See the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28.

(*c*) Ib. s. 32.

(*d*) As to the effect of the 5th section, see *Re Hackney Charities*, 34 L. J. N.S. Ch. 169; *Re Burnham National Schools*, 17 L. R. Eq. 241.

[Jurisdiction of Charity Commissioners.]

[10. It is important to observe that the general jurisdiction of the Charity Commissioners is the same as, and no greater than that of the Court of Chancery. Where a scheme is proposed for the administration of a charitable bequest, the first duty of the Court is to construe the will, and to give effect to the charitable directions of the founder, assuming them not to be open to objection on the ground of public policy. The Court does not consider whether those directions are wise, or whether a more generally beneficial application of the testator's property might not be found. By these principles the Charity Commissioners must be guided, and it is not competent for them, where a fund is given for the establishment of a hospital in a particular locality, to direct the application of the fund to the purposes of a hospital in a different locality, merely because such an application would appear to be generally beneficial (*a*).]

II. Of the *extent* of redress against trustees of charities.

What account will be directed of *mesne* rents and profits.

Under this head we propose to inquire only within what period of time the account of *mesne rents and profits* directed against *trustees* of charities guilty of a breach of trust, will be restricted.

The account not affected by Statutes of Limitation.

1. It is clear that in informations against *trustees of charities* the old *Statutes of Limitation* opposed no bar to the account, because charities were held exempt from the purview of the statutes, and the claim was by *cestui que trust* against an *express trustee* (*b*); and although it was at one time considered that the statute might afford a good rule how far back to carry the account (*c*), this doctrine was afterwards overruled (*d*). And now, the Real Property Limitation Act, 1833 (3 & 4 W. 4. c. 27), though applicable to charities (*e*), does not limit the liability of express trustees to account (*f*); so that charity trustees must [except so far as they may be protected by the provisions of the Trustee Act, 1888, already referred to (*g*),] as express trustees, account upon the same footing as before the Act.

Bar to the account from inconvenience of relief.

2. But the Court may set a limit to the account on the ground of *inconvenience*. "It is the constant practice of Courts of

[(*a*) *Re Weir Hospital*, (1910) W. N. (C.A.) 152, reversing Eve, J. (1910) W. N. 82. As to the observance of founders' intentions, see *ante*, pp. 622 *et seq.*]

(*b*) *Attorney-General* v. *Mayor of Exeter*, Jac. 448, *per* Sir T. Plumer; *Attorney-General* v. *Brewers' Company*, 1 Mer. 498, *per* Sir W. Grant; see *Incorporated Society* v. *Richards*, 1 Conn. & Laws. 58; 1 Dru. & War. 258.

(*c*) *Anon. case*, 2 Eq. Ca. Ab. 12, pl. 20; *Love* v. *Eade*, Rep. *t.* Finch, 269.

(*d*) See cases *ante*, p. 1209, note (*d*).

(*e*) See p. 1134, *ante*.

(*f*) *Hicks* v. *Sallitt*, 3 De G. M. & G. 816.

[(*g*) 51 & 52 Vict. c. 59, s. 8; *ante*, p. 1136.]

Equity," said Sir Thomas Plumer, "to discourage stale demands; and this principle has often been acted upon in cases of charities. When there has been a long period, during which a party has, under an innocent mistake, misapplied a trust fund from the *laches* and neglect of others, that is, from no one of the public setting him right, and when the accounts have, in consequence, become entangled, the Court, under its general discretion, considering the enormous expense of the inquiries, and the great hardship of calling upon representatives to refund what families, acting on the notion of its being their property, have spent, has been in the habit, while giving relief, of fixing a period to the account" (*a*).

Period to which account is carried back varies according to circumstances.

3. The period to which the account has been carried back has varied according to the circumstances presented to the consideration of the Court. Where no inconvenience can be objected, the Court will as a general rule carry back the account to the time of commencement of the misapplication.

Attorney-General v. Mayor of Exeter.

4. Thus in *Attorney-General* v. *The Mayor of Exeter* (*b*), where the defendants admitted possession of the charity estate for the last 200 years, and stated that they had *always been ready and willing to account for the rents*, Sir W. Grant ordered the defendants to account for the whole period, and this decision was affirmed by Sir T. Plumer on a rehearing, and by Lord Eldon on appeal.

Attorney-General v. Corporation of Stafford.

5. In *Attorney-General* v. *The Corporation of Stafford* (*c*), the trustees in their answer, filed in 1811, had furnished accounts of the trust estate, from the year 1791, and Lord Gifford saw no inconvenience in decreeing the account as far back as the trustees themselves had stated it, but refused to extend it farther.

Attorney-General v. The Brewers' Company, &c.

6. In *Attorney-General* v. *The Brewers' Company* (*d*), Sir W. Grant directed the trustees to account from the date of a certain Act of Parliament, a period of about *thirty* years. In a more recent suit against a corporation, the account was carried back to the last appointment of new trustees of the corporation, a period short of *ten* years. And in another contemporaneous suit against the same corporation, but where the legal estate was not in trustees, but in the corporation itself, the Court by analogy, and for want of another fixed point, ordered the account to commence at the date of the last appointment of new trustees in the first suit (*e*).

(*a*) *Attorney-General* v. *Mayor of Exeter*, Jac. 448.
(*b*) Jac. 443; 2 Russ. 362.
(*c*) 1 Russ. 547.
(*d*) 1 Mer. 495.
(*e*) *Attorney-General* v. *Mayor of Newbury*, 3 M. & K. 647.

Various other periods adopted.

7. In other cases the account has been carried back to the period when the corporation was first informed of the misapplication (as by the publication of the Charity Commissioners' Report): in others it has been directed from the time of filing the information, and in others from the date of the decree (*a*).

Compromise with sanction of Attorney-General.

8. Occasionally, where the defendant has been in strictness accountable for a very long period, but the right, if enforced, would impose a great hardship, it has been referred to the Attorney-General, as representing the charity, to certify whether under the circumstances it might not be proper for the charity to accept a less sum (*b*).

Trustees acting from mistake.

9. Where the trustees have diverted the charity funds from their proper channel through *mistake*, it is now settled that the Court will not call back any disbursements made before the commencement of the proceedings (*c*), or before the trustees had notice that the propriety of such application would be called into question (*d*). The Court holds a strict hand over trustees where there is any wilful misemployment; but where the Court sees nothing but mistake, while it gives directions for the better management in future, it refuses to visit with punishment what has been transacted in time past. It was said that to carry back the account to the very commencement of the misapplication would be the ruin of half the corporations in the kingdom (*e*); besides, to act on such a principle would be a great discouragement to undertake the office of trustees of charities (*f*).

Distinction between corporations and individuals.

10. If an individual make an annual payment for a particular purpose out of the profits of his estate, it is a reasonable presumption, from the strong interest which he has to resist an unfounded demand, that he has inquired into the origin of the claim, and he is therefore fixed with implied notice of all the circumstances that attend it; but the same presumption cannot

(*a*) See *Attorney-General* v. *Drapers' Company*, 6 Beav. 390.

(*b*) *Attorney-General* v. *Mayor of Exeter*, 2 Russ. 370; and see *Attorney-General* v. *Corporation of Carlisle*, 4 Sim. 279; *Attorney-General* v. *Bretingham*, 3 Beav. 91; *Attorney-General* v. *Pretyman*, 4 Beav. 462.

(*c*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 45; affirmed, 3 Russ. 395; *Attorney-General* v. *Dean of Christchurch*, Jac. 474, 637; *S.C.*, 2 Russ. 321; *Attorney-General* v. *Rigby*, 3 P. W. 145; *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Drapers' Company*, 4 Beav. 67; *Attorney-General* v. *Christ's Hospital*, Ib. 73; [*Andrew's* v. *M'Guffog*, 11 App. Cas. 311;] and see *Attorney-General* v. *Mayor of Newbury*, 3 M. &. K. 650.

(*d*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35, see 37; and see *Attorney-General* v. *Corporation of Berwick-upon-Tweed*, Taml. 239; *Attorney-General* v. *Caius College*, 2 Keen, 150.

(*e*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. &. K. 38, *per* Sir J. Leach.

(*f*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 54, *per* Lord Eldon.

be applied to corporations, because, having no immediate personal interest in the application of the profits of the corporate property, they may, without the imputation of culpable negligence, adopt and follow the practice of their predecessors (*a*).

Breach of trust by a parish.

11. Where the charity fund has been administered by a *parish* and misapplied, there, as a parish is a fluctuating body, and the present ratepayers ought not to pay for past defaults, no retrospective account can be ordered (*b*).

Mode of attaching the corporation property.

12. In the East Retford case (*c*), before Sir J. Leach, the Court, on proof of a breach of trust by the corporation, directed an inquiry by the Master of what property the corporation was possessed not devoted to special purposes, with the view that compensation might be made to the charity by an immediate *sale;* but the case upon that point was subsequently appealed against and reversed, as contrary to principle (*d*), and the plaintiff must now confine himself to a sequestration against the corporation in the ordinary course.

(*a*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 38, *per* Sir J. Leach.

(*b*) *Ex parte Fowlser*, 1 J. & W. 70; and see cases cited Ib. 73, note (*a*).

(*c*) 2 M. & K. 35.

(*d*) *Attorney-General* v. *Burgesses of East Retford*, 3 M. & Cr. 484; and see *Attorney-General* v. *Newark-upon-Trent*, 1 Hare, 395.

CHAPTER XXXII

MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER OF THE TRUST ESTATE AGAINST THE LACHES OR TORT OF THE TRUSTEE.

BESIDES the several rights and remedies which have just been the subject of discussion, the Court, with the view of *keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the* laches *or other misbehaviour of the trustee,* has found it necessary to establish two maxims which we now proceed to examine: viz., *First,* What ought to be done should be considered as done (*a*); and, *Secondly,* The act of the trustee shall not alter the nature of the *cestui que trust's* estate (*b*).

SECTION I

WHAT OUGHT TO BE DONE SHALL BE CONSIDERED AS DONE

General principle.

1. "The forbearance of the trustees," said Sir J. Jekyll, "in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust,* since at that rate it would be in the power of trustees, either by doing or delaying to do their

(*a*) *Walker* v. *Denne*, 2 Ves. jun. 183, *per* Lord Loughborough; *Foone* v. *Blount*, Cowp. 467, *per* Lord Mansfield; *Holland* v. *Hughes*, 16 Ves. 114, *per* Sir W. Grant; *Gaskell* v. *Harman*, 11 Ves. 507, *per* Lord Eldon; *Stead* v. *Newdigate*, 2 Mer. 530, *per* Sir W. Grant; *Pulteney* v. *Darlington*, 1 B. C. C. 237, *per* Lord Thurlow; *Burgess* v. *Wheate*, 1 Eden, 186, *per* Sir T. Clarke; *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215, *per* Sir J. Jekyll; *Fitzgerald* v. *Jervoise*, 5 Mad. 29, *per* Sir J. Leach; *Earl of Buckingham* v. *Drury*, 2 Eden, 65, *per* Lord Hardwicke; *Guidot* v. *Guidot*, 3 Atk. 256, *per* Lord Hardwicke; *Crabtree* v. *Bramble*, Ib. 687, *per eundem*; *Trafford* v. *Boehm*, Ib. 446, *per eundem*; *Astley* v. *Earl of Essex*, 6 L. R. Ch. App. 898.

(*b*) *Philips* v. *Brydges*, 3 Ves. 127, *per* Lord Alvanley; *Earlom* v. *Saunders*, Amb. 242, *per* Lord Hardwicke; *Selby* v. *Alston*, 3 Ves. 341, *per* Sir R. P. Arden.

duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that '*What ought to have been done shall be taken as done*,' and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money" (*a*). And Lord Macclesfield, in the case of a bequest to a trustee for purchasing lands, observed: "If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient*" (*b*).

Money to be laid out on land to be regarded as land.

2. Upon these grounds it is in equity a universal rule, that *money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted;* and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, and whether the land has been actually conveyed, or is only agreed to be conveyed (*c*).

Subject to curtesy.

3. Thus, if money be stipulated to be laid out in land to be settled on a *feme covert* in fee or in tail, the husband of the *feme* is entitled to his *curtesy*, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money until a purchase can be found; and when the investment has been made, he will have a life estate in the lands (*d*).

Whether subject to dower.

4. Whether under similar circumstances a widow could, before the Dower Act, 1833, have established her title to *dower*, was much questioned. It was admitted she was not dowable of a *mere trust estate* (*e*); but, where money was to be converted into land, and the interest was only prevented from being legal through the forbearance of the trustee, it was contended that the rights of parties ought not to be varied by the neglect of

(*a*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215.

(*b*) *Scudamore* v. *Scudamore*, Pr. Ch. 543.

(*c*) *Fletcher* v. *Ashburner*, 1 B. C. C. 499; and see *Wheldale* v. *Partridge*, 5 Ves. 396.

(*d*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. 174; *Dodson* v. *Hay*, 3 B. C. C. 405.

(*e*) Altered by the Act (3 & 4 W. 4. c. 105).

the person who was merely the instrument for carrying out the settlor's wishes.

Lord Hardwicke's opinion.

The opinion of Lord Hardwicke was on more than one occasion expressed adversely to the wife's claim (*a*); but there are several authorities in favour of the right to dower (*b*).

Dower Act.

By the Dower Act (except where the marriage was celebrated on or before the 1st day of January, 1834), the Legislature has given dower out of every species of trust estate in possession, subject to be defeated, however, by any declaration of intention on the part of the husband (*c*).

[Letters of administration.]

[5. Money which has arisen from settled land sold under the Settled Estates Acts, and liable to be reinvested in land under those Acts, is not a proper subject for letters of administration, so as to give jurisdiction to the Court to grant such letters (*d*).]

Money to be laid out in land is not subject to escheat.

6. If money be articled, or directed, to be laid out in land to be settled on a person in fee, and the *cestui que trust* dies without heirs, there can, as a general rule, be no claim for an escheat by any one, since until the land is actually purchased it is uncertain who will fill the character of lord (*e*). Cases might no doubt occur free from this element of uncertainty, as where the trust is to lay out money in the purchase of lands in the parish of A., all the lands in which are held under the same lord; but even in such a case the lord would fail to establish his claim, for a lord by escheat comes under no head of equity—is entirely a stranger to the trust, claiming by title paramount of his own (*f*). The pretence for his claim would be, that the operation of the rule so absolutely converts the equitable into a legal estate, that all the incidents that would have belonged to the legal, must be considered in equity as attaching to the equitable estate; but the rule was meant not to benefit third persons, but to protect the interests of *parties to the trust.*

(*a*) See *Cunningham* v. *Moody*, 1 Ves. 176; *Crabtree* v. *Bramble*, 3 Atk. 687.

(*b*) *Fletcher* v. *Robinson*, cited *Dudley* v. *Dudley*, Pr. Ch. 250; *S. C.*, stated from R. L. in *Banks* v. *Sutton*, 2 P. W. 709; *Otway* v. *Hudson*, 2 Vern. 583; *Banks* v. *Sutton*, 2 P. W. 700; *Re Lord Lismore*, 1 Hog. 177; and see the arguments of Sir J. Jekyll in *Banks* v. *Sutton*, 2 P. W. pp. 704, 706.

(*c*) See *ante*, p. 949.

[(*d*) *Re Goods of Lloyd*, 9 P. D. 65; but see now the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, sub-s. 4, and *ante*, p. 248. Under the Act, where the real estate of an intestate greatly exceeded the personalty in value, the Court granted administration to the guardian *ad litem* of the infant heir; *In the Goods of Ardern*, (1898) P. 174.]

(*e*) This point escaped notice in *Walker* v. *Denne*, 2 Ves. jun. 170, and it seems to have been assumed that the *Crown* would be the lord.

(*f*) *Walker* v. *Denne*, 2 Ves. jun. 185, *per* Lord Loughborough; *Henchman* v. *Attorney-General*, 3 M. & K. 494, *per* Lord Brougham.

How affected by the *cestui que trust's* will.

7. As money to be laid out in land is regarded as land, it could not, even before the Wills Act, have been devised by an infant, though of sufficient age to bequeath personal estate (*a*); and, for the same reason, it will pass by the *cestui que trust's* will under the general description of all the testator's *lands* (*b*), or of all his lands in the county of —— *or elsewhere* (*c*), though in the latter case it was very plausibly contended that the testator could not have referred to money, but must have alluded to something that possessed a local character. [Money arising from the sale of lands in a particular county, and liable to be laid out in the purchase of land generally will pass under a general residuary devise, and not under a specific devise of lands in the particular county (*d*); but where the money is subject to a general power of appointment by will, and *there is no intermediate interest* in any person who after the death of the donee of the power would have a right to call for its investment in land, and the donee has shown an intention in his lifetime to make the money personal estate so far as he can, it will pass under a general bequest by the donee of all his personal estate (*e*).]

Is subject to judgments.

8. So money to be converted into land was bound by a *judgment* (*f*), and was never accounted *personal assets*, and therefore was not, until the Act of William IV. (*g*), liable to the payment of simple contract debts (*h*).

Orphanage share.

9. So a gift by a parent (a freeman of the city of London) to a child, of *money to be laid out in land*, was considered a purchase by the father and a donation of the estate, and consequently under the law existing before the Act 19 & 20 Vict. c. 94, the child was not bound, before receiving his orphanage share, to bring the purchase into hotchpot (*i*).

(*a*) *Carr* v. *Ellison*, 2 B. C. C. 56; *Earlom* v. *Saunders*, Amb. 241. By the Wills Act, 7 W. 4. & 1 Vict. c. 26, an infant cannot make a will even of personal estate.

(*b*) *Guidot* v. *Guidot*, 3 Atk. 256, *per* Lord Hardwicke; *Rashleigh* v. *Master*, 1 Ves. jun. 201; *S. C.*, 3 B. C. C. 99; *Green* v. *Stephens*, 17 Ves. 77; *Biddulph* v. *Biddulph*, 12 Ves. 161; [*Chandler* v. *Pocock*, 15 Ch. D. 491; *Re Greaves' Settlement Trusts*, 23 Ch. D. 313; *Re Duke of Cleveland*, (1893) 3 Ch. (C.A.) 244].

(*c*) *Lingen* v. *Sowray*, 1 P. W. 172; *Guidot* v. *Guidot*, 3 Atk. 254.

[(*d*) *Re Duke of Cleveland*, *ubi sup.*]

[(*e*) *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. (C.A.) 648; and see *Re Greaves' Settlement Trusts*, 23 Ch. D. 313; *Re Harman*, (1894) 3 Ch. 607.]

(*f*) *Frederick* v. *Aynscombe*, 1 Atk. 392.

(*g*) Administration of Estates Act, 1833 (3 & 4 W. 4. c. 104).

(*h*) *Whitwick* v. *Jermin*, cited *Baden* v. *Earl of Pembroke*, 2 Vern. 58; *Lawrence* v. *Beverly*, cited Ib. 55; *S. C.*, 2 Keb. 841; *Fulham* v. *Jones*, cited *Pulteney* v. *Darlington*, 7 B. P. C. 550; *Foone* v. *Blount*, Cowp. 467, *per* Lord Mansfield. Money to be laid out on a purchase of land is not land for the purposes of the Stamp Acts, but pays legacy duty; *Re De Lancey*, 4 L. R. Ex. 345; 5 L. R. Ex. 102.

(*i*) *Hume* v. *Edwards*, 3 Atk. 450; *Annand* v. *Honeywood*, 1 Vern. 345.

In what cases money to be laid out on land goes to the heir.

10. With respect to the *heir* of the person upon whom the lands, when purchased, are directed or agreed to be settled, it is necessary, for ascertaining his rights, to distinguish between the cases where the real representative claims as against a *stranger*, and where he claims as against the *executor of his own ancestor*.

Case of the heir claiming against a stranger.

It appears to be perfectly established that the heir is entitled to the money as land, if he seek to enforce his equity against a *stranger*. Thus, 1. If a sum of money be *bequeathed* to be laid out in a purchase of lands to be settled to the use of A. and his heirs, and A. dies intestate before a purchase has been obtained, the money is the property, not of the executor, but of the heir of A. (*a*). 2. If on the marriage of A. money be *actually deposited* in the hands of trustees, either by A. himself or by a stranger, to be laid out in a purchase of lands to be settled to the use of A. for life, remainder to his wife for life, remainder to the issue in tail, remainder to A. in fee, and A. dies intestate and without issue, his heir, and not his executor is entitled (*b*). 3. If on the marriage of A. there be a *covenant* on the part of B. to lay out money in a purchase of lands to the above uses, and A. dies intestate and without issue, his heir takes the benefit of the covenant (*c*).

Case of the heir claiming against the executor of his own ancestor.

11. But if the heir have to enforce his claim, not against a stranger, but against the *personal representative of his own ancestor*, as if A. on his marriage covenant to lay out money in a purchase of lands to be settled to the use of himself for life remainder to his wife for life, remainder to the issue in tail, remainder to his own right heirs, in this instance the question whether the heir can call upon the executor for the money must depend upon this further distinction:—

The heir has a right, if any person has an equitable interest.

a. If at the death of A. there be an equitable interest in the fund outstanding in another, as a life estate in the wife, [or a right in a jointress to have a rent-charge (*d*),] or an estate tail in

(*a*) *Scudamore* v. *Scudamore*, Pr. Ch. 543. *Abbot* v. *Lee*, 2 Vern. 284, at first sight appears *contra*, but it seems from the Registrar's book that the direction for conversion was not imperative, but to be at the discretion of the testator's executors. Had the money been absolutely converted into *land*, the ultimate remainder would, by failure of issue of the surviving daughter, have resulted as personal estate of the *testator* (see p. 174, *ante*); but being *money* absolutely bequeathed, subject to a discretion to lay out on land which was not exercised, it belonged to the administrator of the legatee, as was decreed. The case is stated from Reg. Lib. in Appendix No. II. to 3rd edition of this Treatise.

(*b*) *Disher* v. *Disher*, 1 P. W. 204; *Chaplin* v. *Horner*, Ib. 483; *Edwards* v. *Countess of Warwick*, 2 P. W. 171; and see *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 90.

(*c*) *Knights* v. *Atkyns*, 2 Vern. 20.

[(*d*) *Walrond* v. *Rosslyn*, 11 Ch. D.

the issue, then the real quality of the money is sustained and continued by that right, and the heir of A. is entitled to call upon A.'s executor to pay the money (*a*); and if there be such an outstanding claim at the death of the ancestor, the circumstance that the heir institutes his suit during the subsistence of that claim, or after its determination, seems to be immaterial (*b*).

In *Walker* v. *Denne* (*c*), Lord Loughborough expressed some doubt upon this doctrine. "Between the heir and personal representative," he said, "their rights are pure legal rights: chance decides what shall be real, what personal; neither has a *scintilla* of equity to make the property that which it is not in fact." To this reasoning of Lord Loughborough it may be replied that, when it is said there is no equity between the real and personal representatives, the meaning is no more than this—that what is real estate at the death of the ancestor will go to the heir, and what is personal estate at the death of the testator will go to the executor; but, for the purpose of determining what *is* real and what *is* personal estate, the Court is guided, not by the *legal* nature of the property at the death of the owner, but, as appears in numerous instances, by the stamp and character impressed upon it in consideration of a Court of Equity. Thus if a *mortgagee in fee* died, the mortgage being regarded as a mere security for part of the mortgagee's personal estate, the executor might call upon the heir for a conveyance of the land (*d*). So, if the *mortgagor* died, the heir of the mortgagor might, until the Real Estate Charges Act, 1877 (*e*), have called on the executor to discharge the incumbrance out of the personal assets. So, if a person contracted for the sale of an estate (*f*), and died before the completion of the sale, the legal fee descended upon the heir (*g*), but the purchase-

Walker v. Denne.

[Contract for sale effects conversion.]

640. *Semble*, it would be otherwise if the only right were that of portionists to have their portions raised; *S. C.*]

(*a*) *Kettleby* v. *Atwood*, 1 Vern. 298; re-heard, Ib. 471; *Lancy* v. *Fairechild*, 2 Vern. 101; *Chaplin* v. *Horner*, 1 P. W. 483; *Lechmere* v. *Earl of Carlisle*, 3 P. W. 211; affirmed Cas. *t.* Talbot, 89; *Oldham* v. *Hughes*, 2 Atk. 452.

(*b*) See *Chaplin* v. *Horner*, 1 P. W. 483; *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 80.

(*c*) 2 Ves. jun. 175, 176, 183; and see *Oxenden* v. *Lord Compton*, Ib. 70; *Lord Compton* v. *Oxenden*, Ib. 265.

[(*d*) Now by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, and the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 1 (see *ante*, pp. 247, 248), where the death has occurred since the 31st December, 1881, the land devolves upon the executor.]

[(*e*) 40 & 41 Vict. c. 34.]

[(*f*) But this is to be understood only of a *binding* contract; and where the *title* is bad, and is not accepted by the purchaser, and the contract is rescinded, there is no conversion; *Re Thomas*, 34 Ch. D. 166; and see *Plews* v. *Samuel*, (1904) 1 Ch. 464, 468; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506, 507, 515, and *ante*, p. 260.]

[(*g*) Now, by the Land Transfer Act, 1897, s. 1, sub-s. 1 (see *ante*, p. 248), where the death has occurred since the 31st December, 1897, the legal fee

money passes to the executor; and, on the other hand, if a person contract for the purchase of an estate, and die, the executor must, [until the Act of 1877, have paid] the money, but the heir was entitled to the purchase (*a*). Thus, in the words of Lord Talbot, "Where the dispute is between the two representatives of the deceased, the one of his real, the other of his personal estate, the heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of the Court, for though the question is between two volunteers, the Court will determine which way the right is, and will decree accordingly" (*b*). "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn in *Walker* v. *Denne*, and some other modern authorities, that if the instrument be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, it will remain for his benefit, and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir" (*c*). And Sir W. Grant to the same effect observed: "There is no weight in the circumstance that the property is found in the shape of money or land, *for the character is to be found in the deed.* The opinion of Lord Rosslyn that property was to be taken as it happened to be at the death of the party from whom the representatives claimed, was much doubted by Lord Eldon, who held, *in which I perfectly concur*, that it must be considered as being in the state in which it *ought to be.* Lord Rosslyn's rule was new, and not according to prior cases" (*d*).

Heir has no right where the money is "at home."

β. But if A. die, leaving neither wife nor issue, so that, to use the technical expression, the money is "at home," that is A. at the time of his death is the absolute and exclusive owner, and there is no outstanding right in another person, in this case the real quality of the money has become merged and extinguished,

will vest in the executor, and by the Conveyancing Act, 1881, s. 4, where the death has occurred since the 31st December, 1881, if the contract is enforceable against the heir or devisee of the vendor, his personal representatives can convey the land for the purpose of giving effect to the contract.]

[(*a*) But since the Act of 1877, the estate in the hands of the heir (or, if leasehold, of the legatee or next of kin) will be subject to the repayment to the executor of the purchase-money paid by him; *Re Cockcroft*, 24 Ch. D. 94; *Re Kershaw*, 37 Ch. D. 674; *Re Fraser*, (1904) 1 Ch. (C.A.) 727.]

(*b*) *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 90.

(*c*) *Wheldale* v. *Partridge*, 8 Ves. 235.

(*d*) *Thornton* v. *Hawley*, 10 Ves. 138; *Kirkman* v. *Miles*, 13 Ves. 339.

and on the death of A. the heir has no equity to call upon the executor. To keep on foot the *notional* conversion of money into land, it is evident there must be a right in some one to insist upon the *actual* conversion; but if A. be in possession of 20,000*l.* upon trust to lay out in a purchase of lands to be settled to the use of himself and his heirs, the right and the thing both centering in the same person, there is nobody to sue, and it follows that the action is extinguished (*a*).

Chichester *v.* Bickerstaff.

The decision in the much litigated case of *Chichester* v. *Bickerstaff* (*b*), amounted probably to no more than this (*c*).

Actual receipt of the money makes it "at home."

12. Of course the money will be "at home" where the person absolutely entitled to the fund receives it from the trustee the depositary of it, and that, whether the payment was made with the sanction of the Court, or by the voluntary act of the trustee himself (*d*).

Voluntary covenant to lay out money on land.

13. Lord Macclesfield advanced the position, that if a person *voluntarily and without consideration* covenanted to lay out money in a purchase of land to be settled on himself and his heirs, the Court would compel the execution of such a contract, though merely voluntary; for in all cases where it was a measuring cast between an executor and an heir, the latter should in equity have the preference (*e*). But the proposition that the heir is more favoured than the executor, though often repeated (*f*), and arising perhaps from the leaning of the Court towards the heir *in respect of lands of which the ancestor was seised*, does not appear to be founded on any intelligible principle, and the opinion expressed by Lord Macclesfield may be questioned.

Conversion must be absolute or imperative, not optional.

14. In the preceding observations it is assumed that the direction or agreement for conversion is by the terms of the instrument made *absolute and imperative;* for where a mere *option* is given, the original character of the property continues until the discretion has been exercised, and the conversion actually effected; as, if the direction or agreement be to lay

(*a*) See *Pulteney* v. *Darlington*, 1 B. C. C. 237.

(*b*) 2 Vern. 295; *S. C.*, cited *Pulteney* v. *Darlington*, 7 B. P. C. 554.

[(*c*) The author's reasons for taking this view will be found stated at length in the eighth edition of this work, at pp. 944-946. To the principle under consideration must be referred the case of *Pulteney* v. *Darlington*, 1 B. C. C. 223; affirmed in D. P.; see *Wheldale* v. *Partridge*, 8 Ves. 235; and see 3rd ed. of this work, p. 803.]

(*d*) See *Pulteney* v. *Darlington*, 1 B. C. C. 236; *Bowes* v. *Earl of Shaftesbury*, 5 B. P. C. 144; *Chaplin* v. *Horner*, 1 P. W. 483, as to the 1350*l.*

(*e*) *Edwards* v. *Countess of Warwick*, 2 P. W. 176; and see *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 90, 91.

(*f*) See *Crabtree* v. *Bramble*, 3 Atk. 689; *Scudamore* v. *Scudamore*, Pr. Ch. 544; *Haytor* v. *Rod*, 1 P. W. 364; *Wilson* v. *Beddard*, 12 Sim. 32.

out money in "lands *or* securities" (*a*), in "freehold *or* leaseholds" (*b*), or if by any other mode of expression an intention be manifested of not converting the property at all events (*c*). [But a direction to trustees to sell "so soon as they shall see necessary for the benefit of" the *cestuis que trust* (*d*), or "whenever it shall appear to their satisfaction that such sale will be for the benefit of" the *cestuis que trust* (*e*), amounts to an imperative direction to convert.]

[But the conversion may be imperative, although the trustees have an option as to the *time* of sale.]

Of conversion, apparently optional, but where the uses declared are exclusively applicable to real estate.

15. Where *the uses declared are exclusively applicable to real estate*, the direction or agreement will be construed to be imperative, though the direction or agreement be to lay out the money in "*freeholds*, *leaseholds*, or *copyholds*" (*f*), or the instrument contains an authority to invest the money upon securities until a purchase can be found (*g*), or the fund being already out upon security, a power is inserted to call it in, and lay it out upon other securities (*h*), or even though the direction or agreement be to lay out the money on lands *or* securities, the intention in the last case apparently being, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividends in the meantime shall be paid to the person who would be entitled to the rents (*i*).

Conversion at "the request" or "with the consent" of a party.

16. And, where the uses are thus exclusively applicable to real estate, the direction or agreement will be regarded as imperative though the settlement require the purchase to be made at the *request* of a person (*j*), for the insertion of such a clause has been taken to mean, not that a conversion may not be effected *before* but that it shall certainly be effected *after*

(*a*) *Curling* v. *May*, cited *Guidot* v. *Guidot*, 3 Atk. 255; *Amler* v. *Amler*, 3 Ves. 583; [*Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165;] and see *Van* v. *Barnett*, 19 Ves. 102.

(*b*) *Walker* v. *Denne*, 2 Ves. jun. 170; *Davies* v. *Goodhew*, 6 Sim. 585.

(*c*) *Wheldale* v. *Partridge*, 5 Ves. 388; *S. C.*, 8 Ves. 227; and see *Abbot* v. *Lee*, 2 Vern. 284; *Davies* v. *Goodhew*, 6 Sim. 585; *Polley* v. *Seymour*, 2 Y. & C. 708; *Clissold* v. *Cook*, 27 L. T. N.S. 143; 20 W. R. 796; [*Re Hotchkys*, 32 Ch. D. (C.A.) 408].

[(*d*) *Doughty* v. *Bull*, 2 P. Wms. 320.]

[(*e*) *Re Raw*, 26 Ch. D. 601; *Robinson* v. *Robinson*, 19 Beav. 494.]

(*f*) *Hereford* v. *Ravenhill*, 5 Beav. 51; *Re Whitty's Trust*, 9 Ir. R. Eq. 41; [*Re Bird*, (1892) 1 Ch. 279].

(*g*) *Edwards* v. *Countess of Warwick*, 2 P. W. 171; *Earlom* v. *Saunders*, Amb. 241; and see *Davies* v. *Goodhew*, 6 Sim. 585.

(*h*) *Thornton* v. *Hawley*, 10 Ves. 129; and see *Triquet* v. *Thornton*, 13 Ves. 345.

(*i*) *Earlom* v. *Saunders*, Amb. 241; *Cowley* v. *Hartstonge*, 1 Dow, 361; *Johnson* v. *Arnold*, 1 Ves. 169; *Cookson* v. *Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; but see *Atwell* v. *Atwell*, 13 L. R. Eq. 23; [and see *Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165].

(*j*) *Thornton* v. *Hawley*, 10 Ves. 129; *Johnson* v. *Arnold*, 1 Ves. 169; [*Attorney-General* v. *Dodd*, (1894) 2 Q. B. 150].

request (*a*). And the construction is the same, though the purchase be directed to be made with a person's *consent* and *approbation* (*b*); for upon a convenient purchase being proposed, the Court, said Sir J. Jekyll, will take upon itself to judge thereof, and, without some reasonable objection made, will order the money to be laid out in it, so that such a proviso seems to be immaterial, and as if omitted (*c*). But of course the instrument may be so strongly expressed as to show the intention of the parties that the request or consent of a particular person should be a substantial ingredient, and that no conversion should take place unless it is given (*d*).

[In all these cases the real question is whether it appears from the whole tenor of the instrument that the intention was that the personalty should be converted into realty, and where such an intention appears a trust for conversion may be implied (*e*). But a mere gift of personalty with limitations appropriate to real estate, a great part of which limitations must necessarily fail as soon as the personalty vests in any one who, if it had been real estate, would have taken an estate tail, does not raise an implied trust for conversion into realty (*f*).]

Land to be converted into money is regarded as money.

17. As money to be converted into land is considered as land, so *land to be converted into money is, upon the same principle, invested with all the properties of money* (*g*). Thus, if an estate be directed or agreed to be sold, and the proceeds be made payable to A., the property, though unconverted at A.'s decease will pass by a general bequest of all his *personal estate* (*h*); and upon A.'s death, will vest in his *personal representatives* (*i*), and will be liable to *probate* (*j*) [or estate], and *legacy*

(*a*) *Thornton* v. *Hawley*, 10 Ves. 137; but see *Stead* v. *Newdigate*, 2 Mer. 530.

(*b*) *Thornton* v. *Hawley*, 10 Ves. 129; [*Batteste* v. *Maunsell*, 10 I. R. Eq. 97, 314]. In *Symons* v. *Rutter*, 2 Vern. 227, Sir G. Hutchins was right, according to Sir J. Jekyll, *Lechmere* v. *Earl of Carlisle*, 3 P. W. 220, and Lord Thurlow, *Pulteney* v. *Darlington*, 1 B. C. C. 238; but see *Stead* v. *Newdigate*, 2 Mer. 530.

(*c*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 220, *per* Sir J. Jekyll; and see *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172.

(*d*) *Davies* v. *Goodhew*, 6 Sim. 585; and see *Re Taylor's Trust*, 9 Hare, 596; *Sykes* v. *Sheard*, 33 Beav. 114.

[(*e*) *Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165.]

[(*f*) *Evans* v. *Ball*, *ubi sup.*]

(*g*) But a settlement of land so circumstanced is not a settlement of a "definite" sum of money within the meaning of the Stamp Act; *Re Stucley's Settlement*, 5 L. R. Ex. 85. [See the Stamp Act, 1891 (54 & 55 Vict. c. 39), sched.]

(*h*) *Stead* v. *Newdigate*, 2 Mer. 521.

(*i*) *Ashby* v. *Palmer*, 1 Mer. 296; *Biggs* v. *Andrews*, 5 Sim. 424; *Bayden* v. *Watson*, 7 Jur. 245; *Burton* v. *Hodsoll*, 2 Sim. 24; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Griffith* v. *Ricketts*, 7 Hare, 299; *Hardey* v. *Hawkshaw*, 12 Beav. 552; *Simpson* v. *Blackburn*, W. N. 1875, p. 157.

(*j*) *Attorney-General* v. *Brunning*, 4 H. & N. 94; reversed on appeal, 8 H. L. Cas. 243; *Attorney-General* v.

duty (*a*). And the result will be the same though the conversion is by the terms of the instrument of trust not to take place until after A.'s death (*b*). [And a will made by a married woman in exercise of a power over the proceeds of sale of real estate given on trust for conversion, and appointing the property, was admitted to probate, though the property was unconverted at her death (*c*).]

As to rents before conversion.

18. But it has been held as a rule of convenience that if a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A. for life with remainders over, the tenant for life is entitled to the *rents* only of the estate from the testator's decease (*d*); and so, if the sale be directed on the death of a particular person, the tenant for life is entitled only to the *rents* from the death of that person (*e*). But a tenant for life without impeachment of waste of the estate to be *purchased*, though entitled to the rents and profits of the estate to be *sold*, may not, as part of such profits, cut timber on the estate to be sold, for this would give him double waste (*f*).

Next of kin have no right where land is *at home*.

19. The doctrine already explained with reference to the exclusion of the claim of the heir where the money is *at home* must, it is conceived, equally apply as against *next of kin and residuary legatees* in cases where the *land* may be said to be at home. Thus, if A., being entitled to land, *covenant* on the occasion of his marriage to convey it to trustees, who are to sell and stand possessed of the proceeds upon trusts for the benefit of A. and his wife and the children of the marriage, with an ultimate trust for A. absolutely, here if, in A.'s lifetime and before any conveyance, the wife dies without children, both the land and the benefit of the ultimate trust are united in A., and the *land* is

Lomas, 9 L. R. Ex. 29; [*Attorney-General* v. *Hubbuck*, 10 Q. B. D. 488; 13 Q. B. D. (C.A.) 275; *In the Goods of Gunn*, 9 P. D. 242; *Attorney-General* v. *Marquess of Ailesbury*, 14 Q. B. D. 895; 16 Q. B. D. (C.A.) 408; 12 App. Cas. 672;] and see *Matson* v. *Swift*, 8 Beav. 368; *Custance* v. *Bradshaw*, 4 Hare, 324.

(*a*) *Forbes* v. *Steven*, 10 L. R. Eq. 178; [*Stokes* v. *Ducroz*, 38 W. R. 535].

(*b*) *Clarke* v. *Franklin*, 4 K. & J. 257.

[(*c*) *In the Goods of Gunn*, 9 P. D. 242; but now under the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, s. 1, sub-s. 3, a will of real estate may be admitted to probate.]

(*d*) *Casamajor* v. *Strode*, cited *Walker* v. *Shore*, 19 Ves. 390; *Hutchin* v. *Mannington*, 1 Ves. jun. 367, *per Cur.*; [*Re Searle*, (1900) 2 Ch. 829, *per* Kekewich, J., adopting the above statement of the law, and pointing out that if the real estate produces nothing, the tenant for life can get nothing, whereas in the case of personalty he would get something upon the principle laid down in *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; and see *Re Earl of Darnley*, (1907) 1 Ch. 159; *Re Oliver*, (1908) 2 Ch. 74].

(*e*) *Fitzgerald* v. *Jervoise*, 5 Mad. 25, the marginal note of which does not exactly accord with the report itself.

(*f*) *Plymouth* v. *Archer*, 1 B. C. C. 159; and see *Burges* v. *Lamb*, 16 Ves. 180.

at home, and upon A.'s death, no claim can, it is conceived, be sustained by those entitled to his personal estate. [So where real estate was settled to the use of the settlor for life, and after his death to a trustee upon trust to sell and hold the proceeds for certain purposes, which failed in the lifetime of the settlor, it was held that the trust for conversion having failed, the property passed as realty under the will of the settlor (*a*).] But of course the case would be different if land had been actually *conveyed* to the trustees upon trust for sale, since this would be analogous to a deposit in the hands of trustees, as above supposed, of money to be laid out in land (*b*); and consequently there would be a complete conversion, of which those entitled to the personal estate of A. would reap the benefit.

Alien may take proceeds of sale.

20. If the proceeds of sale of real estate be given to an *alien*, the doctrine of conversion applies in his favour. He was always capable of taking for his own benefit, and the Crown was excluded (*c*).

Proceeds forfeitable for felony if land in fact sold, but not otherwise.

21. [Prior to the abolition of forfeitures for felony it was held that] if a share of proceeds was given to a *felon*, and the time of sale had arrived, and the sale had been actually made before the felon had worked out his punishment, the Crown was entitled (*d*). But if the felon had worked out his punishment before the time of sale had arrived, there, as the Crown had no equity to compel the conversion, the discharged felon and not the Crown was entitled (*e*). Money paid into Court as representing land taken under the provisions of an Act of Parliament, and liable to be laid out again in the purchase of land, retained, as against the Crown, its character of real estate, and was therefore not forfeitable on conviction for felony (*f*).

Proceeds could not be bequeathed to a charity.

22. It was at one time held that if real estate was stamped with a trust for conversion, and a portion of the proceeds of sale was given to A., and A. died having by his will given his *personal estate* to charity, his interest in the proceeds of sale was to be regarded as pure personal estate, and the bequest was

[(*a*) *Re Lord Grimthorpe*, (1908) 2 Ch. (C.A.) 675.]

(*b*) See *ante*, p. 1218.

(*c*) *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 M. & Cr. 525; *Sharp* v. *St Sauveur*, 17 W. R. 1002; 20 L. T. N.S. 799, but overruled on another ground, 7 L. R. Ch. App. 343. See now as to aliens, the Naturalisation Act, 1870 (33 Vict. c. 14), and *ante*, p. 26.

(*d*) *Re Thompson's Trusts*, 22 Beav. 506.

(*e*) Ibid. See now as to felons, the Forfeiture Act, 1870 (33 & 34 Vict. c. 23); and *ante*, p. 27.

(*f*) *Re Harrop's Estate*, 3 Drew. 726.

good (*a*); but this doctrine has since been overruled (*b*). And where a testator gave to A. a legacy of 3000*l.*, payable out of the testator's personal estate and the proceeds from the sale of his real estate, and A. bequeathed the 3000*l.* to a charity, it was ruled that the whole bequest was void, and that the charity was not entitled to claim so much of the 3000*l.* as, on an apportionment of the original testator's real and personal estate, would be found payable out of the pure personalty (*c*); [but in a subsequent case, where a testator gave a share of his residuary personal estate to charity, and the residuary estate consisted of pure personalty, and of a legacy from another testator payable out of the proceeds of his real and personal estate, an apportionment was directed, and the bequest was held to fail only so far as it arose from the portion of the legacy attributable to the realty, or to the personalty savouring of realty, of the testator who bequeathed the legacy (*d*). Now, as we have already seen (*e*), the law in this respect has been altered by the Mortmain and Charitable Uses Act, 1891 (*f*), under which land or personal estate arising from or connected with land, may be given to or for the benefit of any charitable use, by the will of a testator dying after the passing of the Act, viz. the 5th of August, 1891.]

[*Secus*, now under Mortmain and Charitable Uses Act, 1891.]

Locke King's Act.

23. A share of the proceeds to arise from a sale under a trust for conversion is not an interest in land within the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), and, therefore, though such share be subject to a mortgage of it made by the testator, a legatee of the share can call for a discharge of the mortgage out of the general personal estate (*g*); [and a similar conclusion was come to where debentures specifically bequeathed were subject to incumbrance (*h*); and where the testator directed that his son should have the *option* of purchasing part of the real estate, the Act did not apply, as the son was not an "heir or devisee" (*i*). A direction to pay debts, "except the mortgage debts, if any, on B.," out of residue, implies that other mortgage debts are to be paid out of residue, and is a sufficient contrary intention to take the case out

(*a*) *Marsh* v. *Attorney-General*, 2 J. & H. 61; *Attorney-General* v. *Harley*, 5 Mad. 321; *Shadbolt* v. *Thornton*, 17 Sim. 49.

(*b*) *Brook* v. *Badley*, 4 L. R. Eq. 106; *S. C.*, 3 L. R. Ch. App. 672; *Lucas* v. *Jones*, 4 L. R. Eq. 73; [*Ashworth* v. *Munn*, 15 Ch. D. (C.A.) 363].

(*c*) *Brook* v. *Badley*, 3 L. R. Ch. App. 672; [approved *Re Watts*, 29 Ch. D. (C.A.) 947, affirming *S. C.*, 27 Ch. D. 318; and see *Ashworth* v. *Munn*, 15 Ch. D. (C.A.) 363; *Re Hume*, (1895) 1 Ch. (C.A.) 422, 428].

[(*d*) *Re Hill's Trusts*, 16 Ch. D. 173.]

[(*e*) See *ante*, p. 106.]

[(*f*) 54 & 55 Vict. c. 73.]

(*g*) *Lewis* v. *Lewis*, 13 L. R. Eq. 218; [Carson's R. P. Stats., 430].

[(*h*) *Re Chantrell*, (1907) W.N. 213.]

[(*i*) *Re Wilson*, (1908) 1 Ch. 839, following *Given* v. *Massey*, 31 L. R. Ir. 126.]

of the Real Estate Charges Acts (*a*); but not so a direction that a mortgage debt on estate A. shall be paid out of the proceeds of sale of estate B., as that is only an exoneration of A. to the extent of such proceeds, and not a general indication of intention (*b*)].

The conversion must be imperative.

24. If real and personal estate be given to trustees upon trust for a class, with a *discretionary* and not an *imperative* power to convert the whole into personal estate, and if the trustees make a total or partial conversion, the objects of the trust will take the property as real or personal estate, according to the actual condition in which it is found (*c*). [But if the power be discretionary, and an order is made in an administration action directing a sale absolutely, the property is converted as from the date of the order (*d*).

A mere declaration in a will that the residuary real estate shall for the purpose of transmission be impressed with the quality of personal estate from the time of the testator's death, does not amount to a conversion of the real estate into personalty, but the property will, notwithstanding the direction, devolve as realty (*e*). Nothing short of an absolute and effective trust for sale can in equity create a conversion of realty into personalty (*f*).]

Case of a sale by mortgagee.

25. If a *mortgage* deed contain a power of sale with a direction that the surplus proceeds shall be paid to the mortgagor, his heirs, executors, administrators, and assigns, and the property is sold by the mortgagee, the surplus will be personal or real estate of the mortgagor, according as the sale takes place before or after his death (*g*). But where an option to purchase has been given to a lessee, and the option is exercised after the lessor's death, such exercise has been held to effect a retrospective conversion (*h*). The difference is, that in the case of a

Case of option of purchasing.

[(*a*) *Re Valpy*, (1906) 1 Ch. 531.]

[(*b*) *Re Birch*, (1909) 1 Ch. 787.]

(*c*) *Walter* v. *Maunde*, 19 Ves. 424; *Atwell* v. *Atwell*, 13 L. R. Eq. 23; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; *Re Beaumont's Trusts*, 32 Beav. 191; *Polley* v. *Seymour*, 2 Y. & C. 708; *Edwards* v. *Tuck*, 23 Beav. 268; *Re Whitty's Trust*, 9 Ir. R. Eq. 41; and see *Yates* v. *Yates*, 28 Beav. 637; *Cowley* v. *Hartstonge*, 1 Dow, 378; *Bourne* v. *Bourne*, 2 Hare, 35; *Lucas* v. *Brandreth* (No. 1), 28 Beav. 273; *Beecroft* v. *Wilkin*, W. N. 1867, p. 117; *Re Ibbitson's Estate*, 7 L. R. Eq. 226; *Miller* v. *Miller*, 13 L. R. Eq. 263. Otherwise, where the power is imperative, *Grieveson* v. *Kirsopp*, 2 Keen, 653.

[(*d*) *Hyett* v. *Mekin*, 25 Ch. D. 735; and see *ante*, pp. 172, 173.]

[(*e*) *Hyett* v. *Mekin*, 25 Ch. D. 735; and see *Attorney-General* v. *Dodd*, (1894) 2 Q. B. 150.]

[(*f*) *Goodier* v. *Edmunds*, (1893) 3 Ch. 455, *per* Stirling, J.; and so where a trust for sale of land for purposes of division is void for remoteness, the beneficiaries may take the land as real estate: *Re Appleby*, (1903) 1 Ch. (C.A.) 565; and see *ante*, p. 109.]

(*g*) *Wright* v. *Rose*, 2 Sim. & St. 323; and see *Clarke* v. *Franklin*, 4 K. & J. 260; *Bourne* v. *Bourne*, 2 Hare, 35; *Re Cooper's Trusts*, 4 De G. M. & G. 768.

(*h*) *Lawes* v. *Bennett*, 1 Cox, 167; *Collingwood* v. *Row*, 4 Jur. N.S. 785;

mortgage the mortgagor or his heir can redeem at any time, and therefore the real character of the property continues until the time of actual sale, when the proceeds become the personal estate of the person then entitled to the equity of redemption; but in the option given to a lessee, the lessor has parted with all control over the property and placed it in the power of another to change the nature of it, and if the power be exercised the conversion operates retrospectively, and it becomes personal estate as between all who claim under the lessor. [The rule applies although the option is not exercisable until after the death of the person giving it (*a*); but where the lessee dies without having exercised the option, the beneficial interest in the lease with the benefit of the option goes as part of his personal estate, and no subsequent exercise of the option will work a retrospective conversion as between the persons entitled to his realty and personalty respectively (*b*).

The doctrine of *Lawes* v. *Bennett* (*c*), though well established, is not favoured by the Court, and where a testator, on the same day on which he granted a lease conferring an option on the lessee to purchase the fee, made a codicil to his will confirming it in general terms, it was held that he had shown a sufficient intention to pass his interest in the land to the specific devisees thereof named in the will (*d*).]

Where the mortgagee is a trustee for sale.

26. If, instead of executing a mortgage, the debtor convey the estate to the creditor upon *trust* to sell and pay himself and hand over the balance to the debtor, his executors and administrators, and a declaration is inserted in the deed that it is not to be considered as in the nature of a mortgage, but as a conveyance to become absolute, in equity as well as at law, immediately after default in payment, here, though the sale is not

Weeding v. *Weeding*, 1 J. & H. 424; *Whitmore* v. *Douglas*, cited *Ripley* v. *Waterworth*, 7 Ves. 436; *Townley* v. *Bedwell*, 14 Ves. 590; [*Re Adams and the Kensington Vestry*, 27 Ch. D. (C.A.) 394; *Re Isaacs*, (1894) 3 Ch. 506;] but see *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722; [*Baldwyn* v. *Smith*, (1900) 1 Ch. 588, (where a direction by a Master in Lunacy that a voidable contract for purchase entered into by a lunatic should be completed, was held to be an election adopting the contract and effecting a conversion). This retrospective conversion is, however, implied only as between the real and personal representatives of the person giving the option, and does not apply as between the vendor and the purchaser, *e.g.* so as to enable a tenant, after the premises have been burnt down, to exercise an option to purchase, and claim the insurance money as part of his purchase; *Edwards* v. *West*, 7 Ch. D. 858; and see *Re Isaacs*, (1894) 3 Ch. 506, 511].

[(*a*) *Re Isaacs*, (1894) 3 Ch. 506.]

[(*b*) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. (C.A.) 394.]

[(*c*) See *ante*, p. 1227, note (*h*).]

[(*d*) *Re Pyle*, (1895) 1 Ch. 724.]

made in the debtor's lifetime, yet the property is converted into personalty, and belongs, subject to the charge, to the debtor's personal representative (*a*).

[Where in a mortgage with power of sale, the trust of surplus proceeds of sale was for the mortgagor "his heirs or assigns," and the mortgagor became lunatic after the execution of the mortgage but before a sale, and so continued until his death intestate, the surplus proceeds, notwithstanding the terms of the trust, were regarded as personalty (*b*).

If a number of persons be associated together for the purposes of an undertaking, and they agree among themselves that land shall be bought and vested in trustees upon trusts which shall give the members no equitable interest in the lands, but only an interest in profits to be made by the use of them, the members will have no equitable interest in the land so purchased, but only an interest of the nature of personalty in the profits of the undertaking, and will not thereby acquire the right to the county franchise (*c*).]

Neither heir nor next of kin can claim under the will of an ancestor by virtue of the doctrine of conversion.

27. In the above discussion of the doctrine of conversion, it may be taken to be generally immaterial whether the instrument which directs the money to be laid out in land or the land to be converted into money is a deed, or writing, or will. But it may be useful to point out, in reference to claims by an *heir at law* or by *next of kin*, that where the instrument effecting the conversion is a *will*, neither the *testator's* heir at law *as such*, nor his next of kin *as claiming under the intestacy*, can establish any right by virtue of the doctine of conversion (*d*). The conversion directed is a conversion *for the purposes of the will only*, and so far as the trusts declared by the will respecting the property directed to be converted may fail, the property devolves, according to its original character of realty or personalty, in conformity with the principles established by the decisions respecting resulting trusts (*e*).

But heir or next of kin may claim as *persona designata*.

28. But of course either the heir at law or next of kin may claim as *persona designata*. Thus, where a testator bequeathed a sum of money to be laid out on lands to be settled to certain

(*a*) *Re Underwood*, 3 K. & J. 745.

[(*b*) *Re Grange*, (1907) 2 Ch. (C.A.) 20.]

[(*c*) *Per* Lord Coleridge, C.J., Grove and Cave, JJ., *Watson* v. *Black*, 16 Q. B. D. 270.]

(*d*) This point seems to have escaped Lord Loughborough's notice in *Walker* v. *Denne*, 2 Ves. jun. 170, though the cases upon resulting trusts were cited; see Ib. p. 173.

(*e*) See *ante*, pp. 164 *et seq.*

uses, with the ultimate remainder to his *own right heirs*, and the prior limitations failed, the heir, on a bill filed against the executor of his ancestor, was held entitled to the money (*a*); but here the title of the heir was not as *heir*, but as *purchaser* under the will.

Election.

In connection with the subject of conversion, it is to be observed that where land is to be converted into money, or money is to be converted into land, the notional conversion will subsist only until some *cestui que trust*, who is competent to *elect*, intimates his intention to take the property in its original character (*b*). The Court will not compel a conversion against the will of the absolute owner; for should the conversion be made, he would immediately reconvert it, and equity will do nothing in vain (*c*).

Upon this subject we shall consider :—I. What persons are capable of electing; and, II. How the act of the election may be manifested.

Who may elect.

I. Who may elect.

Infants, lunatics.

1. In respect of *personal incapacity*, an infant (*d*) or lunatic (*e*) has no power to make election.

Power of *feme covert* over money-land.

2. A *feme covert*, although [as regards property not settled to her separate use, or belonging to her as separate property by statute,] she has no power to elect by act *in pais* (*f*) like a person who is *sui juris*, yet may, by exercise of the powers of disposition given her by law over money to be laid out in land, or land directed to be turned into money, alter the nature of the property, and so effect an election.

(*a*) *Robinson* v. *Knight*, 2 Eden, 155.

(*b*) *Harcourt* v. *Seymour*, 2 Sim. N.S. 45; *Cookson* v. *Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; *Dixon* v. *Gayfere*, 17 Beav. 433.

(*c*) *Seely* v. *Jago*, 1 P. W. 389.

(*d*) *Carr* v. *Ellison*, 2 B. C. C. 56; *Earlom* v. *Saunders*, Amb. 241; *Thornton* v. *Hawley*, 10 Ves. 129, 139; *Van* v. *Barnett*, 19 Ves. 102; *Seeley* v. *Jago*, 1 P. W. 389; *Re Harrop's Estate*, 3 Drew. 734; and see *Ashby* v. *Palmer*, 1 Mer. 301.

(*e*) *Ashby* v. *Palmer*, 1 Mer. 296.

(*f*) The election here treated of must not be confounded with that which a *feme covert* is *bound to make* under the general doctrine of election; as to which, see *Barrow* v. *Barrow*, 4 K. & J. 415, 419; *Griggs* v. *Gibson*, 1 L. R. Eq. 685; *Cooper* v. *Cooper*, 7 L. R. H. L. 53; [*Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124; *Harle* v. *Jarman*, (1895) 2 Ch. 419; *Re Hodson*, (1894) 2 Ch. 421; *Greenhill* v. *North British and Mercantile Ins. Co.*, (1893) 3 Ch. 474; *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396; *Haynes* v. *Foster*, (1901) 1 Ch. 361. As to the power of the Court to elect, on behalf of a lunatic, to comply with a condition in a will under which he may acquire a greater estate by surrendering a lesser one, see *Re Earl of Sefton*, (1898) 2 Ch. (C.A.) 378].

How *feme covert* might elect to take money-land under the old law.

3. "Although," says Lord Hardwicke, "a *feme covert* cannot alter the nature of money to be laid out in land by contract or deed, yet if the money be invested in land (and sometimes sham purchases have been made for the purpose (*a*)), she may then levy a fine on the land, and give it to her husband, or anybody else. There is a way, also, of doing this without laying the money out in land, and that is, by coming into a Court of Equity and consenting to take the money as personal estate; for upon her being present in Court, and being examined (as a *feme covert* upon fine is), her consent binds the money articled to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband or anybody else. And the reason of it is that at law, money so articled to be laid out in land is considered barely as money until an actual investment, and the equity of this Court alone views it in the light of real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land" (*b*). And, at a later date, Lord Hardwicke's views were ratified by express decision; for where money was devised to be laid out in land for a *feme covert* in tail, with reversion to her in fee, and a bill was filed by her, it was declared that she was entitled to the money, and a commission was ordered to be issued to examine her, separate and apart from her husband, touching the disposition thereof (*c*). [So in a more recent case, money in Court which had arisen from a sale under the Partition Acts, and to shares whereof married women were entitled, was, upon their being separately examined and consenting, distributed as personal estate (*d*); and where the share of the married woman is less than 200*l*. the Court will dispense with her separate examination (*e*). But an election by a *feme covert* to confirm a marriage settlement cannot be inferred from the mere fact of her concurring in an appointment of new trustees thereof under the usual power (*f*).]

How she might elect to take land directed to be sold.

4. Previously to the Fines and Recoveries Act, 1833, if a *feme covert* was entitled to the proceeds of land directed to be *sold*, she

(*a*) See *Henley* v. *Webb*, 5 Mad. 407.

(*b*) *Oldham* v. *Hughes*, 2 Atk. 453.

(*c*) *Binford* v. *Bawden*, 1 Ves. jun. 512; [and from a subsequent report of this case, 2 Ves. 38, it appears that the *feme covert* on being examined elected to have the money paid to her husband; and see *Standering* v. *Hall*, 11 Ch. D. 652].

[(*d*) *Standering* v. *Hall*, 11 Ch. D. 652; see *ante*, p. 964.]

[(*e*) *Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Re Shaw*, 49 L. J. N.S. Ch. 213. In some recent cases, on the husband consenting to payment to the wife on her separate receipt, the amount has been increased to £500: Seton, 6th ed. p. 933.]

[(*f*) *Haywood* v. *Tidy*, 63 L. T. N.S. 679.]

and her husband might have made a title to the proceeds of sale by fine (*a*); and by the same method, as it would seem, might have made themselves absolute owners, and have called for a conveyance, and by this means have elected to take the land.

Fines and Recoveries Act, 1833.

5. By 3 & 4 W. 4. c. 74, ss. 40, 71, 77 (*b*), a married woman is enabled, with the concurrence of her husband, and with the formalities required by the Act, to dispose of any estate at law or in equity, or any interest, charge, lien, or incumbrance in or upon lands, or money to be laid out in a purchase of lands, or to relinquish or release any power over the same, as if she were a *feme sole;* so that in the case of money liable to be laid out in land, a *feme covert* can, through the medium of the power of disposition conferred by the Act, virtually elect to take the money.

Special power of married woman under Fines and Recoveries Act, over money which is an *interest in land.*

6. And the Act enables a married woman not only to dispose of property which, though personal estate in fact, is real estate in equity, but also of property which is in equity *personal estate*, provided only it be *an interest in land;* and this, although according to the ordinary doctrines of the Court (*c*), the married woman would, by reason of her interest being *reversionary*, have no such power of disposition. Thus, where real estate is devised upon trust for sale in terms amounting to a conversion out and out, and a married woman takes a share of the proceeds, she can, under the statute, dispose of her share, even though reversionary, as being an interest in land (*d*). And it is conceived that the same principle must apply to the case of a reversionary *money legacy raisable out of land,* notwithstanding the doubts entertained by Lord Justice (then Vice-Chancellor) Knight Bruce, in the case of *Hobby* v. *Collins* (*e*). But the Fines and Recoveries Act ceases to apply when the money has been actually raised (*f*).

[Power of married woman to elect as to separate property.]

[As a married woman has an absolute power of disposition over property settled to her separate use, or belonging to her as her separate property under the Married Women's Property Act, 1882 (*g*), she can elect to take it either as land or money as if she were *sui juris* (*h*).]

(*a*) *May* v. *Roper*, 4 Sm. 360; *Forbes* v. *Adams*, 9 Sim. 462.

(*b*) Extended to contingent interests by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6.

(*c*) See *ante*, p. 958.

(*d*) *Briggs* v. *Chamberlain*, 11 Hare, 69; *Tuer* v. *Turner*, 20 Beav. 560; *Bowyer* v. *Woodman*, 3 L. R. Eq. 313; [*Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Franks* v. *Bollans*, 3 L. R. Ch. App. 717; *Miller* v. *Collins*, (1896) 1 Ch. (C.A.) 573.]

(*e*) 4 De G. & Sm. 289; and see observations of Lord St. Leonards in his essay on the Real Property Statutes, 240, [and of Lindley, L.J., in *Miller* v. *Collins*, *sup.*].

(*f*) *Re Alge*, 2 Ir. R. Eq. 485.

[(*g*) 45 & 46 Vict. c. 75.]

[(*h*) *Re Davidson*, 11 Ch. D. (C.A.) 341.]

A person may elect, subject to a charge.

7. If A. convey an estate to a trustee in trust to sell and pay to the trustee a certain amount, and to pay the balance to A., his executors, administrators, and assigns as personalty, it is competent to A., as the person entitled subject to the *charge*, to elect to take it as realty; and if he do so, and the trustee sells after A.'s decease, the *heir* of A. will take the surplus (*a*).

[Election subject to rights of third persons to insist on a sale.]

[Where it is sought to establish an election to take *in specie*, and free from a trust to convert, by a person who is only entitled so to elect subject to the rights of third persons to insist upon a sale, it must be shown that such persons have assented (*b*).]

Remainderman.

8. How far a *remainderman* may elect, has not been definitely settled. It seems clear, so far, that the remainderman may elect for the purposes of disposition; that is, being absolutely entitled to the interest in remainder, he may deal with it by act *inter vivos*, or by will, by any denomination that he pleases; and if, therefore, in the case of money impressed with the character of land, he chooses to call it personal estate, it will pass by his will under the description of personal estate (*c*). But should the remainderman declare an intention of taking the money as personalty, and then die, in the lifetime of the tenant for life, *intestate*, will the money devolve, as between the real and personal representative, as realty or personalty? If the tenant for life call for a conversion, and the money is actually laid out on a purchase of land, it is of course too late then for the remainderman to elect to take it as money; for, as the property is now in the shape of land, the policy of the law will not allow him to impress upon it the character of personalty. Supposing the remainderman to elect to take the property as money, *before the actual conversion*, and then to die intestate, and after his death the tenant for life calls for a conversion, and the money is laid out in a purchase of land accordingly, it is conceived, that, as the election was made subject to another's right to call for a conversion, which right was exercised, the act of election is defeated, and the property will devolve as land (*d*). Should the remainderman elect to take the money as such, and then die intestate, and the tenant for life *never calls for a conversion*, it may be argued that, as the remainderman is absolutely entitled, subject to another's right to

(*a*) *Re Gardiner's Trust*, 1 Eq. Rep. 57; *Mutlow* v. *Bigg*, 1 Ch. D. (C.A.) 385; [*Meek* v. *Devenish*, 6 Ch. D. 566].

[(*b*) *Re Douglas and Powell's Contract*, (1902) 2 Ch. 296.]

(*c*) *Lingen* v. *Sowray*, 1 P. Wms. 172; *Harcourt* v. *Seymour*, 2 Sim. N.S. 12; *Re Skeggs*, 2 De G. J. & S. 533.

(*d*) *Holloway* v. *Radcliffe*, 23 Beav. 163. This was the case of an undivided share, but the principle was the same. But see *Re Gardiner's Trust* 1 Eq. Rep. 57.

require conversion which was never exercised, the money, being still found in that shape, should be discharged from the impress of realty, and be deemed to have that character in which the remainderman was desirous of taking it (*a*). Such a doctrine, however, is open to the objection that during the life of the tenant for life the nature of the remainderman's interest, whether real or personal, would be uncertain, and dependent on the option of the tenant for life; and the principle acted upon in a recent case appears to be, that there can be no election by a person whose interest is a limited one or contingent at the time (*b*).

[A person contingently entitled may make a contingent election.]

[9. But in a more recent case, where real estate was devised to trustees upon trust for sale, and the proceeds were, subject to a charge, given in a contingent event to the testator's son absolutely, it was held that the son, pending the contingency, was competent to make an election, which would be operative in the event of the contingency happening before or upon his death, to take the estate as realty (*c*).]

Election where an estate is to be sold or money is to be laid out on land, and several parties are interested.

10. Where an estate is directed to be sold, the proceeds to be divided amongst *several persons*, no one *singly* can elect that his own undivided share shall not be disposed of, but shall remain realty (*d*), for the other undivided shares will not sell so beneficially in proportion as if the estate were entire (*e*); but if money be directed to be laid out in lands to be settled on A., B., and C., as tenants in common, any one of them may elect to take his own third as money, for two-thirds may be invested just as advantageously as the whole sum (*f*).

Tenant in tail may elect.

11. Sound principle would require that *a tenant in tail* of lands to be purchased should not be allowed to elect, because the interests of the issue and the remainderman, who both take by title paramount, would otherwise be prejudiced. But the old rule appears to have been, that a tenant in tail might in *every case* have elected, and on filing a bill would have been entitled to the money (*g*); and the principle upon which the practice was

(*a*) See *Re Skeggs*, 2 De G. J. & Sm. 533; *Stead* v. *Newdigate*, 2 Mer. 531; *Gillies* v. *Longlands*, 4 De G. & Sm. 379; *Re Pedder's Settlement*, 5 De G. M. & G. 890; *Re Stewart*, 1 Sm. & G. 32.

(*b*) *Sisson* v. *Giles*, 3 De G. J. & S. 614; [and see *Walrond* v. *Rosslyn*, 11 Ch. D. 640; *Re Douglas and Powell's Contract*, (1902) 2 Ch. 296].

[(*c*) *Meek* v. *Devenish*, 6 Ch. D. 566.]

(*d*) *Holloway* v. *Radcliffe*, 23 Beav. 163; *Fletcher* v. *Ashburner*, 1 B. C. C. 500, *per* Sir T. Sewell; *Deeth* v. *Hale*, 2 Moll. 317; and see *Smith* v. *Claxton*, 4 Mad. 494.

(*e*) *Chalmer* v. *Bradley*, 1 J. & W. 59; *Holloway* v. *Radcliffe*, 23 Beav. 163; and see *Trower* v. *Knightley*, 6 Mad. 134.

(*f*) *Seeley* v. *Jago*, 1 P. W. 389; *Walker* v. *Denne*, 2 Ves. jun. 182, *per* Lord Loughborough.

(*g*) *Cunningham* v. *Moody*, 1 Ves. 176, *per* Lord Hardwicke.

grounded was said to be, that equity will do nothing in vain, and it were useless to direct an actual purchase and settlement when the tenant in tail the next moment might dispose of the fee simple. Lord Cowper, however, in the case of *Colwal* v. *Shadwell* (*a*), took the distinction, that where the *remainder in fee* was not vested in the tenant in tail himself, but was limited over to a stranger, there, as the absolute fee could only be acquired by a *recovery*, which was a thing of time, and could not be suffered in *vacation*, the remainderman should not lose his chance; and as in that case the tenant in tail did actually die before the recovery was suffered, it showed the remainderman's interest in so glaring a light, that it established the precedent ever afterwards (*b*). But even then the money would have been decreed to the tenant in tail, provided the remainderman had waived his right and consented to the payment (*c*).

Lord Chancellor King's doubt.

12. In *Eyre's case* (*d*), Lord Chancellor King was for extending the same protection to the *issue*. "I cannot see," he said, "why I should not have the like regard to the *issue* in tail as for the *remainderman*. It is possible the tenant in tail, before he can light on a purchase and settle it, may die, leaving issue, and this is a chance of which I would not deprive such issue." And in *Speaker Onslow's case* (*e*), he declared his adherence to the same opinion. But the rule which had been established before his time (*f*) of paying the fund to the tenant in tail where the uses might be barred by fine, but not where they could only be barred by recovery, appears, notwithstanding his Lordship's authority, to have been revived by his successors (*g*).

Tenant in tail may elect without suit.

13. And the election of the tenant in tail need not necessarily have been made in a suit, but might have been expressed by act *in pais*, as if tenant in tail with remainder to himself had received the money of the trustee, or if tenant in tail with remainder to a stranger had received it of the trustee with the consent of the remainderman (*h*).

(*a*) Cited *Chaplin* v. *Horner*, 1 P. W. 485.

(*b*) See *Cunningham* v. *Moody*, 1 Ves. 176; *Talbot* v. *Whitfield*, Bunb. 204.

(*c*) See *Trafford* v. *Boehm*, 3 Atk. 440, and the cases cited under note (*a*) p. 1238, *post*.

(*d*) 3 P. W. 13.

(*e*) 3 P. W. 14, note (G).

(*f*) See *Benson* v. *Benson*, 1 P. W. 130, note (1).

(*g*) *Trafford* v. *Boehm*, 3 Atk. 447, *per* Lord Hardwicke; *Cunningham* v. *Moody*, 1 Ves. 176, *per eundem*; *Binford* v. *Bawden*, 1 Ves. jun. 512; *Holdernesse* v. *Carmarthen*, 1 B. C. C. 382, *per* Lord Thurlow; and see the preamble of 39 & 40 G. 3. c. 56.

(*h*) *Trafford* v. *Boehm*, 3 Atk. 448; and see *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 590; but see *Pearson* v. *Lane*, 17 Ves. 106.

Observation of Lord Thurlow.

Lord Thurlow, indeed, once said: "If the fund be outstanding in trustees, and it is necessary to come hither in order to obtain it, the money, when obtained, will be personal property; and so it would also, if the trustees pay it without suit. That is, supposing the estate, when purchased, would be a fee simple, for *it would be otherwise in case of its being an estate tail*" (*a*). But the concluding remark must have been intended (as Mr Serjeant Hill, in a note on the passage, has justly observed (*b*)) to apply not to every tenant in tail, as, not to tenant in tail with remainder to himself in fee, but only to tenant in tail, with remainder to a stranger; for, in a subsequent case, where the tenant in tail had executed an assignment of two sums of money directed to be laid out in lands, his lordship said: "As to the 500*l.*, the assignor was tenant in tail, remainder to a stranger, remainder to himself in fee; as to the 1,000*l.*, he was tenant in tail, with remainder in fee to himself. I am clear, that in regard to the 1,000*l.* he had the absolute dominion over it, having the immediate remainder in fee; but as to the 500*l.*, I am equally clear the other way, because of the intermediate remainder" (*c*).

39 & 40 G. 3. c. 56.

14. By 39 & 40 G. 3. c. 56 (*d*), the inability of the tenant in tail with remainders over of money to be laid out in the purchase of land to obtain possession of the money, except through the medium of a fictitious purchase (*e*), was removed; and the Court was empowered, on the petition of the first tenant in tail of such money-land, and of the parties (if any) having antecedent estates therein (with a provision for the separate examination of married women), to order the money to be paid to the petitioners or as they should appoint (*f*); so that a kind of statutory power of election was thus conferred on tenants in tail.

Fines and Recoveries Act

15. By the Fines and Recoveries Act, 1833 (*g*), a tenant in tail may, with the consent of the protector of the settlement, if any, dispose absolutely of the lands entailed *at any time, whether in term or vacation*, and by the 71st section of the statute it is enacted, that money subject to be invested in the purchase of lands to be settled so (*h*) that any person, if the lands were

(*a*) *Pulteney* v. *Darlington*, 1 B. C. C. 236.

(*b*) Ib. note (*a*), Lord Henley's edition.

(*c*) *Holdernesse* v. *Carmarthen*, 1 B. C. C. 382.

(*d*) Repealed and extended by 7 G. 4. c. 45, which in its turn was repealed by 3 & 4 W. 4. c. 74, s. 70.

(*e*) See *Henley* v. *Webb*, 5 Mad. 407.

(*f*) See 5 Ves. 12, note (8), as to the qualification introduced by the Court in making orders for payment under this Act.

(*g*) 3 & 4 W. 4. c. 74, s. 71.

[(*h*) These words comprise money which is subject to be invested in land either presently or *in futuro*,

purchased, would have an estate tail therein, shall be treated as the lands to be purchased, and the previous clauses of the Act shall apply to such money, as if it were directed to be laid out in the purchase of *freehold* lands, and such lands were actually purchased and settled.

Whether tenant in tail of money liable to be laid out in land may still elect to take the money.

16. With respect to this enactment, a doubt suggests itself whether, even at the present day, a tenant in tail, *with remainder to himself in fee*, may not elect to take in its original character money which is liable to be laid out in the purchase of lands, and declare such election either by the institution of a suit or by act *in pais*. It is true that under the 71st section of the Act the tenant in tail may at any time defeat his issue and the remaindermen by a deed executed with the proper formalities; but what is there to prevent him from exercising a power founded upon principles independent of the statute, and so acquiring the fee simple by the mere act of election? It may be said that the old rule, which made election a bar to the issue, might have been grounded on this—that, because no fine or recovery could have been levied or suffered of money (*a*), the Court, on that account, held election to have the effect of a bar, lest the tenant in tail should lose the power, which the law intended him, of defeating the settlement, but that, since by the Fines and Recoveries Act a tenant in tail of money may bar his issue and the remainderman by the same formalities as if the lands were actually purchased and settled, the same indulgence ought not now to be shown. But to this it may be answered, that the tenant in tail was allowed to elect, not because the tenant in tail of money had a right to exercise the same powers of ownership as a tenant in tail of lands, but for the purpose of avoiding circuity. Had the former been the principle, the tenant in tail might equally have barred the remainderman as the issue; but for the destruction of remainders an actual settlement was necessary, and a sham purchase was often resorted to for the purpose (*b*).

Practice of the Court as to moneys paid in by railway companies.

17. The practice of the Court in dealing with sums paid in by railway companies as compensation for portions of entailed land taken by them, went beyond any rule previously established,

and consequently the fact that the direction for investment of the money is deferred until the death of a tenant for life, does not prevent the execution of an effectual disentailing assurance; *Re Harvey*, (1901) 2 Ch. 290.]

(*a*) See *Benson* v. *Benson*, 1 P. W. 130; *Edwards* v. *Countess of Warwick*, 2 P. W. 174; *Maynwaring* v. *Maynwaring*, 3 Atk. 413.

(*b*) See —— v. *Marsh*, cited *Chaplin* v. *Horner*, 1 P. W. 485, note (†); *Maynwaring* v. *Maynwaring*, 3 Atk. 413; *Henley* v. *Webb*, 5 Mad. 407.

for the Court was in the habit of ordering the money to be paid to the tenant in tail without the execution of a disentailing deed, and without inquiring who was entitled in remainder (*a*). But subsequently Lord Selborne, sitting for M.R., refused to order payment out of Court except on production of a disentailing deed in the ordinary way (*b*).

II. How election may be manifested.

How election may be made.

1. The *act* of election may either be *presumed* by the Court or be *expressly declared.*

Presumption.

2. The *presumption* may arise from slight circumstances of conduct (*c*). Thus it will be sufficient, where land is to be converted into money, if the *cestui que trust* enter into possession and take the title-deeds into his own custody, for the trustees cannot recover the deeds from the *cestui que trust,* and they cannot sell without them (*d*); or if the *cestui que trust* merely keep the estate for a length of time unsold (*e*); but in one case a period of two years was considered not to be sufficient indication of such an intention (*f*), [and the mere fact of keeping the property unsold for a long time will not be sufficient if there was a good reason for not attempting to sell, as, for instance, the existence of an over-riding right of pre-emption in a lessee (*g*)]. So, where money is to be turned into land, it will be sufficient if

Possession of the land.

[Where good reason for not selling.]

(*a*) *Sowry* v. *Sowry*, 6 Jur. N.S. 337; *Re South Eastern Railway Company*, 30 Beav. 215; *Re Tyler's Estate*, 8 W. R. 540; *Nottley* v. *Palmer*, 1 L. R. Eq. 241; *Re Row*, 17 L. R. Eq. 300; *Re Holden*, 1 H. & M. 445 (where the amount of the fund in question was 1394*l.* Consols); *Re Watson*, 10 Jur. N.S. 1011 (in which case the Lords Justices said they could not understand how the Court could have first come to the conclusion, in the face of the statute, that the money could be paid out without the execution and enrolment of a disentailing deed, but the practice was useful and convenient, and saved expense). *Ex parte Maunsell*, 2 Ir. Rep. Eq. 32; *Re Wood's Settled Estates*, 20 L. R. Eq. 372. [In *Stead* v. *Harper*, W.N. (1896) p. 46, a small sum was paid out without a disentailing deed.]

(*b*) *Re Butler's Will*, 16 L. R. Eq. 479; and see *Re Broadwood's Settled Estates*, 1 Ch. D. 438; *Re Limerick and Ennis Railway Company, Ex parte Smyth*, 10 Ir. R. Eq. 66; [*Re Reynolds*, 3 Ch. D. (C.A.) 61].

(*c*) See *Pulteney* v. *Darlington*, 1 B. C. C. 238; *Van* v. *Barnett*, 19 Ves. 109; *Bradish* v. *Gee*, Amb. 229; *Dixon* v. *Gayfere*, 17 Beav. 433; [*Re Gordon*, 6 Ch. D. 531; *Re Douglas and Powell's Contract*, (1902) 2 Ch. 296].

(*d*) *Davies* v. *Ashford*, 15 Sim. 42; and see *Padbury* v. *Clark*, 2 Mac. & G. 298.

(*e*) See *Ashby* v. *Palmer*, 1 Mer. 301; *Dixon* v. *Gayfere*, 17 Beav. 433; *Griesbach* v. *Fremantle*, 17 Beav. 314; *Mutlow* v. *Bigg*, 1 Ch. D. (C.A.) 385; [*Re Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. (C.A.) 341; *Potter* v. *Dudeney*, 56 L. T. N.S. 395].

(*f*) *Kirkman* v. *Miles*, 13 Ves. 338; *Cookson* v. *Cookson*, 12 Cl. & Fin. 121; and see *Brown* v. *Brown*, 33 Beav. 399; *Parker* v. *Williams*, 15 W. R. 1006; but see *Crabtree* v. *Bramble*, 3 Atk. 688; *Inwood* v. *Twyne*, 2 Eden, 148.

[(*g*) *Re Lewis*, 20 Ch. D. 654.]

the *cestui que trust* receive the money from the trustee (*a*); but not if he merely receive the annual income, though for a considerable length of time (*b*). Receipt of the money.

3. It was determined by Lord Harcourt that a *cestui que trust* had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself and his *executors*; for this, he observed, was tantamount to saying the money should *not* go to the heir (*c*); and *vice versâ*, where land was to be converted into money, it was held by Lord Hardwicke, that a lease by the *cestui que trust*, reserving a rent to her *heirs* and assigns, was evidence of an intention to continue the property as real estate (*d*). Change of securities and trust declared for the "executors." Grant of a lease and reservation of rent to the "heirs."

4. To constitute an act of election it is not necessary that the person entitled, as, for instance, to money to be laid out in land, should know that but for the act of election it would pass as land, but it is sufficient if the Court can collect the intention that, with or without such knowledge, he meant the money to be dealt with and treated as money (*e*). What knowledge required for election.

5. A person may *express* his election even by parol. This, at least, was the opinion of Lord Macclesfield (*f*), and apparently was actually decided in the case of *Chaloner* v. *Butcher* (*g*), in which the husband having *declared* that the money should not be laid out in land, the Court held that, if the question concerned the right of a third person, the declarations of the husband ought not to be admitted, but, as it was between his personal and real representative, they should be read. And both Lord Thurlow (*h*) and Lord Eldon (*i*) seem to have lent their sanction to the same doctrine, so that an *obiter dictum* of Lord Hardwicke to the contrary (*j*), though supported by so illustrious a name, must be considered as overruled. Election expressed. Parol declaration when admissible.

6. Where money bore the notional impress of realty, the *cestui que trust* might, until the Wills Act, 1837, have bequeathed it as so much money to be laid out in land, and the money would have How money to be turned into land affected by *cestui que trust's* will.

(*a*) *Pulteney* v. *Lord Darlington*, 1 B. C. C. 238, *per* Lord Thurlow; *Trafford* v. *Boehm*, 3 Atk. 440; and see *Rook* v. *Worth*, 1 Ves. 461.

(*b*) *Gillies* v. *Longlands*, 4 De G. & Sm. 372; and see *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*c*) *Lingen* v. *Sowray*, 1 P. W. 172; and see *Cookson* v. *Cookson*, 12 Cl. & Fin. 121; *Harcourt* v. *Seymour*, 2 Sim. N.S. 12.

(*d*) *Crabtree* v. *Bramble*, 3 Atk. 680, see 688, 689; and see *Griesbach* v. *Fremantle*, 17 Beav. 314; [and, as to the case of a mortgagee, *Re Grange*, (1907) 2 Ch. (C.A.) 20, *ante*, p. 1229].

(*e*) *Harcourt* v. *Seymour*, 2 Sim. N.S. 12, see p. 46.

(*f*) *Edwards* v. *Countess of Warwick*, 2 P. W. 174.

(*g*) Cited *Crabtree* v. *Bramble*, 3 Atk. 685.

(*h*) *Pulteney* v. *Darlington*, 1 B. C. C. 237.

(*i*) *Wheldale* v. *Partridge*, 8 Ves. 236.

(*j*) *Bradish* v. *Gee*, Amb 229.

passed, though the will was not attested acccording to the Statute of Frauds (*a*); for the will operated first by way of election, and then by way of bequest; but now by the Wills Act (*b*), the same formalities are required for the testamentary disposition of personal as of real estate.

SECTION II

THE ACT OF THE TRUSTEE SHALL NOT ALTER THE NATURE OF THE CESTUI QUE TRUST'S ESTATE

Power of the trustee at law and in equity.

1. At *law* the trustee is the absolute owner of the land or fund, and therefore may exercise any control or dominion over it—may convert realty into personalty, or personalty into realty: but *equity*, which regards the trustee as a mere instrument for the execution of the trust, will not permit the interest of the *cestui que trust* to be affected by any act of misconduct, but, as often as any wrongful conversion is made, will transfer to the new interest the quality and character of the old — will treat real estate as personal, and personal as real, as the circumstances of the case may require. [Thus where pure personal estate is given upon trust for one for life, with remainder to charities, and the trustees are empowered to invest on real securities, and do so during the life of the tenant for life, their act will not affect in any way the validity of the gift in favour of the charities (*c*).]

Where the *cestui que trust* is *sui juris*.

2. But although every such change in the nature of the property as is not made either in pursuance of the trust or by the authority of the beneficial owner, must in general be considered a misfeasance, the dealings of the Court (under the respective jurisdictions of *lunacy* and *chancery*), and of committees, guardians, and trustees, with the property of *lunatics* and *infants*, require particular notice.

Power of the trustee where the *cestui que trust* is a lunatic.

3. It has been laid down as a general rule in *lunacy*, that the Court will not alter the condition of the lunatic's property to the prejudice of his successors; but the maxim must be received with the qualification, *except it be for the benefit of the lunatic*

(*a*) See the cases cited, *Lechmere* v. *Earl of Carlisle*, 3 P. W. 221, note (C); and see *Pulteney* v. *Darlington*, 1 B. C. C. 235, 236; *Sharp* v. *St Sauveur*, 7 L. R. Ch. App. 343.

(*b*) 7 W. 4. & 1 Vict. c. 26.

[(*c*) *Re Hamilton*, (1896) 2 Ch. (C.A.) 617.]

himself (*a*). The Chancellor takes the advice and assistance of the presumptive next of kin and presumptive heir at law in the care and management of the property (*b*); but through all the cases runs this prevailing principle—that the object of attention is exclusively and entirely the interest of the lunatic, without any regard to those who may have eventual rights of succession (*c*). If the Court considered how the representatives would be affected, there would always be among them an emulation of each other, and their speculations, if the administrator were to engage in them, would mislead his attention as to the interest of the only person he was bound to protect; there would be a continued running account between the personal and real estates; the Chancellor would be perpetually looking to the right or left, and the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events (*d*).

The interest of the lunatic the exclusive object.

4. Upon this principle, where a lunatic was seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., and the latter was subject to a mortgage, the money arising from a fall of timber upon A. was directed to be applied in discharge of the mortgage upon B.; and upon a question between the respective heirs, it was held that the representative who succeeded to A. was not entitled to any recompense from the representative who inherited B. (*e*).

Timber cut on estate *ex parte paternâ* applied to relief of estate *ex parte maternâ*.

5. So, if the lunatic be considerably indebted, and it appears that his maintenance would be better provided for, and his advantage promoted, by the sale of a real estate inconvenient and ill-conditioned, instead of exhausting the personalty, the Court, on a proper representation of the case, would have no difficulty in making an order to that effect (*f*).

Sale of lunatic's real estate.

[6. And where a lunatic became absolutely entitled to funds which were vested in trustees upon trust to lay them out in the purchase of land, but which were actually invested on mortgage,

[Getting in money directed to be laid out in land.]

(*a*) *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley.

(*b*) *Ex parte Phillips*, 19 Ves. 123, *per* Lord Eldon.

(*c*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72; and *S. C.*, 4 B. C. C. 233, *per* Lord Thurlow; and see *Ex parte Bromfield*, 1 Ves. jun. 462; *Ex parte Grimstone*, Amb. 708; *S. C.*, cited 2 Ves. jun. 75, note (*x*), and 4 B. C. C. 235, note; *Ex parte Phillips*, 19 Ves. 123; *Dormer's case*, 2 P. W. 265; *Ex parte Chumley*, 1 Ves. jun. 297; *Ex parte Baker*, 6 Ves. 8.

(*d*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72, 73; *S. C.*, 4 B. C. C. 233, 234, *per* Lord Loughborough.

(*e*) *Ex parte Phillips*, 19 Ves. 123, *per* Lord Eldon; but see *Re Leeming*, 3 De G. F. & J. 43; *post*, p. 1244.

(*f*) *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon.

and the mortgage money was got in pursuant to an order in the lunacy expressing that it was for the benefit of the lunatic to call it in, and was thereafter dealt with in the lunacy with other moneys admittedly personalty, it was held that the fund had been reconverted into personalty (*a*).]

Fall of timber.

7. So, timber which *ought to be cut* on a lunatic's estate may be felled by the direction of the Court, and the proceeds may either be applied to the redemption of the land-tax, or payment of debts (*b*), or to any other purpose which the true interest of the lunatic may require; or if not wanted for *any* particular purpose, will go to the next of kin as personalty, and not to the heir as part of the realty (*c*).

Action of trespass.

8. So, if it be necessary for the interest of the real estate to bring an action of trespass, resort may be had with that object to the lunatic's personal fund (*d*).

Improvements.

9. By the same rule the money of the lunatic may be laid out in improvements (*e*); and the Chancellor, acting *tanquam bonus pater-familias*, may take every opportunity of ameliorating the estate by fair and ordinary means, such as draining, inclosure, &c. (*f*), or erecting a steam engine for the purpose of working a coal mine (*g*), but must not engage in risks and dangerous adventures (*h*). And of course the personalty may be drawn upon for *necessary expenses*, as repairs (*i*), fines for renewal of leases, or admission to copyholds (*j*). But where the committees of a lunatic, who were entitled to the estate themselves after his death, laid

Necessary expenses of real estate.

[(*a*) *M'Donogh* v. *Nolan*, 9 L. R. Ir. 262.]

(*b*) *Ex parte Phillips*, 19 Ves. 119; *Bevan's case*, cited *Ex parte Bromfield*, 1 Ves. jun. 455, 457; *Re Mary Smith* (*a lunatic*), 10 L. R. Ch. App. 84, *per* L. J. James.

(*c*) *Ex parte Bromfield*, 1 Ves. jun. 453; *S. C.*, 3 B. C. C. 510; *Oxenden* v. *Compton*, 2 Ves. jun. 69; *S. C.*, 4 B. C. C. 231; *Shelley's case*, cited 1 Ves. jun. 457; *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon. The *dictum* in *Marquis of Anandale* v. *Marchioness of Anandale*, 2 Ves. 384, must be considered as overruled.

(*d*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72, *per* Lord Loughborough.

(*e*) *Sergeson* v. *Sealey*, 2 Atk. 414, *per* Lord Hardwicke; *Dormer's case*, 2 P. W. 262; [*Re Gist*, 5 Ch. D. (C.A.) 881].

(*f*) See Justice De Grey's argument in *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 2 Ves. jun. 75, note.

(*g*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 73.

(*h*) Ib. *per* Lord Loughborough.

(*i*) *Sergeson* v. *Sealey*, 2 Atk. 414, *per* Lord Hardwicke; *Ex parte Grimstone*, Amb. 708: *S. C.*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 237, note, *per* Lord Apsley; 2 Ves. jun. 72, *per* Lord Loughborough; *Newport's case*, cited Ib.; [*Re Gist*, 5 Ch. D. (C.A.) 881;] *Re Badcock*, 4 M. & Cr. 440. But it was said in the last case, that "if the money were laid out in a purchase of land, or, what was the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty."

(*j*) Justice De Grey's argument in *Ex parte Grimstone*, *ubi sup.*; but see *Degg's case*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note.

out a sum in *purchasing* timber for repairs, when they ought to have cut timber on the estate, Lord Hardwicke said that, having done so merely to serve their own interest, they should make good the disbursement to the lunatic's next of kin (*a*).

[Where the estate duty on the realty of a lunatic was paid out of the personalty, so that any charge on the realty in favour of the personalty was extinguished before the death of the lunatic, it was held that the next of kin had no right to have a charge on the realty for the amount of the duty, there being no interest in the lunatic requiring the charge to be kept alive, and no person who could require it to be raised (*b*).] [Estate duty.]

10. In the preceding cases the conversion has been for the clear benefit of the lunatic, but in general the Court will not lightly change the condition of the property, but will only act on pressing and urgent occasions (*c*): it will interfere with great caution, and do nothing that is unnecessary or uncalled for (*d*). The Court will not *buy and sell* for the lunatic (*e*); and therefore, if the committee of a lunatic wantonly, and of his own head, lay out money upon land, or turn land into money, the Court will not suffer such fraudulent management to affect the rights of the representatives (*f*), but will transfer to the heir what ought to have remained real estate, and to the next of kin what ought to have remained personal estate (*g*). [So, where a lunatic was tenant in tail in possession of large estates, upon which it was desirable to expend a considerable sum for repairs and improvements, and he was also entitled to a fund in Court sufficient for the required outlay, it was held that the expenses of the repairs and improvements on the settled estates ought to be raised by mortgage or charge of those estates, and that the fund in Court ought not to be applied for the purpose (*h*);] and where a mortgage upon the lands of the lunatic is discharged out of his personal estate, though it was formerly held that the next of kin after the lunatic's decease had no *lien*

Conversion not allowed, except where it is clearly for the lunatic's benefit.

Personal estate applied to relief of real estate.

(*a*) *Ex parte Ludlow*, 3 Atk. 407.

[(*b*) *Re Hole*, (1905) 2 Ch. 384; (1906) 1 Ch. (C.A.) 673.]

(*c*) *Ex parte Bromfield*, 1 Ves. jun. 463, and 3 B. C. C. 515, *per* Lord Thurlow; and see *Re Mary Smith* (*a lunatic*), 10 L. R. Ch. App. 79.

(*d*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 76, and 4 B. C. C. 238, *per* Lord Loughborough.

(*e*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 73, *per* Lord Loughborough; *Ex parte Grimstone*, cited in *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley; *Sergeson* v. *Sealey*, 2 Atk. 414, *per* Lord Hardwicke.

(*f*) See *Ex parte Bromfield*, 1 Ves. jun. 462.

(*g*) *Anon. case*, 2 Freem. 114; *Awdley* v. *Awdley*, 2 Vern. 192; *Marquis of Anandale* v. *Marchioness of Anandale*, 2 Ves. 384, *per* Lord Hardwicke; and see *Re Badcock*, 4 M. & Cr. 440.

[(*h*) *Re Gist*, 5 Ch.D. (C.A.) 881.]

upon the real estate for the amount expended (*a*), it has since been ruled that the personal estate after the lunatic's death shall be recouped the amount expended in exonerating the real estate (*b*). [And where a mortgage of a lunatic's real or leasehold property is paid off out of his personal estate, the mortgage ought not to be re-conveyed to the lunatic, but kept on foot by transferring it to the committee, to be disposed of as the Court may direct, so as to leave open the question how the mortgage debt should ultimately be borne (*c*).] However, if timber be cut down, not by a committee in breach of his duty, but by a stranger tortiously, then, as there is no abuse of confidence, the heir has no equity, and the property of the timber, like a windfall, will belong to the executor (*d*).

[Transfer of mortgage should be taken.]

[Right of customary heir preserved in equity on enfranchisement.]

[11. Where a copyhold estate, as to which the rules of descent were different from those of freeholds, was enfranchised, the Court inserted in the order sanctioning the enfranchisement, a declaration carrying over the equitable interest in the enfranchised property, in the event of the lunatic dying intestate, to the persons who would have taken it if it had not been enfranchised (*e*).

[Money of lunatic invested in land.]

12. So where, under an order made in lunacy, part of the personal estate of a lunatic was laid out in the purchase of real estate as a convenient mode of investment, and a declaration was inserted in the conveyance, in conformity with the terms of the order, that the premises granted were "to all intents and purposes to be considered as part of the personal estate of the lunatic," it was held that the value of the lands was part of the personal estate of the lunatic at his death, and consequently liable to probate duty (*f*); and where a contract for purchase of real estate was entered into by a person who was subsequently found to be of unsound mind, and the purchase was completed by direction of the Master in Lunacy, and then the lunatic died intestate, it was held that, as there had been an election by the authorities in lunacy to adopt the voidable contract, a conversion had been effected, and the purchased land devolved as realty (*g*).

(*a*) *Ex parte Grimstone*, Amb. 706; S. C., cited *Oxenden* v. *Compton*, 4 B. C. C. 235, and *Weld* v. *Tew*, Beat. 272.

(*b*) *Weld* v. *Tew*, Beat. 266; *Re Leeming*, 3 De G. F. & J. 43.

[(*c*) *Re Melly*, 49 L. T. N.S. 429.]

(*d*) *Anon. case*, cited *Ex parte Bromfield*, 1 Ves. jun. 462, and 3 B. C. C. 515, *per* Lord Thurlow.

[(*e*) *Re H. D. Ryder*, 20 Ch. D. (C.A.) 514.]

[(*f*) *Attorney-General* v. *Marquis of Ailesbury*, 12 App. Cas. 672, reversing the decision of C. A., 16 Q. B. D. 408, and restoring decision of Q. B. D., 14 Q. B. D. 895.]

[(*g*) *Baldwyn* v. *Smith*, (1900) 1 Ch. 588.]

13. Where property is vested in trustees in trust to apply the income for the maintenance of a lunatic during his life, and any surplus income not required is to be *accumulated as capital*, and the lunatic is absolutely entitled to other property, the Court will apply the life interest, in the first place, towards his maintenance, unless the trustees of the settled property have an absolute discretion whether they will apply the whole or any part of the income for the lunatic's benefit, in which case the exercise of such discretion will not be interfered with (*a*).] [Out of what fund lunatic to be maintained.]

Next as to *infants*.

1. Lord Thurlow, on one occasion, but without having examined the authorities, said he could not distinguish between lunatics and infants (*b*); but, when the matter came on again, and he had maturely considered the subject, he never once hinted at the existence of such a doctrine (*c*); and, indeed, until the Wills Act, 1837, there was a very broad distinction between the two cases; for, if a *lunatic* recovered, which in contemplation of law is always possible, he had precisely the same power of disposition, though by different modes, over one species of property as over the other (*d*); but an *infant*, while he could have bequeathed personal estate under the age of twenty-one, could not have devised a freehold until he had attained that age (*e*). The Court, therefore, would not allow an infant's estate to be converted from one species of property into another, not from any tenderness to the rights of the representatives, but from a regard to the circumstances and capacity of the infant himself. Should his money have been turned into land, he would have lost a power of disposition which the law permitted him to exercise: should land have been turned into money, he would indirectly have gained a power which the policy of the law had forbidden him (*f*). Infants distinguished from lunatics.

2. Upon the same principle, had timber been cut on an infant's estate, the proceeds, and, it seems, the accumulation of the proceeds (*g*), would have continued part of the realty, and have Timber cut on an infant's estate.

[(*a*) *Re Weaver*, 21 Ch. D. (C.A.) 615.]

(*b*) *Ex parte Bromfield*, 1 Ves. jun. 461; *S. C.*, 3 B. C. C. 515.

(*c*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69; *S. C.*, 4 B. C. C. 231.

(*d*) See *Ex parte Phillips*, 19 Ves. 123.

(*e*) See *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 437, in which case the distinction appears first to have been noticed.

(*f*) *Ware* v. *Polhill*, 11 Ves. 278, and *Ex parte Phillips*, 19 Ves. 122, *per* Lord Eldon; *Ashburton* v. *Ashburton*, 6 Ves. 6; *Sergeson* v. *Sealey*, 2 Atk. 413; *Rook* v. *Worth*, 1 Ves. 461, *per* Lord Hardwicke; *Witter* v. *Witter*, 3 P. W. 99; but see *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 435; *Inwood* v. *Twyne*, 2 Eden, 152; *Ex parte Bromfield*, 1 Ves. jun. 461; [and see *Warnicker* v. *Bretnall*, 23 Ch. D. 188].

(*g*) See *Ex parte Bromfield*, 1 Ves. jun. 454.

descended to the heir (*a*). But a distinction was taken in *Mason* v. *Mason* (*b*) (and Sir Thomas Clarke said he allowed it (*c*),) between the case of an infant tenant in fee and an infant tenant in tail: that in the former case the proceeds of the timber should be taken as realty, inasmuch as the infant was thus at all events absolutely entitled; but in the latter case, as the proceeds might, if impressed with the character of realty, become vested in the remainderman, the Court would treat the fund as personalty, and give it to the infant's executors.

Exoneration of infant's real estate out of his personal estate.

3. Again, if an infant's money had been applied to pay off a charge, or redeem a mortgage affecting his real estate, it was the better opinion (though some old authorities were against it), that the sum so invested would still be looked upon as part of the personalty (*d*).

Necessary expenses.

4. But *necessary expenses*, though affecting the infant's *lands*, were allowed to be thrown upon the personal fund, as disbursements for repairs (*e*), for keeping up a house, &c. (*f*).

Vernon *v.* Vernon.

5. So, in *Vernon* v. *Vernon* (*g*), where an estate was devised to an infant in consideration of his paying the sum which the original purchase had cost, it was held that the amount, being a *necessary* outlay, had properly fallen upon the personalty, and the next of kin were not entitled to compensation.

Exceptions from the general rule.

6. There were some cases to which the reason for preserving the original character of the property did not apply. Thus, if an infant was seised of a lease for lives *ex parte maternâ*, and the guardian procured a new lease to be granted to the infant and his heirs, whereby the old lease was merged, the substituted lease would not descend in the maternal line, but, as a new acquisition, would go to the heirs on the part of the father (*h*); for it being

(*a*) *Tullet* v. *Tullet*, 1 Dick. 322; *S. C.*, Amb. 370; *Mason* v. *Mason*, cited Ib. 371; *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon; and see *Rook* v. *Worth*, 1 Ves. 461; but see *Ex parte Bromfield*, 3 B. C. C. 516.

(*b*) *Ubi sup.*

(*c*) *Tullet* v. *Tullet*, Amb. 371; and see *Dyer* v. *Dyer*, 34 Beav. 504.

(*d*) *Ex parte Bromfield*, 3 B. C. C. 516, *per* Lord Thurlow; *Tullet* v. *Tullet*, 1 Dick. 323, *per* Sir T. Clarke; *Seys* v. *Price*, 9 Mod. 220, *per* Lord Hardwicke; *Dowling* v. *Belton*, 1 Flan. & Kelly, 462; but see 2 Freem. 114, c. 126; *Ex parte Grimstone*, Amb. 708; *Palmes* v. *Danby*, Pr. Ch. 137; *Zoach* v. *Lloyd*, cited *Awdley* v. *Awdley*, 2 Vern. 192; as to *Dennis* v. *Badd*, cited Ib. 193, see *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 436; [and see *Warnicker* v. *Bretnall*, 23 Ch. D. 188].

(*e*) *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley.

(*f*) *Ex parte Grimstone*, Amb. 708, *per eundem.*

(*g*) Cited in *Ex parte Bromfield*, 1 Ves. jun. 456.

(*h*) *Mason* v. *Day*, Pr. Ch. 319; *Pierson* v. *Shore*, 1 Atk. 480; [and see *Re Wells*, (1903) 1 Ch. 848, 853. As to the general jurisdiction of the Court to sanction investments by trustees, see *ante*, p. 392].

perfectly immaterial to the infant himself whether the *seisin* was in the paternal or maternal line, the representative *ex parte maternâ* had no equity against the representative *ex parte paternâ*. [The Court has jurisdiction to change the nature of an infant's estate by sanctioning a scheme which is manifestly for the infant's benefit, as, for example, by making his interest absolute instead of contingent (*a*).

[Repairs.]

7. Where repairs are absolutely necessary for the protection of an infant's property, the Court has jurisdiction to direct the raising of the necessary funds by mortgage or sale of part of the infant's property (*b*). But the jurisdiction should be jealously exercised, and only in cases which amount to actual salvage (*c*).]

Effect of Wills Act.

8. By the Wills Act (*d*), an infant has no greater testamentary power over personal than over real estate; and it remains to be seen how far the removal of the ground, so frequently relied upon, against permitting the conversion of the personal estate of an infant into realty, can be treated as having diminished the rights of the next of kin, or as authorising the application of the decisions in lunacy to the administration of the property of infants.

Dyer *v.* Dyer.

9. The leaning of the Courts would appear to be to simplify the law by assimilating the case of infants to that of lunatics. Thus in a modern case (*e*) an estate was devised to an infant, his heirs and assigns, with a limitation over on his dying under twenty-one, and timber was cut on the estate during the infancy with the sanction of the Court. The infant died without attaining his age, and the question was whether the proceeds belonged to the infant's personal representative, or should go with the estate to the person entitled under the limitation over, and Sir J. Romilly, M.R., held it to be personalty, and evidently made no distinction between infancy and lunacy.

[(*a*) *Re Wells*, (1903) 1 Ch. 848, explaining *Peto* v. *Gardner*, 2 Y. & C. C. C. 312.]

[(*b*) *Re Jackson*, 21 Ch. D. 786; *Glover* v. *Barlow*, 21 Ch. D. 788, note; and see *Conway* v. *Fenton*, 40 Ch. D. 512, 517.]

[(*c*) *Per* Kay, J., *Re Jackson*, *ubi sup.*; and see cases cited *ante*, p. 592.]

(*d*) 7 W. 4. & 1 Vict. c. 26.

(*e*) *Dyer* v. *Dyer*, 34 Beav. 504. But if an estate be settled upon A. for life only, with remainders over, and the Court cuts the timber for the benefit of all parties interested, the proceeds will go along with the estate; *Field* v. *Brown*, 27 Beav. 90; unless the order be made upon the application of a remainderman entitled in fee simple, subject to the prior estate; *Phillips* v. *Daycock*, W. N. 1867, p. 54.

PART IV

PRACTICE

CHAPTER XXXIII

In this chapter we propose to consider such parts only of the practice of the Court as most materially affect trustees and their *cestuis que trust*, and are capable of being compressed within reasonable limits, viz.—*First*, Distringas; *Secondly*, Production of documents; *Thirdly*, Compulsory payment into Court; *Fourthly*, Receivership; and *Fifthly*, Costs of suit (*a*).

SECTION I

OF DISTRINGAS

Danger to which stock, &c., exposed in consequence of legal title only being recognised.

1. In the case of stock transferable in the books of the Bank of England, and also in the case of the stocks and shares of many other public companies, no obligation exists on the part of the bank or public company to look beyond the title of the legal holder. The modern form of legislative enactment on the subject is usually to the effect that the company "shall not be bound to see to the execution of any trust, whether express, implied, or constructive" (*b*). Where, therefore, property of this

[(*a*) In the sixth and earlier editions of this work, the subject of parties to suits relating to trusts, and of the order and manner in which trustees and *cestuis que trust* ought to sue or be sued were considered at some length, but in referring to those editions the recent changes in the practice of the Court must be borne in mind.]

(*b*) Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), s. 20; and see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30, and *ante*, p. 905.

description is held upon trust, the interests of the *cestui que trust* are peculiarly liable to be endangered by the dishonesty of the trustee; and, indeed, but for the means of protection now about to be explained, would be almost entirely at his mercy.

Origin of the writ of distringas.

2. The *distringas* was originally a process of the equity side (afterwards abolished) of the Court of Exchequer for compelling the appearance of a corporation to a bill filed, but formerly it was a common practice, more particularly in any emergency, to issue a subpœna before the bill was actually on the file. When, therefore, a party sought to restrain a transfer of stock, before he filed the bill against the holder of the stock and the bank (which was then a necessary party), to prevent any mischief in the interim, he served process immediately on the secretary of the bank to appear to the bill. But as the form of *distringas* gave no information as to the stock to be restrained, the *distringas* was accompanied with a notice in writing, which specified the stock, and required the bank not to permit the transfer. The effect of this was, that if the holder of the stock applied to the bank to make a transfer, the bank immediately forwarded a notice to the party issuing the *distringas*, that unless he actually filed a bill, and obtained and served an injunction before a certain day, they should permit a transfer to be made.

Practice continued notwithstanding 4 Anne, c. 16, and 39 & 40 G. 3. c. 36.

3. The Law Amendment Act, 1705 (4 Anne, c. 16), sect. 22, declared that no *subpœna* or other process for appearance should issue until after the bill was filed: and the Transfer of Stock Act, 1800 (39 & 40 G. 3. c. 36), enabled suitors to obtain an injunction against the bank, without making the bank a party. However, in practice the *distringas* still continued to be served on the bank, and the same attention was paid to it in not allowing a transfer.

Process transferred to Chancery on the abolition of the equity Exchequer.

4. The convenience of the *distringas* was so sensibly felt, from the frequent necessity of laying an embargo upon stock at a moment's notice, that when the Court of Chancery Act, 1841 (5 Vict. c. 5), abolished the equity side of the Exchequer, it was thought expedient to transfer the process to the Court of Chancery, and enlarge the remedy.

Additional remedy given by 5 Vict. c. 5, s. 4.

5. Accordingly, by sect. 4 of the Act referred to, it was by way of additional remedy enacted that "it should be lawful for the Court of Chancery, upon the application *of any party interested*, by *motion* (*a*) *or petition*, in a summary way, *without bill*

[(*a*) The application ought to be intituled in the matter of the trusts of the will or other instrument affecting the fund: *Re Pike*, W. N. (1902) 42.]

filed, to restrain the Bank of England or other company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or *any stock or shares in any public company*, or from paying any dividend or dividends due or to become due thereon; and every order of the Court upon such motion or petition should specify the *amount of the stock*, or the particular shares to be affected thereby, and the *name or names of the person or persons, body politic or corporate, in which the same should be standing*."

Practice under the 4th section.

6. An application to the Court under this section must be founded upon an affidavit verifying the special grounds upon which it proceeds (*a*). And when the order has been made, as it was not the intention of the Legislature to do more than protect the stock until the party could assert his right in the ordinary way, if the opposite party move to dissolve the injunction, and the Court sees that there has been great neglect on the part of the person who obtained the order, and that any extension of time would be oppressive to the party restrained, it will not as of course give further time for instituting proceedings (*b*). Under the former practice, when a bill had been filed and an answer put in, and the defendant moved to discharge the restraining order, the plaintiff was allowed to file affidavits in opposition to the answer, and was not confined to the merits disclosed in the answer (*c*).

Transfer of the old writ of distringas.

7. By sect. 5 (*d*) of the Act it was enacted that in the place and stead of the writ of distringas, as the same had been theretofore issued, a writ of distringas in the form set out in the schedule to the Act should be issuable from the Court of Chancery, and be sealed at the subpœna office, and the force and effect of such writ, and the practice under or relating to the same, should be such as was then in force, provided, nevertheless, that such writ, and the practice under or relating to the same, should be subject to such orders and regulations as might be made with reference to the proceedings and practice of the Court of Chancery (*e*).

(*a*) *Ex parte Field*, 1 Y. & C. C. C. 1; *Re Marquis of Hertford*, 1 Hare, 586; *Re Locke and others*, 18 W. R. 275; *Re East of England Bank*, 6 N. R. 81.

(*b*) *Re Marquis of Hertford*, 1 Hare, 584; see same case, 1 Ph. 203.

(*c*) Ib. 1 Ph. 203; and see Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 59.

[(*d*) Repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).]

(*e*) In the schedule to the Act, the form of the writ was as follows: "Victoria, &c., to the Sheriffs of London, greeting. We command you that you omit not, by reason of any liberty, but that you enter the same, and distrain the Governor and

8. The Act, as we have seen, empowered the Court to regulate the practice of the *distringas*, and orders [were accordingly issued with that object (*a*): but the writ of *distringas* has now been superseded (*b*), and a notice substituted in its place, which is made to apply not only to the Bank of England, but to all companies, whether incorporated or not, and the practice in relation to such notices is now regulated by Order XLVI., Rules 2—11, of the Rules of the Supreme Court, 1883.

Orders of Court regulating practice.

[Notice substituted for the writ.]

9. The present course is as follows:—The party seeking the benefit of the Act prepares a notice, and makes an affidavit in the form prescribed by the general order. The notice and affidavit are then filed in the Central Office, and an office copy of the affidavit and a duplicate of the notice, authenticated by the seal of the Central Office, are obtained and served on the bank or company; and such service has the same force and effect against the bank or company as a writ of *distringas* duly issued under the 5th section of the Act previously had.

[Present practice as to obtaining and serving the notice in lieu of *distringas*.]

The notice may be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by an order made upon notice, on the application of any other person claiming to be interested.

If, while the notice continues in force, the bank or company receive from the person in whose name the stock is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred, or to pay the dividends thereon, the bank or company is not, by force or in consequence of the service of the notice, authorised without the order of the Court or a judge to refuse to permit the transfer to be made, or to withhold the payment of the dividends, for more than eight days after the date of the request.] The result is, that when the holder of the stock requests a transfer of the stock, or payment of the dividends, the bank [or company]

Company of the Bank of England, by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until We otherwise command you; and that you answer us the issue of the said lands, so that they do appear before us in our High Court of Chancery on the day of , to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by complainant; and, further, to do and receive what our said Court shall then and there order in the premises, and that you then leave there this writ. Witness," &c.

(*a*) XXVII. Cons. Order, 1860. See Orders, 17th November 1841, 3 Beav. xxxiii.; and 10th December 1841, 3 Beav. xxxviii.

[(*b*) See Rules of the Supreme Court, 1883, Order XLVI., superseding the similar Rules of April, 1880.]

immediately forwards a notice to the party who served the notice, that unless he bring an action, and obtain and serve an injunction within eight days from the date of such request, the transfer or payment will be made. The party must, of course, be then upon the alert to take proceedings and obtain and serve the injunction before the eight days have expired (*a*).

Distinction between remedies under the 4th & 5th sections of the Act.

10. [Until the issuing of the order of April, 1880, it was considered that while the fourth section of the Act applied] not merely to stock in the funds, but to stock and shares of *public companies*, whether incorporated or not, the 5th section was by the joint effect of the schedule to the Act of Parliament and of the Orders of Court before referred to (*b*), confined to stock transferable at the *Bank of England*, [but this distinction between cases under the 4th and 5th sections has been superseded, and by Order XLVI., Rule 3, the notice is applicable to any public company, whether incorporated or not, and may affect shares, securities, and dividends thereon, as well as stock. The distinction, however, still remains that notice in lieu of *distringas*] may be, and is in fact, frequently obtained, not from any fear of immediate danger, but as a general safeguard merely (*c*); whereas a special case must be made in order to obtain a restraining order under the 4th section (*d*).

Remedies when concurrent.

11. The [notice in lieu of] *distringas* under the 5th section, and the restraining order under the 4th section, may both occasionally be resorted to should circumstances require it; for the adoption of either remedy is not an election of the one to the exclusion of the other (*e*). "The 4th clause," said Sir J. Wigram, "was intended for interim purposes,—to protect stock until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way,—an opportunity often wanting from the facility with which that species of property is transferred from hand to hand, and which the common *distringas*, preserved by the 5th section, does not in all cases afford (*f*). A *distringas* remains (*g*) only at the

[(*a*) The proper course is to obtain an interim order, *ex parte*, over the next motion day, which must be served on the legal owners of the stock; *Re Blaksley's Trusts*, 23 Ch. D. 549.]

[(*b*) See note (*a*), p. 1251.]

(*c*) See *Etty* v. *Bridges*, 1 Y. & C. C. C. 486; [*Hobbs* v. *Wayet*, 36 Ch. D. 256, 260, where it was held that a legatee by putting a *distringas* on shares forming part of the testator's estate does not accept them so that he cannot afterwards disclaim].

(*d*) Note (*a*), p. 1250, *ante*.

(*e*) *Re Marquis of Hertford*, 1 Hare, 584; 1 Ph. 129.

(*f*) And see *Société Générale de Paris* v. *Tramways Union Company*, 14 Q. B. D. 453, 454; *S. C.*, in D. P. 11 App. Cas. 20, *nom. Société Générale de Paris* v. *Walker*.

(*g*) *Sic. Qu.* "restrains."

discretion of the bank. The restraining order, which the 4th section enables the Court to grant, is imperative; it continues so long as the Court sees fit to direct, and can only be discharged in the meantime upon the application of the parties interested." "Cases might arise," he added, "in which, from the discovery of new matter, after a *distringas* had issued, or from the bank peremptorily but erroneously refusing to notice a *distringas*, or perhaps from other causes, the party who obtained that writ might, notwithstanding, upon a full disclosure of the facts in a case of merits and urgency, entitle himself to a restraining order under the 4th section" (*a*).

SECTION II

OF PRODUCTION

General rule. 1. All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners (*b*). And if the trustee has submitted cases to Cases for opinion. counsel and taken opinions, not for the purpose of defence in any litigation between himself and his *cestuis que trust*, but for his guidance as trustee, he is bound to produce them to the *cestuis que trust*, who pay the expense so incurred by the trustee (*c*). [So, in a suit by *cestuis que trust* against their trustees to compel them to make good a breach of trust, the trustees are bound to produce letters and copies of letters between them and their solicitors in relation to the matters in question in the action *ante litem motam* (*d*); and a trustee cannot claim privilege for communications passing between him and his co-trustee employed as his solicitor (*e*).] But as all the Parties. *cestuis que trust* have an interest in the documents, they must all be represented, directly or indirectly, in the suit before the documents can be finally dealt with (*f*). If the trust documents include mortgages upon which the trust fund has been invested, the production cannot be objected to on the ground that the mortgagors, or persons entitled to the equity of redemption, are not parties (*g*).

(*a*) *Re Marquis of Hertford*, 1 Hare, 590; [*Re Cowin*, 33 Ch. D. 179].
(*b*) *Simpson* v. *Bathurst*, 5 L. R. Ch. App. 202, *per* Lord Hatherley.
(*c*) *Wynne* v. *Humberston*, 27 Beav. 421; *Devaynes* v. *Robinson*, 20 Beav. 42; *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285, 549; [*Re Postlethwaite*, 35 Ch. D. 722].
[(*d*) *Re Mason*, 22 Ch. D. 609.]
[(*e*) *Re Postlethwaite*, 35 Ch. D. 722, *per* North, J.]
(*f*) *Bugden* v. *Tylee*, 21 Beav. 545.
(*g*) *Gough* v. *Offley*, 5 De G. & Sm. 653.

Trust must be established.

2. The privilege of requiring production can be asserted by a *cestui que trust* only when the relation of trustee and *cestui que trust* has been established; for, so long as the claim is disputed, the would-be *cestui que trust* is regarded as a stranger (*a*).

Accounts.

3. An executor and trustee is bound to keep clear and distinct accounts, and if he enter the accounts of the trust in his private books, he is bound to produce them (*b*); and if an executor or trustee, being a partner, be allowed to enter the trust accounts in the partnership books, the Court will not allow the partners to withhold the inspection (*c*); but if an agent be employed to manage an estate, and he keeps the accounts in the same books in which the accounts relating to the estates of other persons are kept, the production, in the absence of those other persons, has been refused (*d*).

Privileged communications.

4. Where litigation is pending or is contemplated between the trustee and his *cestui que trust*, and the trustee submits a case to counsel for his opinion, for the protection of the trustee himself adversely to the *cestui que trust*, the case and opinion are communications within the general rule, and privileged from production (*e*).

Persons bound by notice of the trust.

5. The right of the *cestui que trust* is enforced not only as against the trustee personally, but as against all claiming under him, and though for value, if with notice of the trust (*f*).

SECTION III

OF COMPULSORY PAYMENT INTO COURT

General rule.

1. The general rule as laid down by Lord Eldon, and which has ever since been acquiesced in, is, that to call for payment of money into Court, "the plaintiff must either be *solely entitled* to the fund or *have acquired in the whole of the fund such an interest, together with others, as entitles him on his own behalf,*

(*a*) *Wynne* v. *Humberston*, 27 Beav. 421.

(*b*) *Freeman* v. *Fairlie*, 3 Mer. 43, *per* Lord Eldon; [and see *Thompson* v. *Dunn*, 5 L. R. Ch. 573; *St George* v. *St George*, 19 L. R. Ir. 225; *Re Sutcliffe*, 44 L. T. N.S. 547].

(*c*) *Freeman* v. *Fairlie*, *ubi sup.*

(*d*) *Airey* v. *Hall*, 12 Jur. 1043. [As to accounts under the Public Trustee Act, 1906, see *ante*, Chap. XXIII. p. 705.]

(*e*) *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285, 549; *Brown* v. *Oakshott*, 12 Beav. 252; *Devaynes* v. *Robinson*, 20 Beav. 42; *Bacon* v. *Bacon*, W. N. 1876, p. 96; [see *Re Mason*, 22 Ch. D. 609; *Mayor and Corporation of Bristol* v. *Cox*, 26 Ch. D. 678].

(*f*) *Smith* v. *Barnes*, 1 L. R. Eq. 65.

and the behalf of those others, to have the fund secured in Court" (*a*). It is not indispensable that the plaintiff should be the person exclusively interested; for if he have a partial or contingent interest (*b*), it is enough, provided all the other persons interested in the fund are before the Court (*c*); and occasionally the Court will make orders for payment into Court, although some of the persons interested in the money are not before it (*d*), or the defendant does not *admit* that all are before it (*e*). Where the other persons interested are not necessary parties to the suit, payment into Court, if consistent with the relief sought in the suit, may be obtained without service on them of the notice of motion (*f*); but where *cestuis que trust* had been served with the copy of a bill which prayed the appointment of new trustees, and a transfer of the fund not into Court but *to the new trustees*, the Court held that the parties served with a copy of the bill must be served with notice of the motion to transfer the fund into Court (*g*). [Where there are several plaintiffs all must join in the application (*h*).]

Plaintiff may move upon a possible title.

2. If the defendant admits himself to be a trustee for some one, but it remains to be ascertained whether he is a trustee for the plaintiff or for other parties, the plaintiff may move upon his possible title, where all persons are before the Court among whom there will be found some one who is entitled (*i*). "In a contest as to the title to any particular property," said Lord Cottenham, "the Court will, in some cases, take possession of the subject-matter of the contest for security until it adjudicates upon the right. Such cases generally arise when the property is in the hands of stakeholders, factors, or trustees who do not themselves claim any title to it. In ordering money into Court under such circumstances, the Court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established" (*j*).

(*a*) *Freeman* v. *Fairlie*, 3 Mer. 29; and see *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 77.

(*b*) *Ross* v. *Ross*, 12 Beav. 89.

(*c*) *Whitmarsh* v. *Robertson*, 4 Beav. 26; *Bartlett* v. *Bartlett*, 4 Hare, 631.

(*d*) *Wilton* v. *Hill*, 2 De G. M. & G. 807; *Hamond* v. *Walker*, 3 Jur. N.S. 686.

(*e*) *Symonds* v. *Jenkins*, 34 L. T. N.S. 277; 24 W. R. 512.

(*f*) *Marryatt* v. *Marryatt*, 23 L. J. N.S. Ch. 876.

(*g*) *Lewellin* v. *Cobbold*, 1 Sm. & G. 572.

[(*h*) *Re Wright*, (1895) 2 Ch. 747, where, however, leave to amend was granted, and the motion then proceeded with.]

(*i*) See *Dolder* v. *Bank of England*, 10 Ves. 355; *Whitmore* v. *Turquand*, 1 J. & H. 296; but see *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 73.

(*j*) *Richardson* v. *Bank of England*, 4 M. & Cr. 171.

Payment of a share.

3. Occasionally, where the fund is clear, and is divisible between the plaintiff and defendant in certain proportions, the Court has ordered the defendant to pay into Court the share only of the plaintiff (*a*).

Motion formerly must have been founded on admission in defendant's answer.

4. [It was formerly the rule of the Court that where the motion was made before decree, the merits upon which it was] founded must be admitted by the defendant's answer, and that no evidence as to merits could be adduced *aliunde* (*b*). Thus if money was standing in the joint names of several persons, as of three trustees, it would not be ordered into Court on the admission of the specific sum by one, though the others admitted that a sum was standing in their joint names, and the plaintiff offered to read affidavits sworn by them from which the amount of the sum would appear (*c*). [But in a case in the year 1878 (*d*), the Court of Appeal intimated an opinion that any admission, whether direct or implied, would be sufficient to enable the Court to act; and in a subsequent case, where a motion was made in an administration action, after the defendant's appearance, but before any pleadings had been delivered, for payment into Court of sums of money alleged to be in the defendant's hands, and the motion was supported by the affidavit of the plaintiff, but the defendant, though served with notice of the motion, did not appear, it was held by Sir G. Jessel, M.R., that the defendant must be taken to have admitted that he had received the money, as he had not denied it, and he was ordered to pay the amount into Court (*e*). Admissions by a trustee in correspondence that he has received the money, and a recital to that effect in the settlement which was executed by him, are sufficient to found the order (*f*); and it is not necessary that the admission

[But now any admission, direct or implied, is sufficient.]

(*a*) *Rogers* v. *Rogers*, 1 Anst. 174; *Hamond* v. *Walker*, 3 Jur. N.S. 686; see *Score* v. *Ford*, 7 Beav. 336.

(*b*) *Beaumont* v. *Meredith*, 3 V. & B. 181, *per* Lord Eldon; *Richardson* v. *Bank of England*, 4 M. & Cr. 171, 175, *per* Lord Cottenham; *Dubless* v. *Flint*, 4 M. & Cr. 502; *Black* v. *Creighton*, 2 Moll. 554, *per* Sir A. Hart; and see *Green* v. *Pledger*, 3 Hare, 171; *Hagell* v. *Currie*, 2 L. R. Ch. App. 452. [However in *Jervis* v. *White*, 6 Ves. 738, Lord Eldon took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands, and an affidavit of the defendant before answer, together as an admission, and ordered the money into Court.] The 59th section of the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), directing the defendant's answer to be viewed merely as an affidavit in motions for injunction or receiver, &c., did not touch motions for payment into Court.

(*c*) *Boschetti* v. *Power*, 8 Beav. 98.

[(*d*) *London Syndicate* v. *Lord*, 8 Ch. D. (C.A.) 84.]

[(*e*) *Freeman* v. *Cox*, 8 Ch. D. 148; *Porrett* v. *White*, 31 Ch. D. (C.A.) 52. In a case in Ireland, V. C. Chatterton declined to follow *Freeman* v. *Cox*; see *Nesbitt* v. *Baldwin*, 7 L. R. Ir. 134.]

[(*f*) *Hampden* v. *Wallis*, 27 Ch. D. 251; *Porrett* v. *White*, 31 Ch. D. (C.A.) 52; and see *Wanklyn* v. *Wilson*, 35 Ch. D. 180.]

should be contained in a written document; a mere verbal admission, coupled with omission to reply to an affidavit, was held to be sufficient to justify the order being made (*a*).

[Where account rendered and balance clearly due.]

In a partnership action where an account of partnership dealings had been furnished by the defendant before action brought, the late Master of the Rolls, Sir G. Jessel, looked at the account, rejected certain items, turned the balance against the defendant, and ordered him to pay into Court (*b*); and in general, where an account has been rendered and the Court has before it the parties to the account and evidence as to the items in dispute, the Court will look into the facts of the case, and if, "in the fair exercise of its judicial discretion" (*c*), it can arrive at a clear conclusion that a sum will be due to the plaintiff on the taking of the account, and what that sum will be, it will order payment by the defendant of that amount into Court (*d*).

[But there must be unequivocal admission that money received by and due from trustee.]

The Court of Appeal has, however, recently intimated that the practice ought not to be carried further, and that the order for payment into Court ought not to be made unless there is at least an unequivocal admission by the defendant, by pleading, or affidavit, or omission to traverse allegations in the affidavits against him, that the money has come to his hands, and that it is owing from him (*e*).

Where a defendant, who was solicitor to the first mortgagees of property and also to the mortgagor, admitted by his defence that he had received purchase-moneys on a sale by the first mortgagees, but claimed to deduct sums which he had actually but wrongly paid at the request of the executors of the mortgagor, the Court, in view of the decisions in *Nutter* v. *Holland* (*f*) and *Neville* v. *Matthewman* (*g*), declined to order him to pay the last-mentioned sums into Court on an interlocutory application (*h*).

[Where admission erroneous.]

Where, upon the application of the defendant, who had been ordered to pay money into Court upon an admission in his defence and answer to interrogatories, the Court was satisfied that the admission was erroneous, the defendant was allowed to withdraw

[(*a*) *Re Beeny*, (1894) 1 Ch. 499, where it was observed by North, J., that *Hollis* v. *Burton*, (1892) 3 Ch. (C.A.) 226, was not intended to overrule previous cases.]

[(*b*) *Dunn* v. *Campbell*, 27 Ch. D. 254, note.]

[(*c*) *London Syndicate* v. *Lord*, 8 Ch. D. (C.A.) 90, *per* Jessel, M.R.]

[(*d*) *Wanklyn* v. *Wilson*, 35 Ch. D. 180, 186; and see *Neville* v. *Matthewman*, (1894) 3 Ch. (C.A.) 345.]

[(*e*) *Neville* v. *Matthewman*, (1894) 3 Ch. (C.A.) 345; and see *Hollis* v. *Burton*, (1892) 3 Ch. (C.A.) 226; *Re Wright*, (1895) 2 Ch. 747.]

[(*f*) (1894) 3 Ch. (C.A.) 408; see *post*, p. 1259.]

[(*g*) *Vide sup.*]

[(*h*) *Crompton and Evans Union Bank* v. *Burton*, (1895) 2 Ch. 711.]

the admission, and amend his defence on terms of his paying the money into Court (*a*).]

Old rule that answer should contain an admission of plaintiff's title.

5. It would seem that [the old rule was that] not only must the plaintiff have been able to read from the answer an admission of the defendant's receipt of the money, but also an admission of his own title, or probable title, *e.g.* as next of kin, heir-at-law, &c., and that if the defendant ignored the plaintiff's title, the money would not have been ordered into Court (*b*). But in a suit to establish a constructive trust, the rights of the plaintiff might have appeared so clear upon the answer that the Court, notwithstanding a formal denial by the defendant that he was a trustee, would have felt itself justified in ordering payment (*c*). [It is conceived that under the present practice any admission by the defendant of the plaintiff's title, whether expressed or implied from his conduct, would be sufficient to enable the Court to order money into Court (*d*).

[Present practice.]

[Payment in after decree.]

6. Where the motion is made after decree, the Court will order money into Court in any case where it is ascertained to its satisfaction that the amount must in any event be ultimately payable by the defendant, and if the certificate of the Master has not been made finding the amount due, the Court will in a proper case satisfy itself by an examination of the evidence as to the amount, and order payment of the amount so ascertained (*e*).]

Payment into Court must be upon the footing of an equity alleged by the plaintiff.

7. The plaintiff cannot ask for payment of money into Court upon the footing of an equity not alleged by him in his pleadings, but only stated by the answer [or statement of defence]. Thus, where the plaintiff filed a bill claiming one-fifth of the residuary estate of a testator and asking relief as in the case of an open account, and the defendant by his answer stated a deed amounting to a settlement of account under which he admitted a sum to be due from him, it was held that the plaintiff could not, without amending his bill, obtain payment into Court of the sum so admitted to be due (*f*).

Not necessary that fund should be actually in defendant's hands.

8. It is not necessary that the defendant should acknowledge the fund to be actually in his hands; for if he admit that he once received it, and state that he afterwards applied it in a way not authorised by the trust, the Court will fasten upon the

[(*a*) *Hollis* v. *Burton*, (1892) 3 Ch. (C.A.) 226.]

(*b*) *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 73; *Bank of Turkey* v. *Ottoman Company*, 2 L. R. Eq. 366.

(*c*) *Hagell* v. *Currie*, 2 L. R. Ch. App. 452, *per* L. J. Cairns.

[(*d*) See *Freeman* v. *Cox*, 8 Ch. D. 148; but see *Nesbitt* v. *Baldwin*, 7 L. R. Ir. 134.]

[(*e*) *London Syndicate* v. *Lord*, 8 Ch. D. (C.A.) 84.]

(*f*) *Proudfoot* v. *Hume*, 4 Beav. 476.

receipt, and not allow him to discharge himself by pleading a breach of duty; as, if a trustee admit that he once had a fund in his hands, but that he afterwards allowed it to be received by a co-trustee who misapplied it (*a*), or that he afterwards sold it out and did not re-invest it (*b*), or paid it away improperly (*c*), or lent it on personal (*d*) or other security (*e*) not within the terms of the trust; [and where the trustee had sold and transferred shares, it was not sufficient for him to show that he had no power over the shares, without showing that he had no control over the purchase money (*f*)]. And no attention will be paid to the objection that the suit is for the very purpose of securing the fund, and therefore that the money ought not to be ordered into Court until decree (*g*).

[The contrary is the case where the procedure is by originating summons under Order LV., Rule 3 (d), as that rule is confined to payment into Court of money "in the hands of" executors, administrators, or trustees (*h*).]

[*Secus*, where procedure by originating summons.]

9. But if an executor (and the rule must apply equally to a trustee) admits in his answer [or statement of defence] that he has received a specific sum, but adds that he has made payments, the amounts whereof he does not specify, in respect of the testator's estate, the Court will allow him to verify by affidavit the amount of the payments properly made, and will order him to pay in the actual balance (*i*).

Payments not specified in answer may be verified by affidavit.

10. Payment of money into Court is, in general, confined to the cases of a defendant's admission of actual possession of the fund, or of a receipt not followed by any subsequent legal discharge, and is not ordered upon a mere admission of facts from which a liability may be inferred (*j*). Thus, if a defendant admit that he has had a fund in his hands from a certain time, and it clearly appears that he is liable and will be decreed at the

Payment of money into Court not ordered on a mere admission of circumstances showing a liability.

(*a*) *Ingle* v. *Partridge*, 32 Beav. 661; *Symonds* v. *Jenkins*, 34 L. T. N.S. 277; 24 W. R. 512.

(*b*) *Wiglesworth* v. *Wiglesworth*, 16 Beav. 272; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; and see *Meyer* v. *Montriou*, 4 Beav. 346; *Futter* v. *Jackson*, 6 Beav. 424.

(*c*) See *Scott* v. *Becher*, 4 Price, 350; *Meyer* v. *Montriou*, 4 Beav. 343; *Nokes* v. *Seppings*, 2 Ph. 19.

(*d*) *Vigrass* v. *Binfield*, 3 Mad. 62; *Collis* v. *Collis*, 2 Sim. 365; *Roy* v. *Gibbon*, 4 Hare, 65.

(*e*) *Wyatt* v. *Sharratt*, 3 Beav. 498; *Costeker* v. *Horrox*, 3 Y. & C. 530; *Hinde* v. *Blake*, 4 Beav. 597; *Bourne* v. *Mole*, 8 Beav. 177.

[(*f*) *Re Benson*, (1899) 1 Ch. 39.]

(*g*) See *Rothwell* v. *Rothwell*, 2 S. & S. 217; *Wyatt* v. *Sharratt*, 3 Beav. 498; *Collis* v. *Collis*, 2 Sim. 365.

[(*h*) *Nutter* v. *Holland*, (1894) 3 Ch. (C.A.) 408, overruling *Re Chapman*, 54 L. T. N.S. 13.]

(*i*) *Anon.*, 4 Sim. 359; and see *Proudfoot* v. *Hume*, 4 Beav. 476; *Roy* v. *Gibbon*, 4 Hare, 65.

(*j*) See *Richardson* v. *Bank of England*, 4 M. & Cr. 174; *Peacham* v. *Daw*, 6 Mad. 98.

hearing to pay interest, yet the Court will not order him to pay interest on motion (*a*), unless he also admit that he has actually made interest, which amounts to a receipt (*b*).

Rothwell *v.* Rothwell.

11. The case of *Rothwell* v. *Rothwell* (*c*) is no exception to this rule, for there the defendant had covenanted with the trustees of his marriage settlement to pay 850*l.* within twelve months from the marriage, and the covenant not having been performed, the children filed a bill against the covenantor and the trustees to have the money raised; and the defendant admitting "that the 850*l.* had not been got in, but that *it was still in his hands*," the Court ordered the payment into Court, not on the admission of the debt, but "that *it was still in his hands.*"

Special case of a trustee who is a debtor to the trust estate.

12. However, in some cases the Court orders payment into Court upon motion, of what is apparently a mere debt; as, where an executor or trustee admits himself to owe a debt to the estate he represents, for here the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realised in the hands of the executor or trustee (*d*). Thus, where A., B., and C. were appointed *executors* of a will, of whom A. and C. alone proved, and A. and B. were appointed *trustees*, and a bill was filed by A. for the administration of the trusts of the will, and B. by his answer admitted that he and his partner G. B. were indebted to the testatrix at the time of her decease, and that part of the assets had been lent to the partnership by C., and that the sum of 113*l.* 7s. 10½d. was due from the partnership to the estate on the balance of accounts, and alleged that the debt owing from the partnership, and the moneys received from C. the executor, had been treated as part of the assets, and applied partly in payment of the testatrix's debts, and as to the residue upon the trusts of the will, the Court held, notwithstanding B.'s disclaimer of having acted, that he must be deemed to have acted as executor and trustee, and as such to have received the moneys in question, and ordered him to pay the balance into Court (*e*).

Where trustees mean to apply the fund.

13. Trustees will not be ordered to pay into Court where they have a discretionary power over the fund, and it appears that they are intending *bonâ fide* to exercise it; for this would only

(*a*) *Wood* v. *Downes*, 1 V. & B. 50.
(*b*) *Freeman* v. *Fairlie*, 3 Mer. 43; see *Wood* v. *Downes*, 1 V. & B. 50.
(*c*) 2 S. & S. 217; see *Richardson* v. *Bank of England*, 4 M. & Cr. 174.
(*d*) *Richardson* v. *Bank of England*, 4 M. & Cr. 174, *per* Lord Cottenham.
(*e*) *White* v. *Barton*, 18 Beav. 192; [and see *Re Bourne*, (1906) 1 Ch. (C.A.) 697, *ante*, p. 1192.]

lead to expense by occasioning the necessity of another application to have the fund paid out again (*a*).

Whether the order is matter of course.

14. Lord Langdale once said, that according to the old practice, it was mere matter of course to order trust funds into Court, but that the question now was whether there existed any sufficient ground for the order, such as danger to the fund, &c. (*b*). V. C. Stuart subsequently declared his adherence to the old practice (*c*); [but in a later case, V. C. Hall was of opinion that the rule was not absolute, but a reasonable ground for the payment must be made out (*d*)].

Payment into Court at the hearing.

15. The Court will occasionally make an order for payment into Court at the hearing of the cause, *ex debito justitiæ*, though it might have hesitated to do so upon an interlocutory application by motion; as, where a plaintiff having only a remote contingent interest in a fund claims at the hearing to have the fund brought into Court (*e*). And an order for payment into Court will be made at the hearing, if proper, without notice of motion for that purpose (*f*).

Time allowed for payment into Court.

16. The time to be given for payment of money into Court will depend on the circumstances of the case. If it be money in the defendant's hands, it will be ordered in forthwith, and an immediate transfer may be directed of stock standing in the defendant's name. Where the defendant had improperly lent a sum on personal security, but no insolvency was suggested nor any danger as to the money, the Court ordered it to be paid in, on or before the first day of the following term (*g*). In another case, where the defendant had lent 820*l.* upon a mortgage not authorised by the trust, the Court allowed six weeks, with liberty to apply for further time if the circumstances should then warrant the indulgence (*h*).

[Payment into Court by solicitor not a party.]

[17. Where trust money had been improperly lent without security to the trustee's solicitor, who took it with notice that it was trust money, the Court, in the exercise of its summary jurisdiction over its officers, on motion in an administration action to which the solicitor was not a party, made an order that he should pay the money into Court (*i*).]

(*a*) *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285.

(*b*) *Ross* v. *Ross*, 12 Beav. 89.

(*c*) *Robertson* v. *Scott*, 14 L. T. N.S. 187.

[(*d*) *Re Braithwaite*, 21 Ch. D. 121.]

(*e*) *Governesses' Institution* v. *Rusbridger*, 18 Beav. 467.

(*f*) *Isaacs* v. *Weatherstone*, 10 Hare, App. xxx.

(*g*) *Vigrass* v. *Binfield*, 3 Mad. 62; and see *Hinde* v. *Blake*, 4 Beav. 597; *Roy* v. *Gibbon*, 4 Hare, 65.

(*h*) *Wyatt* v. *Sharratt*, 3 Beav. 498; *Score* v. *Ford*, 7 Beav. 333.

[(*i*) *Re Carroll*, (1902) 2 Ch. 175. In such a case the notice of motion should be entitled in the action and

Distringas.

18. Where a [notice in lieu of] *distringas* or injunction has been previously obtained against the transfer of the stock, the Court orders the transfer into Court to be made, "notwithstanding" the notice or injunction.

SECTION IV

OF RECEIVERSHIP

Receiver will be appointed at the instance of all the *cestuis que trust.*

1. As the *cestuis que trust* or parties beneficially interested in an estate are in equity the owners of it, should they concur in an application for a receiver, and the trustee consent, the Court will at any time make the order (*a*). But the usual recognisances will not be dispensed with (*b*).

Also where trustee is guilty of misconduct, or is insolvent, bankrupt, &c.

2. And as each *cestui que trust* is entitled to have the fund properly protected, a receiver will be granted at his instance if it can be shown that the trustee has been guilty of misconduct, waste, or improper disposition of the trust estate (*c*), or that he has an undue leaning or bias towards one of two conflicting parties (*d*), or that the fund is in danger from his being in insolvent circumstances (*e*), or being a bankrupt (*f*), or that one trustee has misconducted himself, the other consenting to the order (*g*), or that he is incapacitated from acting (*h*), or that the executor is a person of bad character, drunken habits, and great poverty (*i*). [But before judgment in a creditor's action a receiver will not be appointed unless a case is shown of the assets being wasted (*j*), nor merely because the executor will

in the matter of the particular solicitor.]

(*a*) *Brodie* v. *Barry*, 3 Mer. 695; *Beaumont* v. *Beaumont*, cited Ib. 696; see *Browell* v. *Reed*, 1 Hare, 435.

(*b*) *Manners* v. *Furze*, 11 Beav. 30; *Tylee* v. *Tylee*, 17 Beav. 583.

(*c*) *Anon.*, 12 Ves. 5, *per* Sir W. Grant; and see *Middleton* v. *Dodswell*, 13 Ves. 266; *Howard* v. *Papera*, 1 Mad. 142; *Richards* v. *Perkins*, 3 Y. & C. 299; *Evans* v. *Coventry*, 5 De G. M. & G. 911.

(*d*) *Earl Talbot* v. *Scott*, 4 K. & J. 139.

(*e*) *Scott* v. *Becher*, 4 Price, 346; *Mansfield* v. *Shaw*, 3 Mad. 100; and see *Anon.*, 12 Ves. 4; *Middleton* v. *Dodswell*, 13 Ves. 266; *Havers* v. *Havers*, Barn. 23.

(*f*) *Gladdon* v. *Stoneman*, 1 Mad. 143, note; *Langley* v. *Hawk*, 5 Mad. 46; [*Re Hopkins*, 19 Ch. D. (C.A.) 61. In *Bowen* v. *Phillips*, (1897) 1 Ch. 174, the other executor being able and willing to act, no receiver was asked for, but only an injunction, see *ante*, p. 1097].

(*g*) *Middleton* v. *Dodswell*, 13 Ves. 266.

(*h*) *Bainbrigge* v. *Blair*, 3 Beav. 421.

(*i*) *Everett* v. *Pryterch*, 12 Sim. 367, 368.

[(*j*) *Harris* v. *Harris*, 56 L. J. N.S. Ch. 754; 56 L. T. N.S. 507, following *Philips* v. *Jones*, 28 S. J. 360, and dissenting from the dictum of Jessel, M.R., in *Re Radcliffe*, 7 Ch. D. 733; *Re Wells*, 45 Ch. D. 569.]

probably exercise his right of retainer to the prejudice of the other creditors (*a*).]

Where executrix a *feme covert*, and husband abroad.

3. And a receiver was appointed [in a case under the old law] where the executrix was a *feme covert*, and the husband, besides being in indifferent circumstances, was out of the jurisdiction, for in such a case, said the Court, if the executrix waste the assets or refuse payment, the party aggrieved has no remedy, as the husband must be joined in the action (*b*). [But now that under the Married Women's Property Act, 1882 (*c*), the husband is not a necessary party to an action against the executors, and is not subject to liabilities by reason of any devastavit committed by his wife unless he has acted or intermeddled in the administration, it is conceived that his poverty or absence would be no ground for the appointment of a receiver.]

Receiver where trust estate unprotected.

4. And a receiver has been ordered where four trustees had been named in a will and one died, and another was abroad, and the third had scarcely interfered in the trust, and the fourth submitted to a receiver by his answer (*d*). In another case three trustees had *disagreed*, and a receiver was appointed (*e*): the order was taken by arrangement between the parties, but the Court had previously expressed its opinion that unless the trustees chose to agree, a receiver *must* be appointed (*f*). Where two out of three trustees chose to act separately, and took securities in their own names omitting that of the dissentient trustee, a *cestui que trust* was held entitled to a receiver (*g*). And the Court will grant a receiver at the instance of the *cestui que trust*, when the single trustee is, or all the trustees are out of the jurisdiction (*h*).

Receiver not granted on slight grounds.

5. But the Court is not in the habit of granting a receiver, and so taking the administration out of the hands of the trustees, the natural curators of the estate, upon very slight grounds (*i*). Thus it is no sufficient cause for a receiver that one of several trustees has *disclaimed* (*j*), or is *inactive*, or *gone abroad* (*k*). Nor is it a sufficient cause that trustees are in *mean* (not

[(*a*) *Re Wells*, 45 Ch. D. 569; *Re Stevens*, (1898) 1 Ch. (C.A.) 162, 173.]

(*b*) *Taylor* v. *Allen*, 2 Atk. 213.

[(*c*) 45 & 46 Vict. c. 75, ss. 18, 24.]

(*d*) *Tidd* v. *Lister*, 5 Mad. 429.

(*e*) *Day* v. *Croft*, 2nd May, 1839, M.R.

(*f*) See now *Hart* v. *Denham*, W. N. 1871, p. 2.

(*g*) *Swale* v. *Swale*, 22 Beav. 584.

(*h*) *Noad* v. *Backhouse*, 2 Y. & C. C. C. 529; *Smith* v. *Smith*, 10 Hare, App. lxxi.

(*i*) See *Middleton* v. *Dodswell*, 13 Ves. 268; *Barkley* v. *Lord Reay*, 2 Hare, 306.

(*j*) *Browell* v. *Reed*, 1 Hare, 434; but see *Tait* v. *Jenkins*, 1 Y. & C. C. C. 492.

(*k*) *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram.

insolvent) circumstances (*a*), or being trustees for sale have let the purchaser into possession before they received the purchase-money, for the Court will not *necessarily* infer this to be misconduct (*b*).

Receiver not discharged at the mere instance of the party procuring his appointment.

6. When a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested, and therefore will not be discharged merely on the application of the party at whose instance the order was made (*c*).

An exception under special circumstances.

7. However, when a receiver had been appointed on the application of the plaintiff, the tenant for life, on the ground of the misconduct of one of the trustees, and the incapacity of the other, and afterwards three new trustees were appointed by the Court, who, on a motion by the plaintiff to discharge the receiver, undertook to receive the rents and pass their accounts half-yearly before the Master in the same way as a receiver, the Court said it was not proposed to deprive any party of the protection of a receiver, but merely to substitute the trustees in his place; that the tenant for life ought not necessarily to be charged with the costs of a receiver; that it was not intended to put the tenant for life in possession; that if any objections were shown to the trustees the application would be refused, but in the absence of such objections it was a reasonable request: and the order for discharging the receiver was made (*d*).

Expense of receiver falls on life estate.

8. Where the Court appoints a receiver, the poundage and the expenses of passing his accounts fall upon the income of the tenant for life (*e*).

[Receiver's priority for his costs and remuneration.]

[9. Where property was realised in an action by debenture-holders against their trustees to execute the trusts of the deed for securing the debentures, and a receiver and manager had also been appointed in the action, the receiver and manager was allowed the balance due to him, including his remuneration and his costs of the action, in priority to the costs, charges, and expenses of the trustees, and the costs of the plaintiffs, other than costs of the realisation of the property (*f*).]

(*a*) *Anon. case*, 12 Ves. 4; *Howard* v. *Papera*, 1 Mad. 142; and see *Hathornthwaite* v. *Russel*, 2 Atk. 126. In *Havers* v. *Havers*, Barn. 23, the Court considered misapplication probable.

(*b*) *Browell* v. *Reed*, 1 Hare, 434.

(*c*) *Bainbrigge* v. *Blair*, 3 Beav. 423, *per* Lord Langdale.

(*d*) *Bainbrigge* v. *Blair*, 3 Beav. 421, 423, 424; and see *Poole* v. *Franks*, 1 Moll. 80.

(*e*) *Shore* v. *Shore*, 4 Drew. 510.

[(*f*) *Batten* v. *Wedgwood Coal and Iron Company*, 28 Ch. D. 317; and see *Strapp* v. *Bull*, (1895) 2 Ch. (C.A.) 1; *Lathom* v. *Greenwich Ferry Company*, 72 L. T. N.S. 790; *Re London United Breweries Company*, (1907) 2 Ch. 511; and see *Ramsay* v. *Simpson*, (1899) 1 I. R. 69, where costs of a manager in an administration action

SECTION V

OF COSTS OF SUIT

I. *As between strangers on the one hand, and trustees and cestuis que trust on the other.* Costs as between trustees and strangers.

1. In these cases, the trustee is on no better footing than any ordinary plaintiff or defendant, for the circumstances of the trust cannot be allowed to affect the interest of a third person (*a*). Thus, if a trustee fail in his application to the Court, he must pay the costs of it (*b*).

2. So, in a suit by a stranger for specific performance of a contract, the vendor being a trustee for sale must, if he cannot make a title, pay the costs of the suit agreeably to the general rule (*c*). Costs where trustees cannot make a title.

3. So, where trustees or executors are brought before the Court as necessary parties by a stranger, if the trustees or executors contest the claims of the plaintiff, and the plaintiff recover in the suit, they are not entitled to the costs (*d*). Trustee made a defendant as a necessary party.

4. If a plaintiff *fail* in his suit, but stands in so hard a case that he ought not to *pay* any costs, the Court will not oblige him to pay the costs of a defendant because the latter happens to sustain the character of a trustee (*e*). Plaintiff failing in his suit not necessarily bound to pay costs of a trustee.

5. In a foreclosure action against the mortgagor and his trustee to bar dower, the trustee is not entitled to his costs as against the mortgagee (*f*). Trustee to bar dower.

6. Where an action by a stranger is dismissed with costs, a trustee, who is a defendant, will in general be allowed his costs only as between party and party (*g*). [But under the general discretionary power which the Court possesses in all matters of equitable jurisdiction, costs as between solicitor and client may be given under special circumstances (*h*).] Trustee has costs as between party and party only.

had priority over all other costs, except the executor's, and the costs of the realization of the assets.]

(*a*) *Burgess* v. *Wheate*, 1 Eden, 251, *per* Lord Northington.

(*b*) *Ex parte Angerstein*, 9 L. R. Ch. App. 479; [*Pitts* v. *La Fontaine*, 6 App. Cas. 482].

(*c*) *Edwards* v. *Harvey*, G. Coop. 40; and see *Hill* v. *Magan*, 2 Moll. 460; *Elsey* v. *Lutyens*, 8 Hare, 164.

(*d*) *Rashley* v. *Masters*, 1 Ves. jun. 201, see 205.

(*e*) *Brodie* v. *St Paul*, 1 Ves. jun. 326, see 334.

(*f*) *Horrocks* v. *Ledsam*, 2 Coll. 208.

(*g*) *Mohun* v. *Mohun*, 1 Sw. 201; *Saunders* v. *Saunders*, 3 Jur. N.S. 727.

[(*h*) *Andrews* v. *Barnes*, 39 Ch. D. (C.A.) 133, in which case Kay, J., allowed costs as between solicitor and client to the trustees of a small charity fund, made defendants in an action unjustifiably brought to recover the fund from them; and see Seton, 6th ed. p. 1169.]

Trustee respondent to petition of *cestui que trust*.

7. Where money has been paid into Court by a railway company, and the *cestuis que trust* are petitioners and the trustee a respondent, the company must pay the costs of both, as the trustee is justified in appearing separately to inform the Court that the order is right (*a*).

Costs in creditor's suit.

8. If a creditor filed a bill against an executor for payment of a debt, the rule which [until the recent alteration in the practice of the Court] prevailed at *law* was not also the rule of *equity*, viz. that if the creditor recovered he should be entitled to his costs *de bonis testatoris*, and if there were none, then *de bonis propriis* of the executor; for the consideration of costs in *equity* rested entirely in the discretion of the Court (*b*). As the law formerly stood, if the assets were not sufficient to cover both the plaintiff's debt and costs, the executor was not decreed in equity to pay costs personally (*c*), unless he had misconducted himself, as by having satisfied simple contract debts in preference to debts upon specialty (*d*); but he was not entitled to retain his own costs out of the assets in preference to the claims of the plaintiff (*e*). And if a bill had been filed by a specialty creditor, and the specialty debt had exhausted the personal assets, the executor could not have claimed to be reimbursed out of the real estate to the prejudice of the testator's heir (*f*): for the executor, it was said, should have considered the risk before he applied for the probate (*g*). But now the practice is that the executor shall have his own costs in the first place, even as against the plaintiff, for the Court will not take the fund out of his hands until his costs are paid (*h*).

Executor (though not so formerly) now held entitled to his costs in preference to the plaintiff.

(*a*) *Ex parte Metropolitan Railway Company*, 16 W. R. 996; and see *Re English's Settlement*, 39 Ch. D. 556. [See, however, Order LXV., Rule 27 (19), as to tender of 30s. costs to a respondent in such a case.]

(*b*) *Twisleton* v. *Thelwel*, Hard. 165; *Uvedale* v. *Uvedale*, 3 Atk. 119; but see *Davy* v. *Seys*, Mos. 204. [Now by Rules of the Supreme Court, 1883, Order LXV., Rule 1, and the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court.]

(*c*) *Twisleton* v. *Thelwel*, Hard. 165; *Morony* v. *Vincent*, 2 Moll. 461.

(*d*) *Jefferies* v. *Harrison*, 1 Atk. 468; and see *Bennett* v. *Attkins*, 1 Y. & C. 247; *Wilkins* v. *Hunt*, 2 Atk. 151.

(*e*) *Humphrey* v. *Morse*, 2 Atk. 408; *Sandys* v. *Watson*, 2 Atk. 80; and see *Adair* v. *Shaw*, 1 Sch. & Lef. 280.

(*f*) *Uvedale* v. *Uvedale*, 3 Atk. 119; and see *Nash* v. *Dillon*, 1 Moll. 237.

(*g*) See *Uvedale* v. *Uvedale*, 3 Atk. 119; *Humphrey* v. *Morse*, 2 Atk. 408.

(*h*) *Bennet* v. *Going*, 1 Moll. 529; *Tipping* v. *Power*, 1 Hare, 405; [*Leonard* v. *Kellett*, 27 L. R. Ir. 418;] *Ottley* v. *Gilby*, 8 Beav. 603; *Tanner* v. *Dancey*, 9 Beav. 339; [but not his costs of a probate action; *Re Pearse*, 56 L. T. N.S. 228; 35 W. R. 358].

II. *Of costs as between trustees and cestuis que trust.*

Trustee entitled to costs as a general rule.

I. The general rule is that a trustee shall have his costs of suit awarded to him at the hearing either out of the trust estate, or to be paid by the *cestui que trust* (*a*). And if there be a fund under the control of the Court he will have his costs as between solicitor and client (*b*). And if there be no fund, still if the *cestuis que trust* choose to bring the trustees before the Court for obtaining its directions as to the rights of the parties or the mode of administration, and the trustees are free from blame, the trustees are entitled to their costs as between solicitor and client as against the *cestuis que trust personally* (*c*). But if plaintiffs take proceedings *for the purpose of creating* a fund, of which the defendants *would be* trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party (*d*).

[Costs statute barred.]

[And as the right of indemnity of trustees extends to fair claims of every kind, they are entitled to pay and retain costs properly incurred, although the right to recover payment may be barred by the Statute of Limitations; and therefore on moderation or taxation the taxing officer should not exclude statute-barred costs (*e*).]

(*a*) 1 Eq. Ca. Ab. 125, note (*a*); *Hall* v. *Hallett*, 1 Cox, 141, *per* Lord Thurlow; *Attorney-General* v. *City of London*, 3 B. C. C. 171; *Norris* v. *Norris*, 1 Cox, 183; *Sammes* v. *Rickman*, 2 Ves. jun. 38, *per* Lord Chief Baron Eyre; *Rashley* v. *Masters*, 1 Ves. jun. 201; *Rocke* v. *Hart*, 11 Ves. 58; *Maplett* v. *Pocock*, Rep. *t.* Finch, 136; *Landen* v. *Green*, Barn. 389; *Taylor* v. *Glanville*, 3 Mad. 176, &c.; [*Re Knight's Will*, 26 Ch. D. (C.A.) 82, 90; *Re Love*, 29 Ch. D. (C.A.) 348; *Easton* v. *Landor*, 62 L. J. Ch. (C.A.) 164; W. N. (1892) p. 176; *Re Turner*, (1907) 2 Ch. (C.A.) 126, *ante*, p. 795. By Order LXV., Rule 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings, including the administration of estates and trusts, are in the discretion of the Court, but this is not to deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules previously acted upon in the Chancery Division; see *Re Hodgson*, W. N. 1884, p. 117, where the action had been instituted before the order came into operation; *Re M'Clellan*, 29 Ch. D. 495; *Re Beddoe*, (1893) 1 Ch. (C.A.) 547. The right of trustees to their costs on an application by originating summons under Order LV., (see *ante*, pp. 420 *et seq.*, 771) is the same as in an action for administering the trust; *Re Medland*, 41 Ch. D. (C.A.) 476, 492. Though the Court has no power to order payment of costs out of a fund to which infants are contingently entitled, in the absence of next of kin entitled in reversion, yet if trustees are present to represent the next of kin, there is ample jurisdiction to give costs out of the estate: *Re Slaughter*, (1907) W. N. 197].

(*b*) *Mohun v. Mohun*, 1 Sw. 201, *per* Sir T. Plumer; *Moore* v. *Frowd*, 3 M. & Cr. 49, *per* Lord Cottenham.

(*c*) *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 155; and see *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 112; [and *Andrews* v. *Barnes*, 39 Ch. D. (C.A.) 133].

(*d*) *Saunders* v. *Saunders*, 3 Jur. N.S. 727; *Mohun* v. *Mohun*, 1 Sw. 201.

[(*e*) *Budgett* v. *Budgett*, (1895) 1 Ch. 202.]

Charges and expenses.

2. If it appear upon the pleadings, or the Court be otherwise satisfied, that the trustee has sustained charges and expenses beyond the costs of suit, the Court will order him his *costs, charges, and expenses, properly incurred.* But an order made in a suit in this form will not comprise costs, charges, and expenses, incurred in defending *other* suits, unless they be specially mentioned (*a*).

[Priority.]

[3. If the trust estate be insufficient for the payment of all the costs of the action, the trustee is entitled to have his costs, charges, and expenses, paid in priority to the costs of the *cestuis que trust* (*b*). But the necessary costs of realising the trust estate will have priority over the trustees' costs, charges, and expenses, as will also the costs and remuneration of a receiver and manager appointed in the suit (*c*).]

Professional charges.

4. If the trustee be a *solicitor*, he cannot make the usual professional charges (*d*), but the Court will not *declare* that the trustee shall have his *costs out of pocket* only, but will give him his costs as between solicitor and client in the usual way, and leave it to the taxing officer to deal with the effect of the order (*e*).

Practice in creditors' and legatees' suits where fund is deficient.

5. A singular application of the rules respecting costs as between trustees and third persons, and as between trustees and their *cestuis que trust inter se*, arises in the case of a deficient fund. If *a creditor* bring an action for administration, and there is a surplus, he can only have costs as between party and party, for that is all that he is entitled to as against the residuary legatees with whom he has no privity; but if the estate be deficient, and is divisible amongst the creditors *pro ratâ*, the creditor is regarded in the light of a trustee for himself and the other creditors, and then, as between him and his co-creditors, he is allowed his costs as between solicitor and client. Thus the less the estate the larger the plaintiff's costs. The same principle applies [*mutatis mutandis*, to a debenture-holder's action where the company's assets are insufficient for payment of the debentures in

(*a*) *Payne* v. *Little*, 27 Beav. 83. [An appeal from an order as to "costs, charges, and expenses," will not lie as to costs only; for the mere fact that the order refers to charges and expenses, about which no complaint is made, does not give the trustee a general right to appeal as to costs; *Bew* v. *Bew*, (1899) 2 Ch. (C.A.) 467.]

[(*b*) *Dodds* v. *Tuke*, 25 Ch. D. 617; and see *Batten Proffitt & Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612, 621.]

[(*c*) *Batten* v. *Wedgwood Coal and Iron Company*, 28 Ch. D. 317; and see *Strapp* v. *Bull*, (1895) 2 Ch. (C.A.) 1; *Lathom* v. *Greenwich Ferry Company*, 72 L. T. N.S. 790; *Re Glasdir Copper Mines Limited*, (1906) 1 Ch. (C.A.) 365.]

(*d*) See *ante*, p. 312.

(*e*) *York* v. *Brown*, 1 Coll. 260.

full (*a*); to an action by a creditor of a deceased partner where the estate is sufficient for payment of separate, but not of partnership, debts (*b*); to the case of a creditor who obtains the conduct of an action originally brought by a legatee or next of kin (*c*); and to an action] by a *legatee* where the fund, *after payment of debts*, is not sufficient for discharge of the *legacies* in full (*d*); but otherwise if the fund be insufficient for payment of *debts* (*e*). Where the personalty had been exhausted and a creditor's suit was instituted against the devisees of the *real* estate, which was also likely to prove deficient, the order was that the proceeds should be applied first in payment of the costs of plaintiffs and defendants as between party and party *pari passu*, and then in discharge of the debts, and if the fund were insufficient for the latter purpose, then, as between the plaintiffs and the other creditors, the plaintiffs should be paid their extra costs as between solicitor and client (*f*).

Trustee not appearing.

6. Where the trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon his paying the costs of the day, Lord Kenyon said: "The payment of the costs of the day makes the trustee *rectum in curiâ;* and as he would most unquestionably have been entitled to his costs if he had appeared at the original hearing, so he now stands in the same situation, and is therefore entitled to his costs" (*g*).

Decree passed.

7. But if the decree has been *passed*, a trustee who has omitted to ask for his costs at the hearing, cannot have the cause reheard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition (*h*).

[Where no order made as to costs.]

[8. Where in an administration action by a beneficiary against a trustee, the judge by his order "does not think fit to make any order as to the costs of the action," the *prima facie* right of

[(*a*) *Re New Zealand Midland Railway Company*, (1901) 2 Ch. (C.A.) 357.]

[(*b*) *Re M'Rae*, 32 Ch. D. 613.]

[(*c*) *Re Richardson*, 14 Ch. D. 611.]

(*d*) *Thomas* v. *Jones*, 1 Dr. & Sm. 134, and cases there cited; and see *Tardrew* v. *Howell*, 2 Giff. 530.

(*e*) *Weston* v. *Clowes*, 15 Sim. 610; *Newman* v. *Hatch*, Seton, 6th ed. p. 1513; *Wettenhall* v. *Davis*, 9 Jur. N.S. 1216; *S. C.*, *nom. Wetenhall* v. *Dennis*, 33 Beav. 285; [and as to the application of a like principle to the case of an action to enforce a charge and declare priorities, so as to entitle the plaintiff to costs out of a fund, so far as the other incumbrancers have had the benefit of the action in securing the fund to them, and ascertaining and determining their rights, see *Batten Proffitt and Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612; *Ford* v. *Earl of Chesterfield*, 21 Beav. 426; *Wright* v. *Kirby*, 23 Beav. 463; *Leonard* v. *Kellett*, 27 L. R. Ir. 418].

(*f*) *Henderson* v. *Dodds*, 2 L. R. Eq. 532.

(*g*) *Norris* v. *Norris*, 1 Cox, 183.

(*h*) *Colman* v. *Sarell*, 2 Cox, 206.

the trustee to retain his costs out of the estate is judicially negatived (*a*).]

Disclaimer.

9. If a person named as trustee be made defendant to a suit, and by his defence disclaim the trust, the suit will be dismissed as against him with *costs* (*b*); but not with *costs as between solicitor and client*, for, having refused to accept the office, he stands in the position of an ordinary defendant (*c*); and if his defence be unnecessarily long, he will only be allowed the reasonable costs of a disclaimer (*d*).

Costs of trustee of a void deed.

10. If a person be a trustee of a deed void as against creditors, or on other grounds, the plaintiff by praying a *conveyance* by the trustee may elect to treat him in that character, so as to give him a claim to costs (*e*). Otherwise the *so-called* trustee is a trustee of a nullity, and he and his *cestui que trust* cannot have costs as against the true owner (*f*); more particularly if the deed to which the trustee is a party contain a false recital for the purpose only of misleading (*g*); and if the trustee's claim to the expenses of the so-called trust be the occasion of the suit, he will be ordered to pay costs (*h*). [So, where the trustee had prepared the settlement and had persuaded the settlor to execute it, he was ordered to pay the costs of the action to set it aside (*i*).] If a suit be instituted against trustees of an instrument, which is a nullity, for enforcing the void trusts, and the suit is dismissed, the *quasi* trustees will have their costs, but only as between party and party (*j*). [Where a settlement is set aside in an action brought against the trustees by the trustee in bankruptcy of the settlor, trustees who have acted properly, and not put the plaintiff to unnecessary expense, will be allowed to retain their costs of the action, as between solicitor and client, out of the trust fund (*k*).]

Suit originated by the trustee's misconduct.

11. If any particular instance of misconduct, or a general

[(*a*) *Re Hodgkinson*, (1895) 2 Ch. (C.A.) 190.]

(*b*) *Hickson* v. *Fitzgerald*, 1 Moll. 14.

(*c*) *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655.

(*d*) *Martin* v. *Persse*, 1 Moll. 146.

(*e*) *Snow* v. *Hole*, V.C. of England, 8th March, 1845; and see *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 556; *Daking* v. *Whimper*, 26 Beav. 571; *Ponsford* v. *Widnell*, W. N. 1869, p. 81; *Travis* v. *Illingworth*, W. N. 1868, p. 206; *Ex parte Tomlinson*, 3 De G. F. & J. 745; and see *ante*, p. 787.

(*f*) *Elsey* v. *Cox*, 26 Beav. 95; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

(*g*) *Turquand* v. *Knight*, 14 Sim. 643.

(*h*) *Smith* v. *Dresser*, 1 L. R. Eq. 651; *S. C.*, 35 Beav. 378.

[(*i*) *Dutton* v. *Thompson*, 23 Ch. D. (C.A.) 278.]

(*j*) *Mohun* v. *Mohun*, 1 Sw. 201.

[(*k*) *Merry* v. *Pownall*, (1898) 1 Ch. 306.]

dereliction of duty in the trustee (*a*), or even his mere caprice and obstinacy (*b*), be the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings which his own improper behaviour occasioned (*c*); and of course if the trustee be decreed to pay the costs personally, he cannot afterwards deduct them from the trust fund in his hands (*d*). [So, if an executor or trustee improperly institute an action to administer the estate or execute the trust, the Court will not allow its process to be used as an instrument of oppression, but will make the plaintiff personally bear all the costs of the action (*e*); and under the new rules, if an administration action be rendered necessary solely by the neglect of the trustee to furnish accounts, the judgment should be so framed as to enable the Court to throw the whole costs of the action on the trustee (*f*). But the right of a trustee to his costs rests substantially upon contract, and can only be lost or curtailed by such inequitable conduct as amounts to a violation or culpable neglect of his duty under the contract (*g*), and his costs accordingly are not "by law left to the discretion of the Court"; and a trustee if deprived of his

(*a*) *Springett* v. *Dashwood*, 2 Giff. 521; *Byrne* v. *Norcott*, 13 Beav. 346; *Attorney-General* v. *Hobert*, Rep. *t.* Finch, 259; *Earl Powlet* v. *Herbert*, 1 Ves. jun. 297; *Caffrey* v. *Darby*, 6 Ves. 488; *Littlehales* v. *Gascoyne*, 3 B. C. C. 73; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Adams* v. *Clifton*, 1 Russ. 297; *Mosley* v. *Ward*, 11 Ves. 581; *Piety* v. *Stace*, 4 Ves. 620; *Seers* v. *Hind*, 1 Ves. jun. 294; *Fell* v. *Lutwidge*, Barn. 319, see 322; *Brown* v. *How*, Barn. 354, see 358; *Sheppard* v. *Smith*, 2 B. P. C. 372; *Haberdashers' Company* v. *Attorney-General*, 2 B. P. C. 370; *Franklin* v. *Frith*, 3 B. C. C. 433; *Whistler* v. *Newman*, 4 Ves. 129; *Stacpoole* v. *Stacpoole*, 4 Dow, 209; *Crackelt* v. *Bethune*, 1 J. & W. 586; *Baker* v. *Carter*, 1 Y. & C. 252, *per* Lord Abinger, C. B.; *Hide* v. *Haywood*, 2 Atk. 120; *Wilson* v. *Wilson*, 2 Keen, 249; *Attorney-General* v. *Wilson*, Cr. & Ph. 1; *Lyse* v. *Kingdon*, 1 Coll. 184; [*Thomson* v. *Eastwood*, 2 App. Cas. 215; *Heugh* v. *Scard*, 33 L. T. N.S. 659; 24 W. R. 51; *Re Weall*, 42 Ch. D. 674; *Easton* v. *Landor*, 62 L.J. Ch. (C.A.) 164; W. N. (1892) p. 176; *Re Skinner*, (1904) 1 Ch. 289].

(*b*) *Taylor* v. *Glanville*, 3 Mad. 178, *per* Sir J. Leach; *Smith* v. *Bolden*, 33 Beav. 262; *May* v. *Armstrong*, W. N. 1866, p. 233; *Jones* v. *Lewis*, 1 Cox, 199; *Earl of Scarborough* v. *Parker*, 1 Ves. jun. 267; *Kirby* v. *Mash*, 3 Y. & C. 295; *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438; *Hampshire* v. *Bradley*, 2 Coll. 34; *Penfold* v. *Bouch*, 4 Hare, 271; and see *Burrows* v. *Greenwood*, 4 Y. & C. 251; *Hayhow* v. *George*, and *Southwell* v. *Martin*, 21 L. T. N.S. 135; [*Coppinger* v. *Shakleton*, 15 L. R. Ir. 461].

[(*c*) Such an order may be made in proceedings commenced by originating summons: *Re Skinner*, (1904) 1 Ch. 289.]

(*d*) *Attorney-General* v. *Daugars*, 33 Beav. 621.

[(*e*) *Re Cabburn*, 46 L. T. N.S. 848.]

[(*f*) *Re Hayter*, 32 W. R. 26.]

[(*g*) *Turner* v. *Hancock*, 20 Ch. D. (C.A.) 303; *Re Evans*, 26 Ch. D. (C.A.) 58, 65; and see *Re Jones*, (1897) 2 Ch. 190, where an administrator was held entitled to his costs of an administration action, caused by a mistaken claim by him to be allowed expenses which were subsequently disallowed.]

costs, may, without the leave of the Court or judge making the order, appeal on the question of his costs only (*a*). Where, however, the settlement is itself set aside, the trustee has no claim to his costs as matter of right, as in that case there is no contract in existence, and accordingly he cannot appeal as to such costs (*b*).]

Where misconduct proved only in part.

12. But where a bill was filed charging the trustee with a breach of trust both as to realty and personalty, and the charge failed as to the former but succeeded as to the latter, the Court said, it was scarcely possible to suppose that the trustee should be permitted to *have* his costs, but it would be injustice to make him *pay the whole costs*, as one part of the bill had failed, and he was therefore ordered to pay the costs of that part of the bill which had succeeded (*c*).

[Trustee severing from co-trustee.]

[13. A trustee ought not to be deprived of his costs of an administration action out of the trust estate merely because he has severed from his co-trustee, but he is entitled to have an opportunity of explaining his conduct, so that the Court may decide judicially whether the severance was improper (*d*).

[Costs of innocent trustee.]

14. Where two trustees are jointly and severally liable for a breach of trust committed by one of them, the other trustee being innocent, the Court may order the guilty trustee to repay to the innocent trustee the costs of the action to repair the

[Breach of trust repaired before judgment.]

breach of trust (*e*). Where a trustee acting honestly has invested the trust funds on improper securities, but has made good the loss to the trust estate before judgment in an action to execute the trusts, he will be allowed his costs (*f*).

[Trustee unsuccessfully attacked.]

A trustee whose conduct was unsuccessfully attacked in an administration action was held entitled to the costs of appearing by two counsel (*g*).]

Setting aside a purchase by trustees, in absence of fraud.

15. Trustees for sale had purchased in the name of a trustee at an undervalue, but *without any imputation of fraud, and by*

[(*a*) *Cotterell* v. *Stratton*, 8 L. R. Ch. App. 295; *Farrow* v. *Austin*, 18 Ch. D. 58; *Turner* v. *Hancock*, 20 Ch. D. (C.A.) 303; *Re Sarah Knight's Will*, 26 Ch. D. (C.A.) 82; *Re Love*, 29 Ch. D. (C.A.) 348; *Re Beddoe*, (1893) 1 Ch. (C.A.) 547; *Re Isaac*, (1897) 1 Ch. (C.A.) 251; but see *Taylor* v. *Dowden*, 4 L. R. Ch. App. 697; *Re Hoskin's Trusts*, 6 Ch. D. (C.A.) 281.]

[(*b*) *Dutton* v. *Thompson*, 23 Ch. D. (C.A.) 278.]

(*c*) *Pocock* v. *Reddington*, 5 Ves. 800; [*Re Sarah Knight's Will*, 26 Ch. D. (C.A.) 82].

[(*d*) *Re Isaac*, (1897) 1 Ch. (C.A.) 251, where the order of the Court below was varied so as to allow to the severing trustee costs of work actually done by him.]

[(*e*) *Price* v. *Price*, 42 L. T. N.S. 626; *Wilson* v. *Thomson*, 20 L. R. Eq. 459.]

[(*f*) *Peacock* v. *Colling*, 54 L. J. N.S. Ch. 743; 53 L. T. N.S. 620; 33 W. R. 528.]

[(*g*) *Re Maddock*, (1899) 2 Ch. 588.]

auction. As to so much of the suit as related to calling upon the trustees to submit to a resale, and the directions consequential thereon, the Court gave relief against the trustees *with costs;* but as to accounts that must have been taken had the sale been unimpeachable, the trustees were allowed their costs (*a*).

Mistake or slight neglect of the trustee.

16. If the suit was occasioned by an innocent *mistake* of the trustee (such as an investment in good faith, and without loss to the trust fund, on a security not strictly correct (*b*)), the Court will content itself with *not giving* him costs (*c*), or will punish him with *payment of part* of the costs only (*d*), or will even allow him his costs (*e*); [but an official liquidator who is a paid agent is not entitled to the same latitude in the matter of costs as a gratuitous trustee (*f*)].

Administration suit mainly caused by a breach of trust.

17. Though, as a general rule, where a trustee commits a *breach of trust* he must pay the costs of a suit to repair it, yet he [may] be entitled to his subsequent costs relating to the ordinary taking of the accounts (*g*); [but under the new practice there is no general rule to that effect, and in a case of gross neglect, he may be ordered to pay the costs of taking and vouching the accounts (*h*)].

Misconduct of the trustee discovered in the progress of the suit.

18. If the suit did not originate from any necessity of inquiring into the conduct of the trustee, but, in the course of the proceedings instituted upon other grounds, it appears that the trustee has in some particular instance been guilty of a breach of trust, the Court will not award against the trustee the costs of the *whole* suit, but only of so much of it as connects itself with his misconduct, and as to the rest of the suit will allow him his costs (*i*).

Clearance of default.

19. The Court never gives costs to a defaulting trustee while he continues in default, but the Court says, " when you have

(*a*) *Sanderson* v. *Walker*, 13 Ves. 601.

(*b*) *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*c*) *O'Callaghan* v. *Cooper*, 5 Ves. 117; *Mousley* v. *Carr*, 4 Beav. 49; *Attorney-General* v. *Drapers' Company*, Ib. 71; *Devey* v. *Thornton*, 9 Hare, 222; [*Ryan* v. *Nesbitt*, W. N. 1879, p. 100].

(*d*) *East* v. *Ryall*, 2 P. W. 284.

(*e*) *Taylor* v. *Tabrum*, 6 Sim. 281; *Flanagan* v. *Nolan*, 1 Moll. 84; *Travers* v. *Townsend*, Ib. 496; *Attorney-General* v. *Caius College*, 2 Keen, 150; *Bennett* v. *Attkins*, 1 Y. & C. 247; *Fitzgerald* v. *O'Flaherty*, 1 Moll. 347; *Attorney-General* v. *Drummond*, 2 Conn. & Laws. 98; *Royds* v. *Royds*, 14 Beav. 54.

[(*f*) *Re Silver Valley Mines*, 21 Ch. D. (C.A.) 381.]

(*g*) *Hewett* v. *Foster*, 7 Beav. 348; and see *Bate* v. *Hooper*, 5 De G. M. & G. 345; *Re King*, 11 Jur. N.S. 899.

[(*h*) *Re Skinner*, (1904) 1 Ch. 289, referring to *Easton* v. *Landor*, 62 L. J. Ch. (C.A.) 164.]

(*i*) *Tebbs* v. *Carpenter*, 1 Mad. 290, see 308; *Newton* v. *Bennett*, 1 B. C. C. 359; *Pride* v. *Fooks*, 2 Beav. 430; *Heighington* v. *Grant*, 1 Ph. 600.

paid in the balance found due from you, then you shall have your costs" (*a*). But a bankrupt [formerly ceased] from the date of bankruptcy to be a debtor to the trust estate, and was therefore entitled to his costs from the date of the bankruptcy (*b*).

[Where defaulting trustee a bankrupt.]

[20. The liability of a trustee for his breaches of duty was, however, by the Bankruptcy Act, 1869, sect. 49, continued notwithstanding his discharge, and there was some conflict of opinion as to the right of a bankrupt trustee under that Act to his costs as from the date of bankruptcy, but the better opinion seems to be that he was not entitled to such costs until he had made good his default (*c*). By the Bankruptcy Act, 1883 (*d*), the liability of a trustee for a breach of trust, (except in cases of fraudulent breaches) is released by the order of discharge, and it follows that under that Act, except in cases of fraud, a bankrupt trustee will, as from the date of his discharge, be entitled to his costs. If the liability of the trustee does not arise from a breach of trust, but is a mere ordinary liability which ceases as from the date of the bankruptcy, the trustee is entitled to his costs as from that date (*e*).

[Apportioning costs in action against executor of defaulting executor.]

21. If an action be brought against the executor of a defaulting executor to administer the original testator's estate, the defendant's costs ought strictly to be borne, as to those incurred solely in reference to the original testator's estate out of that estate, as to those incurred in seeking relief against the defaulting executor out of his estate, and as to the remaining costs out of the two estates equally; but to avoid the complication and expense of thus apportioning the costs, the Court has allowed the defendant the costs of taking the account of the original testator's estate, and half the rest of his costs out of the original testator's estate (*f*).]

Costs of discussing a doubtful point of law.

22. An executor, instead of accumulating a fund as directed by the will, had improperly kept the balance in his hands; but as the amount of costs had in a great measure been occasioned by

(*a*) *Birks* v. *Micklethwait*, 33 Beav. 409; *Watson* v. *Row*, 18 L. R. Eq. 680; [*Lewis* v. *Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *M'Ewan* v. *Crombie*, 25 Ch. D. 175].

(*b*) *Bowyer* v. *Griffin*, 9 L. R. Eq. 340.

[(*c*) *Lewis* v. *Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *M'Ewan* v. *Crombie*, 25 Ch. D. 175; *Re Vowles*, W. N. 1886, p. 73; *Secus*, *Clare* v. *Clare*, 21 Ch. D. 865.]

[(*d*) 46 & 47 Vict. c. 52, ss. 30, 37.]

[(*e*) *Re Vowles*, 32 Ch. D. 243; *Smith* v. *Dale*, 18 Ch. D. 516; *Re Basham*, 23 Ch. D. 195; and *ante*, p. 1184.]

[(*f*) *Re Griffiths*, 26 Ch. D. (C.A.) 465; and see *Palmer* v. *Jones*, 43 L. J. N.S. Ch. 349; *Re Kitto*, 28 W. R. 411.]

the inquiry what rule the Court ought to adopt with respect to the computation of interest, it was thought hard under the circumstances, to fix the executor with payment of costs even relatively to the breach of trust; and therefore the Court gave no costs (*a*).

Costs to be paid in part and received in part by the trustee.

23. In one case, as to part of the suit the trustee ought from his misconduct to have *paid* the costs, and, as to another, to have been *allowed* his costs; and the Court, by a kind of compromise, left each party to pay his own costs (*b*).

Trivial misconduct.

24. When the breach of trust is trivial, the Court may overlook it altogether, and give the trustee his own costs (*c*).

[Action by representative of trustee to recover the trust estate.]

[25. If the representative of a trustee who has invested the trust estate on an unauthorised security, bring an action to recover the trust estate, he will not be allowed the costs of that action as against the *cestuis que trust*, but must look for such costs to the estate of the trustee (*d*).]

Trustees protecting from parental influence.

26. The Court watches with jealousy transactions between parent and child occurring shortly after the child has attained twenty-one, more especially when the transactions had their inception during minority, and trustees acting *bonâ fide* in refusing to convey under such suspicious circumstances will be entitled to their costs (*e*).

Trustee instituting a suit for his private ends.

27. If a trustee have a private interest of his own, separate and independent from the trust, and oblige the *cestui que trust* to come into a Court of Equity merely to have some point relating to the trustee's private interest determined at the expense of the trust, that is such a vexatious proceeding in the trustee, that, for example's sake, he will be decreed to pay the whole costs of the suit (*f*).

Trustee falsely denying the plaintiff's claims.

28. If in a suit for an account the defendant states his belief that the plaintiff is considerably indebted to him, and after a long investigation it proves that the defendant is considerably indebted to the plaintiff, the trustee, thus daring the plaintiff to his account, will be decreed to pay the costs (*g*). And if the balance be in favour of the trustee, but far below what he had

(*a*) *Raphael* v. *Boehm*, 13 Ves. 592.
(*b*) *Newton* v. *Bennet*, 1 B. C. C. 362.
(*c*) *Fitzgerald* v. *Pringle*, 2 Moll. 534; *Bailey* v. *Gould*, 4 Y. & C. 221, see 225; *Knott* v. *Cottee*, 16 Beav. 77; *Cotton* v. *Clark*, 16 Beav. 134: *Chugg* v. *Chugg*, W. N. 1874, p. 185.
[(*d*) *Gurney* v. *Gurney*, 48 L. T. N.S. 529.]
(*e*) *King* v. *King*, 1 De G. & J. 663, see 671.
(*f*) *Henley* v. *Philips*, 2 Atk. 48.
(*g*) *Parrot* v. *Treby*, Pr. Ch. 254; *Eglin* v. *Sanderson*, 3 Giff. 434.

stated, he will not be entitled to *have* his costs (*a*), or at least not the costs of the account itself (*b*).

Trustee mis-stating his accounts.

29. A trustee will be deprived of costs (*c*), or will even have to pay costs if he refuse to account (*d*), or if he wilfully mis-state the accounts (*e*), or if, by any chicanery in his answer, he keep the *cestui que trust* from a true knowledge of the accounts (*f*), or even if he has kept the accounts in a very confused manner (*g*). And an executor will be liable to pay costs if he deny assets, and the contrary be established against him (*h*). But an executor is entitled to have the accounts taken under the direction of the Court, and, therefore, even where he had obstructed the taking of the accounts, he was not decreed to pay the costs, though he was not allowed to have his costs (*i*). But in another case, where he had unnecessarily and unjustifiably protracted the suit, and multiplied the costs by his litigiousness, he was ordered to pay the costs of a simple administration suit up to the hearing (*j*).

Corporation pleading ignorance falsely.

30. Where a corporation filling the character of trustees for a grammar school, by their answer pleaded ignorance of the claims of the charity, and the information was afterwards elicited from the documents scheduled to their answer, as the Court inferred from such conduct a disposition to obstruct and defeat the ends of justice, the corporation was decreed to pay the costs of the suit (*k*).

Corporation suppressing documents.

31. And a corporation similarly circumstanced was punished in the same manner where, the Court having directed the production of certain documents, it was afterwards discovered that a very material one had been suppressed (*l*).

Trustee setting up title of his own.

32. The costs of the suit will be cast upon the trustee, if, in his answer, he set up a title of his own, and make an ill

(*a*) *Attorney-General* v. *Brewers' Company*, 1 P. W. 376.

(*b*) *Fozier* v. *Andrews*, 2 Jon. & Lat. 199.

(*c*) *Gresham* v. *Price*, 35 Beav. 47.

(*d*) *Boynton* v. *Richardson*, 31 Beav. 340; *Kemp* v. *Burn*, 4 Giff. 348; *Wroe* v. *Seed*, 4 Giff. 425; *Underwood* v. *Trower*, W. N. 1867, p. 83; [*Re Radclyffe*, 50 L. J. N.S. Ch. 317].

(*e*) *Sheppard* v. *Smith*, 2 B. P. C. 372; and see *Flanagan* v. *Nolan*, 1 Moll. 86.

(*f*) *Avery* v. *Osborne*, Barn. 349; *Reech* v. *Kennegal*, 1 Ves. 123.

(*g*) *Norbury* v. *Calbeck*, 2 Moll. 461.

(*h*) *Sandys* v. *Watson*, 2 Atk. 80.

(*i*) *Re King*, 11 Jur. N.S. 899. [But under the Rules of the Supreme Court now in force, an executor instituting proceedings to have the accounts taken must, to entitle him to costs, be able to satisfy the Court that under all the circumstances of the case the institution of the action was reasonable. See Order LXV., Rule 1.]

(*j*) *Talbot* v. *Marshfield*, 4 L. R. Eq. 661; 3 L. R. Ch. App. 622.

(*k*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35.

(*l*) *Borough of Hertford* v. *Poor of same Borough*, 2 B. P. C. 377.

defence (*a*); and he will not be allowed to *have* his costs if he set up any trust different from what it actually is (*b*); and where a trustee filed an improper answer he was not allowed the costs of the answer (*c*).

Executors denying relationship of next of kin.

33. An executor sued by the next of kin had put the plaintiffs to the proof of their relationship, and, the fact not admitting a doubt, the executor was fixed with the costs of the inquiry (*d*).

Costs where interest given against executors.

34. It was laid down as a rule by Lord Thurlow, that "where the Court is obliged to *give interest against executors* as a remedy for a breach of trust, costs against them will follow of course" (*e*); but Sir W. Grant said, "that was a proposition to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest, which would not be cases for costs" (*f*); and the existence of any such rule has been denied (*g*). The meaning of Lord Thurlow probably was, that where the suit was occasioned by the misconduct of the trustee, and the charge against him was shown to be well founded by the Court's fixing him with interest, the costs of the suit in that case would be consequential upon the relief (*h*).

[Costs of appeal.]

35. [Trustees, served with notice of an appeal upon the construction of a will, are entitled to their costs of appearance by counsel, but in taxing such costs the taxing officer should have regard to the position of the trustees, and especially whether it was such that, at the hearing of the appeal, their assistance would probably be required by the Court (*i*). Trustees served with notice of appeal and holding a merely neutral position, without any intention of taking part in the argument, ought not to appear by separate counsel on the appeal (*j*).]

(*a*) *Lloyd* v. *Spillet*, 3 P. W. 344; *Bayly* v. *Powell*, Pr. Ch. 92; *Willis* v. *Hiscox*, 4 M. & Cr. 197; *Attorney-General* v. *Drapers' Company*, 4 Beav. 67; *Attorney-General* v. *Christ's Hospital*, Ib. 73; *Irwin* v. *Rogers*, 12 Ir. Eq. Rep. 159.

(*b*) *Ball* v. *Montgomery*, 2 Ves. jun. 191, see 199.

(*c*) *Eddowes* v. *Eddowes*, 30 Beav. 603.

(*d*) *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*e*) *Seers* v. *Hind*, 1 Ves. jun. 294, and see *Franklin* v. *Frith*, 3 B. C. C. 433; *Mosley* v. *Ward*, 11 Ves. 581.

(*f*) *Ashburnham* v. *Thompson*, 13 Ves. 404.

(*g*) *Tebbs* v. *Carpenter*, 1 Mad. 308; *Woodhead* v. *Marriott*, C. P. Cooper's Rep. 1837-38, 62; *Holgate* v. *Haworth*, 17 Beav. 259; [*Re John Jones*, 49 L. T. N.S. 91].

(*h*) See *Mosley* v. *Ward*, 11 Ves. 582.

[(*i*) *Carroll* v. *Graham*, (1905) 1 Ch. (C.A.) 478, *per* Romer & Cozens Hardy, L.JJ.]

[(*j*) S. C., *per* Vaughan Williams, L. J.]

APPENDIX

No. I.

THE TRUSTEE ACT, 1893

56 & 57 Vict. c. 53

"*An Act to consolidate Enactments relating to Trustees.*"
(22*nd September*, 1893.)

Be it enacted, &c.

PART I.—Investments

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust (*a*), invest any trust funds in his hands, whether at the time in a state of investment or not (*b*), in manner following (*c*), that is to say : Authorised investments.

(*a.*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom :

(*b.*) On real or heritable securities in Great Britain or Ireland (*d*) :

(*c.*) In the stock of the Bank of England or the Bank of Ireland :

(*d.*) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India :

(*e.*) In any securities the interest of which is for the time being guaranteed by Parliament :

(*f.*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District :

(*g.*) In the debenture or rent-charge, or guaranteed or preference

(*a*) See *ante*, p. 367.
(*b*) See p. 367.
(*c*) See p. 367.
(*d*) As to the precautions to be observed in lending on mortgage, see pp. 372 *et seq.*

stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(*h.*) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (*g.*), either alone or jointly with any other railway company:

(*i.*) In the debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j.*) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuities Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(*k.*) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(*l.*) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(*m.*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

(*n.*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied :

(*o.*) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (*a*),

and may also from time to time vary any such investment (*b*).

Purchase at a premium of redeemable stocks.

2. (1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section 1 of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value (*c*).

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (*g.*), (*i.*), (*k.*), (*l.*), and (*m.*) of sect. 1, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

Discretion of trustees.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Application of preceding sections.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Enlargement of express powers of investment.

5. (1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(*a.*) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a

(*a*) See pp. 365, 366.
(*b*) See pp. 367 *et seq.*
(*c*) See p. 368.

reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent (*a*); and

27 & 28 Vict. c. 114.

(*b.*) on any charge, or upon mortgage of any charge made under the Improvement of Land Act, 1864 (*b*).

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid (*c*).

(3) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875 (*d*).

38 & 39 Vict. c. 83.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880 (*e*).

43 & 44 Vict. c. 8.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865 (*f*).

28 & 29 Vict. c. 78.

Power to invest, notwithstanding drainage charges.

6. A trustee having power to invest in the purchase of land or on mortgage of land, may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge (*g*).

10 & 11 Vict. c. 32.

Trustees not to convert inscribed stock into certificates to bearer.

7. (1) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

26 & 27 Vict. c. 73.

(*a.*) The India Stock Certificate Act, 1863;

33 & 34 Vict. c. 71.

(*b.*) The National Debt Act, 1870;

38 & 39 Vict. c. 83.

(*c.*) The Local Loans Act, 1875;

40 & 41 Vict. c. 59.

(*d.*) The Colonial Stock Act, 1877.

(*a*) See p. 369.
(*b*) See p. 369.
(*c*) See p. 369.
(*d*) See p. 369.
(*e*) See pp. 369, 370.
(*f*) See p. 370
(*g*) See p. 370.

(2) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted (*a*).

Loans and investments by trustees not chargeable as breaches of trust.

8. (1) A trustee lending money on the security of any property (*b*) on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report (*c*).

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title (*d*).

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted (*e*).

(4) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December, one thousand eight hundred and eighty-eight.

Liability or loss by reason of improper investments.

9. (1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(*a*) See p. 371.
(*b*) In the Act of 1888 the words "of any tenure, whether agricultural or house or other property," were added.
(*c*) See pp. 374 *et seq.*
(*d*) See p. 372.
(*e*) See p. 586.

(2) This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December, one thousand eight hundred and eighty-eight (*a*).

PART II.—Various Powers and Duties of Trustees

Appointment of New Trustees.

Power of appointing new trustees.

10. (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid (*b*).

(2) On the appointment of a new trustee for the whole or any part of trust property—

(*a.*) the number of trustees may be increased (*c*); and

(*b.*) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part (*d*); and

(*c*) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust

(*a*) See p. 378.
(*b*) See p. 806.
(*c*) See p. 820.
(*d*) See p. 828.

unless there will be at least two trustees to perform the trust (*a*); and

(*d.*) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section (*b*).

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained (*c*).

(6) This section applies to trusts created either before or after the commencement of this Act.

Retirement of trustee.

11. (1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act (*d*).

Vesting of trust property in new or continuing trustees.

12. (1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject shall vest in the persons who by

(*a*) See p. 823.
(*b*) See p. 825.
(*c*) See p. 807.
(*d*) See p. 814.

virtue of the deed become and are the trustees for performing the trust (*a*), that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right (*b*).

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament (*c*).

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the thirty-first of December, one thousand eight hundred and eighty-one.

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13. (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with (*d*) any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots (*e*), by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss (*f*).

(2) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3) This section applies only to a trust or power created by an instrument coming into operation after the thirty-first of December, one thousand eight hundred and eighty-one.

Power to sell subject to depreciatory conditions.

14. (1) No sale made by a trustee shall be impeached by any

(*a*) See p. 812.
(*b*) See pp. 811, 812.
(*c*) See p. 812.
(*d*) See p. 743.
(*e*) See p. 517.
(*f*) See pp. 509, 515.

beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This section applies only to sales made after the twenty-fourth day of December, one thousand eight hundred and eighty-eight (*a*).

Power to sell under 37 & 38 Vict. c. 78.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874 (*b*).

Married woman as bare trustee may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee (*c*) she may convey or surrender it as if she were a feme sole (*d*).

Various Powers and Liabilities.

Power to authorise receipt of money by banker or solicitor.

17. (1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee (*e*).

44 & 45 Vict. c. 41.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment (*f*).

(*a*) See p. 516.
(*b*) See pp. 519, 586, 587.
(*c*) See p. 246, note.
(*d*) See pp. 36, 246, note.
(*e*) See pp. 325, 529, 557.
(*f*) See p. 531.

(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee (*a*).

(4) This section applies only where the money or valuable consideration or property is received after the twenty-fourth day of December, one thousand eight hundred and eighty-eight.

(5) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Power to insure building.

18. (1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income (*b*).

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so (*c*).

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19. (1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite : Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of

(*a*) See pp. 331, 530, 531.
(*b*) See pp. 329, 719.
(*c*) See pp. 330, 719.

renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust (*a*).

Power of trustee to give receipts.

20. (1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section applies to trusts created either before or after the commencement of this Act (*b*).

Power for executors and trustees to compound, &c.

21. (1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall

(*a*) See pp. 440, 441, 447. (*b*) See pp. 327, 535.

have effect subject to the terms of that instrument, and to the provisions therein contained.

(4) This section applies to executorships, administratorships and trusts constituted or created either before or after the commencement of this Act (*a*).

Powers of two or more trustees.

22. (1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2) This section applies only to trusts constituted after or created by instruments coming into operation after the thirty-first day of December one thousand eight hundred and eighty-one (*b*).

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee (*c*).

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers (*d*).

PART III.—Powers of the Court

Appointment of New Trustees and Vesting Orders.

Power of the Court to appoint new trustees (*e*).

25. (1) The High Court may, whenever it is expedient (*f*) to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or

(*a*) See pp. 738 *et seq.*
(*b*) See pp. 739, 765.
(*c*) See p. 411.
(*d*) See p. 305.
(*e*) See pp. 838 *et seq.*
(*f*) See p. 838.

impracticable so to do without the assistance of the Court (*a*), make an order for the appointment of a new trustee or new trustees (*b*) either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the forgoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt (*c*).

(2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated (*d*).

(3) Nothing in this section shall give power to appoint an executor or administrator (*e*).

Vesting orders as to land (*f*).

26. In any of the following cases, namely :—

(i.) Where the High Court appoints or has appointed a new trustee ; and

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(*a*) is an infant (*g*), or
(*b*) is out of the jurisdiction of the High Court, or
(*c*) cannot be found ; and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land ; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead ; and

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead ; and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully

(*a*) See pp. 838, 839.
(*b*) See pp. 841 *et seq.*
(*c*) See p. 838.
(*d*) See p. 838.
(*e*) See p. 838.
(*f*) See pp. 844 *et seq.*
(*g*) See p. 844.

refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(*a.*) Where the order is consequential on the appointment of a new trustee, the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(*b.*) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court, or cannot be found, the land or right shall be vested in such other person, either alone or with some other person (*a*).

Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land (*b*).

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely,—

(*a.*) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(*b.*) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person

(*a*) See pp. 844 *et seq.* (*b*) See p. 846.

entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(*c.*) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(*d.*) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(*e.*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee (*a*).

Vesting order consequential on judgmen for sale or mortgage of land.

30. Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein *as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made* (*b*), and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order (*c*), shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person (*d*).

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into

(*a*) A case of uncertainty within the section arises if the will of the mortgagee appointing executors is contested in the Probate Division: *Re Cook's Mortgage*, (1895) 1 Ch. 700.

(*b*) The words in italics were repealed by the Amendment Act of 1894, see *post*, p. 1303.

(*c*) The equities of parties beneficially interested are bound by the order for sale: *Re Williams' Estate*, 5 De G. & Sm. 515; *Cottrell* v. *Cottrell*, 2 L. R. Eq. 330; *Basnett* v. *Moxon*, 20 L. R. Eq. 182; Seton, 6th ed. p. 1255.

(*d*) See p. 847.

existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees (*a*).

Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order (*b*).

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision (*c*).

Effect of vesting order as to copyhold.

34. (1) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things (*d*).

Vesting orders as to stock and choses in action (*e*).

35. (1) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(*a.*) is an infant (*f*), or

(*b.*) is out of the jurisdiction of the High Court, or

(*c.*) cannot be found, or

(*a*) See pp. 847, 848.
(*b*) See pp. 849, 850.
(*c*) See p. 850.
(*d*) See pp. 851, 852.
(*e*) See p. 852 *et seq.*
(*f*) See p. 854.

(*d.*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled (*a*) thereto, for twenty-eight days next after a request in writing has been made to him by the person so entitled (*b*), or

(*e.*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(*a.*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b.*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(2) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer (*c*).

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor (*d*).

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order (*e*).

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised (*f*).

(*a*) See pp. 853, 854.
(*b*) See p. 854.
(*c*) See p. 855.
(*d*) See pp. 855, 856.
(*e*) See pp. 855, 856.
(*f*) See p. 856.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Persons entitled to apply for orders.

36. (1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage (*a*).

Powers of new trustee appointed by Court.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust (*b*).

Power to charge costs on trust estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just (*c*).

Trustees of charities.

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction (*d*).

Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict. c. 5.

40. Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or personal representative or

(*a*) See p. 857.
(*b*) See p. 858.
(*c*) See p. 858.
(*d*) See p. 859.

devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained (*a*).

Application of vesting order to land out of England.

41. The powers of the High Court in England (*b*) to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland (*c*).

Payment into Court by Trustees (d).

Payment into Court by trustees (*d*).

42. (1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered (*d*).

Miscellaneous.

Power to give judgment in absence of a trustee.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action, and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and

(*a*) See p. 859.

(*b*) By s. 2 of the Amendment Act of 1894 (see *post*, p. 1303) these powers are also given to and may be exercised by the High Court in Ireland.

(*c*) See p. 860.

(*d*) See pp. 424 *et seq.*, and for Rules of Court and cases thereunder, see Appendix No. 2.

solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Power to sanction sale of land or minerals separately.

44. (1) Where a trustee [*or other person* (*a*)] is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights and powers, separately from the residue of the land.

(2) Any such trustee [*or other person* (*b*)], with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise (*c*).

Power to make beneficiary indemnify for breach of trust.

45. (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the twenty-fourth day of December, one thousand eight hundred and eighty-eight, and is pending at the commencement of the Act (*d*).

Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

PART IV.—MISCELLANEOUS AND SUPPLEMENTAL.

Application to trustees under Settled Land Acts of provisions as to appointment of trustees.

47. (1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and

(*a*) The words in italics were inserted by s. 3 of the Amendment Act of 1894, see *post*, p. 1303.

(*b*) The words in italics were inserted by s. 3 of the Amendment Act of 1894, see *post*, p. 1303.

(*c*) See pp. 512, 513.

(*d*) See pp. 1181, *et seq.*

retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881 (*a*). 44 & 45 Vict. c. 41.

Trust estate not affected by trustee becoming a convict.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee. 33 & 34 Vict. c. 23.

Indemnity.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same (*b*).

Definitions.

50. In this Act, unless the context otherwise requires,—

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland

(*a*) See pp. 655, 809. (*b*) See pp. 855, 856.

respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land (*a*) :

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description :

The expression "instrument" includes Act of Parliament :

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (*b*) :

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee :

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connection with the expression "into court" include the deposit or transfer of the same in or into court :

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land :

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not ;

The expression "rights" includes estates and interests :

The expression "securities" includes stocks, funds, and shares, and so far as relates to payment into Court, has the same meaning as in the Court of Chancery (Funds) Act, 1872 :

35 & 36 Vict. c. 44.

The expression "stock" includes fully paid up shares (*c*) ; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein (*d*) :

The expression "transfer" in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee :

The expression "trust" does not include the duties incident to

(*a*) See p. 849, note.
(*b*) See p. 844, note.
(*c*) See pp. 362, 363, note.
(*d*) See p. 853.

an estate conveyed by way of mortgage (*a*); but with this exception the expressions "trust" and "trustee" include implied and constructive trusts (*b*), and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person (*c*).

Repeal. 51. The Acts mentioned in the schedule to this Act are hereby repealed, except as to Scotland, to the extent mentioned in the third column of that Schedule.

Extent of Act. 52. This Act does not extend to Scotland.

Short title. 53. This Act may be cited as the Trustee Act, 1893.

Commencement. 54. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

(*a*) See pp. 835, 836.
(*b*) See pp. 835-837.
(*c*) See pp. 366, 835 *et seq.*

SCHEDULE.

Section 51.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3. c. 52 . .	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32 .	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68 .	An Act for extending to Ireland an Act passed in the last session of Parliament, entitled "An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
12 & 13 Vict. c. 74 .	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict. c. 60 .	The Trustee Act, 1850.	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
15 & 16 Vict. c. 55 .	The Trustee Act, 1852.	Sections one to five, eight and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.

SCHEDULE—*Continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
17 & 18 Vict. c. 82	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty, and thirty-one.
23 & 24 Vict. c. 38	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict. c. 73	An Act to give further facilities to the holders of Indian Stock.	Section four.
27 & 28 Vict. c. 114	The Improvement of Land Act, 1864.	Section sixty so far as it relates to trustees; and section sixty-one.
28 & 29 Vict. c. 78	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40	The Partition Act, 1868.	Section seven.
33 & 34 Vict. c. 71	The National Debt Act, 1870.	Section twenty-nine.
34 & 35 Vict. c. 27	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83	The Local Loans Act, 1875.	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39	The Conveyancing Act, 1882.	Section five.
46 & 47 Vict. c. 52	The Bankruptcy Act, 1883.	Section one hundred and forty-seven.
51 & 52 Vict. c. 59	The Trustee Act, 1888.	The whole Act, except sections one and eight.
52 & 53 Vict. c. 32	The Trust Investment Act, 1889.	The whole Act, except sections one and seven.
52 & 53 Vict. c. 47	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5	The Lunacy Act, 1890.	Section one hundred and forty.
53 & 54 Vict. c. 69	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13	The Conveyancing and Law of Property Act, 1892.	Section six.

THE TRUSTEE ACT, 1893, AMENDMENT ACT, 1894.

(57 VICT. CH. 10.)

"*An Act to amend the Trustee Act*, 1893." (18*th June*, 1894.)

1. In sect. 30 of the Trustee Act, 1893, the words "as heir or under the will of a deceased person, for payment of whose debts the judgment was given or order made" shall be repealed (*a*). Amendment of 56 & 57 Vict. c. 53, s. 30.

2. The powers conferred on the High Court in England by sect. 41 of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland (*b*). Extension to Ireland of 56 & 57 Vict. c. 53, s. 41.

3. In sect. 44 of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person" (*c*). Amendment of 56 & 57 Vict. c. 53, s. 44.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law (*d*). Liability of trustee in case of change of character of investment.

5. This Act may be cited as the Trustee Act, 1893, Amendment Act, 1894. Short title.

(*a*) See p. 847.
(*b*) See p. 860.
(*c*) See p. 512.
(*d*) See p. 323.

No. II.

RULES OF COURT RELATING TO PROCEEDINGS UNDER THE TRUSTEE ACT, 1893.

A.—*As to proceedings under Part III., Secs.* 25-41.

Chancery Division.

Order LIV. B. (*a*), Rule 1: "All proceedings in the High Court, commenced under the Trustee Act, 1893 (in this Order called "the Act"), shall be assigned to the Chancery Division of the Court."

Petitions.

Rule 2: "All applications under the Act may be made by petition (*b*), except as otherwise provided under Order LV."

Application by summons under Trustee Act, 1893.

Order LV., Rule 13 A: "Any of the following applications under the Trustee Act, 1893, may be made by summons:—

Appointment of new trustee, and vesting order.

(*a.*) An application for the appointment of a new trustee with or without a vesting or other consequential order.

Vesting order.

(*b.*) An application for a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or a Judge, or out of Court.

Vesting order on sale, &c.

(*c.*) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock, or the suing for or recovering any chose in action.

Payment out of Court.

(*d.*) An application relating to a fund paid into Court in any case coming within the provisions of rule 2 of this Order.'

In a complicated case a petition may be presented, and the costs

(*a*) These rules may be cited as the "Rules of the Supreme Court (Trustee Act), 1893," and each rule may be cited separately according to the heading thereof with reference to the Rules of the Supreme Court, 1883. They came into operation on 1st January, 1894.

(*b*) Under the former Acts the Court required that the particular sections under which the order was to be made should be indicated: *Re Moss's Trusts*, 37 Ch. D. 513; *Re Hall's Settlement*, 58 L. T. N.S. 76. This is now provided for by Rule 4 A, see *post*, p. 1307.

allowed notwithstanding the rule, but in the absence of special circumstances the application must be by summons (*a*).

Service. In applications for the appointment of new trustees, all the *cestuis que trust* ought, as a general rule, to be *served* (*b*); but in special cases the Court relaxes the rule (*c*).

Where it is proposed to appoint new trustees in *substitution* for existing trustees the petition should be served on the old trustees (*d*); but service is dispensed with where a trustee is permanently resident abroad (*e*), or has absconded and cannot be found (*f*).

In general, any person who may have a claim for costs as trustee ought to be served, as *ex. gr.* the adult heir of a last surviving trustee (*g*) who died previously to 1st January, 1882 (*h*), but service was dispensed with where the adult heir had been abroad for twenty-four years, so that the chance of his having any claim for costs was infinitesimal (*i*); and service on the guardian of an infant heir was held to be unnecessary (*j*).

Where an estate is subject to an annuity, a vesting order may be made without service on the annuitant (*k*). Where a mortgagee died intestate, and was illegitimate, the Court made a vesting order on service of the petition on the Crown (*l*).

Evidence. The devolution of the beneficial title may be traced by affidavit, without strict evidence by certificates and affidavits of identity (*m*).

Affidavit of fitness. In addition to evidence of the necessary facts to bring the case within the Act, the Court, before appointing new trustees, requires evidence by affidavit of the fitness of the proposed trustees (*n*). In

(*a*) *Re Morris's Settlement*, 60 L. T. N.S. 96; 37 W. R. 317; W. N. (1889) p. 31, and see *Re Broadwood*, 55 L. J. Ch. 646; 55 L. T. N.S. 312; W. N. (1886) p. 103.

(*b*) *Re Richard's Trust*, 5 De G. & Sm. 636; *Re Sloper*, 18 Beav. 596; *Re Fellow's Settlement*, 2 Jur. N.S. 62; *Re Maynard's Settlement*, 16 Jur. 1084; and see *Re Lonsdale's Trust*, 14 Jur. 1101; *Re Thomas's Trust*, 15 Jur. 187; *Re Prescott's Trust*, 19 L. T. 371.

(*c*) *Re Smyth's Settlement*, 2 De G. & Sm. 781; *Re Blanchard*, 3 De G F. & J. 137; *Re Blanchard's Estate*, 2 N.R. 386; *Re Lightbody's Trusts*, 52 L. T. N.S. 40; *Re Wilson*, 31 Ch. D. (C.A.) 522; and see *Practice Note*, W. N. (1901) 85.

(*d*) *Re Sloper*, 18 Beav. 596; and the old trustees will have their costs; *Futvoye* v. *Kennard*, 3 L. T. N.S. 687.

(*e*) *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223; *Re Martin Pye's Trusts*, 42 L. T. N.S. 247; *Re Stanley's Trusts*, W. N. (1893) p. 30.

(*f*) *Re Nicholson's Trusts*, W. N. 1884, p. 76; *Hyde* v. *Benbow*, W. N. 1884, p. 117. Where an order is asked against recusant trustees, the trustees need not be served; *Re Baxter's Will*, 2 Sm. & G. App. v.; and see the following cases, decided under 1 Will. 4. c. 60, s. 8; *Re Third Burnt Tree Building Society*, 18 Sim. 296; *Re Bradburne*, 12 L. J. N.S. Ch. 353.

(*g*) *Re Oxenham's Trusts*, W.N. 1875, p. 6.

(*h*) See 44 & 45 Vict. c. 41, s. 30, *ante*, p. 247.

(*i*) *Re Stanley*, 62 L. J. Ch. 469; W. N. (1893) p. 30.

(*j*) *Re Little*, 7 L. R. Eq. 323.

(*k*) *Re Winteringham's Trust*, 3 W. R. 578.

(*l*) *Re Minchin's Estate*, 2 W. R. 179.

(*m*) *Re Hoskins*, 4 De G. & J. 436. In practice the evidence is by affidavit, but there is nothing to preclude the admission of oral evidence.

(*n*) *Re Battersby's Trust*, 16 Jur. 900.

ordinary cases an affidavit of fitness by one responsible person is sufficient, but if the trust fund be of large amount the evidence of a second person may be required (*a*). Where the proposed new trustee has been described simply as "gentleman," the Court has disallowed the costs of the affidavit, as being useless by reason of the vagueness of the description (*b*); and the deponent by whom the affidavit is made should be described fully, and not merely as "gentleman" (*c*). Where the trust fund is the subject of a suit, the affidavit of the solicitor in the cause is not the proper evidence of the fitness of the new trustee, as it is the trustee's duty to watch the solicitor (*d*).

Verification of new trustees' consent to act.

By Order XXXVIII., Rule 19A: "The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by the signature of his solicitor" (*e*). The rule further directs that the Form in the appendix "shall be used with such variations as circumstances may require."

The Form (No. 29 in Appendix L.) is as follows:—

"I, A. B. , of , hereby consent to act as trustee of the [*describe the instrument*] (*Signed*) A. B."

"I, C. D. , of , solicitor, hereby certify that the above-written signature is the signature of A. B., the person mentioned in the above-written consent. (*Signed*) C. D."

[*solicitor for the said A. B.*]

By Rule 92 of the Rules in Lunacy, 1892, and Form 12 in the Schedule thereto, a similar practice is established in lunacy.

B.—*As to proceedings under Sect.* 42.

Lodgment under s. 42. On affidavit.

Order LIVB, Rule 4. (1) Where a trustee desires to make a lodgment in Court under sect. 42 of the Act, he shall make and file an (*f*) affidavit intituled in the matter of the trust (described so as to be distinguishable) and of the Act, and setting forth:—

(*a*) *Re Hartley's Will*, W. N. (1879) p. 197. The costs of a second affidavit, if unnecessary, may be disallowed; *Re Arden*, W. N. (1887) p. 166. For form of affidavit of fitness, see Daniell's Chancery Forms, 5th ed. p. 628, Form No. 1268, and see *Re Castle Sterry's Trusts*, W. N. (1888) p. 179.

(*b*) *Re Horwood*, 55 L. T. N.S. 373; *Re Orde*, 24 Ch. D. (C.A.) 271. But a statement that the proposed trustees were "persons in good credit in the neighbourhood in which they respectively carried on business" was held to be sufficient; *Re Smith's Policy Trusts*, W. N. (1894) p. 68.

(*c*) *Re Horwood*, *ubi sup.*

(*d*) *Grundy* v. *Buckeridge*, 22 L. J. Ch. 1007; 11 Jur. 731.

(*e*) This rule does not apply to proceedings in lunacy; *Re Wilson, a lunatic*, 31 Ch. D. (C.A.) 522; but applies to proceedings in Chancery, although entitled in lunacy also; *Re Hume* (No. 2), 35 Ch. D. (C.A.) 457.

(*f*) "Lodgment in Court" means payment or transfer into Court, or deposit in Court; see Supreme Court Funds Rules, 1894, Rule 3. As to securities which may be brought into Court, and the mode of transferring and depositing various securities, see Ib. Rule 29, and Seton, 6th ed. pp. 200, *et seq.*

(*a.*) A short description of the trust and of the instrument creating it.

(*b.*) The names of the persons interested in and entitled to the money or securities, and their places of residence to the best of his knowledge and belief (*a*).

(*c.*) His submission to answer all such inquiries relating to the application of the money or securities paid into Court, as the Court or Judge may make or direct.

(*d*). The place where he is to be served with any petition, summons, or order or notice of any proceeding relating to the money or securities.

Without affidavit.

Provided that if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

(2) Where the lodgment in Court is made on affidavit—

(*a.*) the person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the money or securities lodged in Court;

(*b.*) no petition or summons relating to the money or securities shall be answered or issued unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof;

(*c*) service of any application in respect of the money or securities shall be made on such persons as the Court or Judge may direct.

Application under the Act, how intituled.

Rule 4 A. Applications to deal with funds lodged in Court under the Act shall be intituled in the same manner as the affidavit or request on which the funds were lodged. All other applications under the Act, not made in any pending cause or matter, shall be intituled in

(*a*) This is a restoration of the practice existing before the Supreme Court Funds Rules, 1886. The decision in *Re Graham's Trusts*, (1891) 1 Ch. 151, is therefore in effect overruled. In the case of *Re Jephson*, 1 L. T. N.S. 5, it was held that a person interested in the fund and not named in the affidavit was not competent to present a petition, but this decision was not followed in subsequent practice; see *Re Puttrell's Trusts*, 7 Ch. D. 647; *Pelling* v. *Goddard*, 9 Ch. D. 185.

the matter of the trust (described so as to be distinguishable) and of the Act. Every petition or summons for a vesting order, or the appointment of a person to convey, shall state the section or sections of the Act under which it is proposed that the order shall be made (*a*).

Supreme Court Funds Rules, 1894.

Manner of lodgment of funds in Chancery Division, and particulars to be stated in request.

Rule 30. In the Chancery Division a direction for a lodgment directed by an order, or in a Lodgment Schedule signed by a Chief Clerk (in the case of purchase-moneys or receivers' balances), shall be issued by the Paymaster upon receipt of a copy of the Lodgment Schedule; and a direction for a lodgment under the Trustee Act, 1893, shall be issued by him upon receipt of an office copy of the Schedule mentioned in Rule 41, or upon receipt of the request and certificate of the Commissioners of Inland Revenue mentioned in that Rule.

Lodgments under the Trustee Act, 1893.

Without affidavit.

Rule 41. Where a legal personal representative desires to lodge funds in Court under the Trustee Act, 1893, without an affidavit, he shall leave with the Paymaster a request, signed by him or his solicitor, with a certificate of the Commissioners of Inland Revenue; such request and certificate to be in the Form No. 16 in the Appendix to these Rules, with such variations as may be necessary, or, as regards such certificate, in such other form as shall from time to time be adopted by the said Commissioners with the consent of the Lords Commissioners of Her Majesty's Treasury. The money or securities so lodged shall be placed to the credit mentioned in such request.

On affidavit.

When a trustee or other person desires to lodge funds in Court in the Chancery Division under the Trustee Act, 1893, upon an affidavit, he shall annex to such affidavit a Schedule in the same printed form as the Lodgment Schedule to an order, setting forth :—

(*a.*) His own name and address :

(*b.*) The amount and description of the funds proposed to be lodged in Court :

(*c.*) The ledger credit in the matter of the particular trust to which the funds are to be placed :

(*d.*) A statement whether legacy or estate or succession duty (if chargeable) or any part thereof has or has not been paid :

(*e.*) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

(*a*) As to payment out where the payment in was made under misapprehension, see *Re Hood's Trusts*, (1896) 1 Ch. 270 ; *ante*, p. 431.

An office copy of such Schedule is to be left with the Paymaster.

Investment of money lodged under the Trustee Act, 1893.

Rule 73. A sum of money lodged in Court as provided in Rule 41, if or so soon as such money and the interest, if any, to be credited in respect thereof shall amount to or exceed 40*l.*, and the dividends accruing on any securities so lodged, if and when they shall amount to or exceed 20*l.*, shall be invested without any order or request in New Consols, and the dividends accruing on such New Consols and all accumulations thereof shall, if or so soon as they amount to 20*l.*, be invested in New Consols.

When it is stated in the schedule to the affidavit made pursuant to Rule 41 that it is desired that any money to be lodged in Court, and the accumulations thereof or any dividends to accrue on any securities to be so lodged, should be invested in any description of Government securities, such money, if or so soon as such money and the interest, if any, to be credited in respect thereof shall amount to or exceed 40*l.*, and the dividends accruing on such securities, if or so soon as they shall amount to or exceed 20*l.*, shall be invested accordingly, without any order or further request for that purpose.

Dividends accruing on funds or on investments or accumulations of funds lodged in Court under the 32nd section of the Act 36 Geo. 3. c. 52, or under the Act 10 & 11 Vict. c. 96, prior to the commencement of the Chancery Funds Rules, 1872, shall, when or so soon as they amount to or exceed 20*l.*, be invested without any request.

Lodgments under 36 Geo. 3. c. 52, s. 32, and 10 & 11 Vict. c. 96, prior to 1st Jan. 1894, to be dealt with as if lodged under Trustee Act, 1893.

Rule 74. Money or securities lodged in Court under the 32nd section of the Act 36 Geo. 3. c. 52, or under the 10 & 11 Vict. c. 96, prior to the 1st January, 1894, and securities purchased with such money, or the income thereof, shall, subject to any order affecting the same made prior to the 1st January, 1894, be dealt with in the same manner as if such money or securities had been lodged in Court under the 42nd section of the Trustee Act, 1893.

SCHEDULE

Form No. 16

[*Request for Lodgment without an affidavit under the Trustee Act*, 1893, *and Certificate of Commissioners of Inland Revenue to be furnished therewith, referred to in Rule* 41.]

Trustee Act, 1893.—Legacy (*or* Share of Residue) of E. F. under the Will (*or* Intestacy) of C. D.

A. B., the executor of the will (*or* administrator of the estate) of C. D., deceased, whose will was proved (*or* of whose effects letters of administration were granted) on the day of , proposes

to lodge in Court to the credit of "Legacy to (*or* share of residue of) E. F., an infant (*or* beyond seas), under the will (*or* intestacy) of C. D.," the sum of *l.* (*a*) (or the following securities representing) the full amount (*or* part) of such legacy (*or* share of residue) to which the said E. F. is absolutely entitled [*describe securities, if any, which must be such as the Paymaster can properly accept*].

Trustee's affidavit.

The trustee's affidavit must not go into the whole history of the trust, so as to show upon the accounts how the particular sum arose, and, if it does, the trustee may be deprived of his costs (*b*).

Where there are several trustees, all should properly join in the affidavit, as all may have some information to contribute, but under particular circumstances the Court has ordered the Paymaster-General to receive the money on the affidavit of one of several co-trustees (*c*).

Notice of lodgment.

Under special circumstances the notice of lodgment has been dispensed with; as, for example, where a person interested had gone abroad many years previously, and had not since been heard of (*d*), and where a *cestui que trust* was believed to be in New York but his address was unknown, the Court allowed publication in two New York newspapers to be treated as sufficient notice (*e*). In another case, where the person named in the affidavit could not be found, the Court intimated what would probably be held sufficient notice of the payment in, but declined to give any directions (*f*). Where the parties were extremely numerous, the Court gave leave to substitute notice on some of them (*g*).

Application for payment out (*h*).

Under Order LV., Rule 13A (*d.*), already stated (*i*), any application relating to a fund paid into Court may be made by summons in all cases where the money or securities in Court do not exceed 1,000*l.*, or 1,000*l.* nominal value.

This rule must be read in connection with and as extended by Order LV., Rule 2, clause (1), under which a summons is the proper mode of procedure in the case of "applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity or the birth, marriage, or death of any person."

If the fund in Court exceeds 1,000*l.*, the application must be by petition, notwithstanding that it asks for payment out of a portion only amounting to less than 1,000*l.* (*j*).

(*a*) *N.B.*—No deduction for costs and expenses must be made from the amount to be paid in.

(*b*) *Re Waring*, 16 Jur. 652.

(*c*)—— v. ——, 1 Jur. N.S. 974.

(*d*) *Re Hansford*, 7 W. R. 199, 254; *Re Whitaker's Trusts*, 47 L. T. N.S. 507; 31 W. R. 114.

(*e*) *Re Goodman's Will*, W. N. 1870, p. 152.

(*f*) *Re Hardley's Trusts*, 10 Ch. D. (C.A.) 664.

(*g*) *Re Colson's Trust*, 2 W. R. 111.

(*h*) See *ante*, p. 428.

(*i*) See *ante*, p. 1304.

(*j*) *Re Evan Evans*, 54 L. T. N.S 527; W. N. (1886), p. 84.

A petition should set out the material statements of the affidavit under which the money is paid in, as the affidavit is regarded as a statement of the trust to which the attention of the Court is to be called (*a*). But the petition must not set out the affidavit *in extenso*, or at a needless length (*b*). Form and contents of petition.

Order LIV. B., Rule 4 (2) (c), has been supplemented by a direction of the Judges of the Chancery Division in the following terms :— Service of application.

TRUSTEE ACT, 1893

TRUSTEE RELIEF ACTS

Direction of the Judges of the Chancery Division.

We, the undersigned Judges of the Chancery Division of the High Court of Justice, direct that all applications dealing with funds lodged in Court on affidavit under the Trustee Act, 1893, or under the repealed Trustee Relief Acts, be in ordinary cases served upon the trustees and the persons named in the trustees' affidavit as interested in or entitled to the money or securities. When a special direction is required, it should be so stated on the petition or summons, and the petition should, when presented, be referred to Chambers for such direction to be given before it is answered for hearing in Court.

JOSEPH W. CHITTY, J.
FORD NORTH, J.
JAMES STIRLING, J.
ARTHUR KEKEWICH, J.
ROBERT ROMER, J.

A trustee who did not concur with his co-trustees in paying the money into Court, must still be served with any petition under the Act (*c*).

Where an *infant* is to be served, a guardian *ad litem* should be appointed (*d*).

Where a petition stands over for *amendment*, by adding a next friend on behalf of the petitioner, it is not necessary to have the petition re-answered (*e*). Hearing.

A claimant may proceed in *forma pauperis* under the Act (*f*).

(*a*) *Re Levett's Trusts*, 5 De G. & Sm. 619 ; *Re Flack's Will*, 10 Hare, App. xxx.

(*b*) *Re Curtois*, 17 Jur. 852 ; 10 Hare, App. lxiv.

(*c*) *Re Bryant's Settlement*, W. N. 1868, p. 123.

(*d*) *Re Ward's Will*, 2 Giff. 122 ; *Re Gillman's Trusts*, 1 Ir. R. Eq. 342.

(*e*) *Re Medow's Trusts*, 10 Jur. N.S. 536, and see *Robinson* v. *Harrison*, 1 Drewr. 307.

(*f*) *Re Money*, 13 Beav. 109.

No. III.

THE LUNACY ACTS, 1890 AND 1891.

Such only of the provisions of these Acts are here stated as relate to the appointment of new trustees and to vesting orders.

THE LUNACY ACT, 1890.

53 VICT. C. 5.

1. This Act may be cited as the Lunacy Act, 1890.

2. Save as in this Act otherwise expressly provided, this Act shall not extend to Scotland or Ireland.

3. This Act shall come into operation, save as in this Act otherwise expressly provided, on the first day of May, 1890.

The Judge in Lunacy.

108. (1) The jurisdiction of the Judge in Lunacy under this Act shall be exercised by the Lord Chancellor for the time being entrusted by the sign manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such Judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such Judges as aforesaid (*a*).

PART IV.—JUDICIAL POWERS OVER PERSON AND ESTATE OF LUNATICS.

Management and administration.

116. The powers and provisions of this part of this Act relating to management and administration apply :—(1) (A) To lunatics so found by inquisition; (B) To lunatics not so found by inquisition, for the protection and administration of whose property any order has been made before the commencement of this Act; (C) To every person

(*a*) See p. 861.

lawfully detained as a lunatic, though not so found by inquisition; (D) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in Lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs; (E) To every person with regard to whom it is proved to the satisfaction of the Judge in Lunacy by the certificate of a master, or by the report of the Commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l.* in value, or that the income thereof does not exceed 100*l.* per annum; (F) To every person with regard to whom the Judge is satisfied by affidavit or otherwise that such person is or has been a criminal lunatic and continues to be insane and in confinement. (2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the Judge, shall be exercised by such person in such manner and with or without security as the Judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the Judge. (3) Every person appointed to do any such act, or exercise any such power, shall be subject to the jurisdiction and authority of the Judge as if such person were the committee of the estate of a lunatic so found by inquisition. (4) The powers of this Act relating to management and administration shall be exercisable in the discretion of the Judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in due course of management of the property of the lunatic. (5) Nothing in this Act shall subject a lunatic's property to claims of his creditors further than the same is now subject thereto by due course of law (*a*).

Committee may exercise power vested in lunatic in character of trustee or guardian.

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the Judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs (*b*).

(*a*) See pp. 860, 861.

(*b*) See p. 861. This section is in substitution for s. 137 of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70).

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this Act the committee of the estate, under order of the Judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the Judge may, in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees (*a*).

Vesting Orders (*b*).

Power to transfer stock of lunatic.

133. Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof as the Judge in Lunacy directs, then the Judge may order some fit person to transfer the stock to or into the name of a new committee or into court or otherwise, and also to receive and pay over the dividends thereof in such manner as the Judge directs (*c*).

Stock in name of lunatic out of the jurisdiction.

134. Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the Judge thinks fit.

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

135. (1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the Judge in Lunacy may

(*a*) See pp. 838, 839. This section is in substitution for s. 138 of the Lunacy Regulation Act, 1853.

(*b*) As to the parties to make application under these sections, the title of summons, and service, see the Rules in Lunacy, 1892, Rules 55-57; Renton on Lunacy, Appendix, pp. 988, *et seq.*

(*c*) The order should be entitled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy; but this does not apply to a case under s. 116, subs. 1 (d), where the title contains a

by order vest such land in such person or persons for such estate, and in such manner, as he directs (*a*).

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the Judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the Judge directs.

(3) An order under sub-sects. (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right (*b*).

(4) In all cases where an order can be made under this section the Judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sects. (1) and (2).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things (*c*).

Power to vest right to transfer stock and sue for chose in action.

136. (1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action

reference to the statutes "53 Vict. c. 5 and 54 & 55 Vict. c. 65"; *Re Purvis*, (1904) 1 Ch. (C.A.) 373.

(*a*) See pp. 862, 863.
(*b*) See pp. 862, 863.
(*c*) See p. 863.

is vested in a lunatic, as the personal representative of a deceased person, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4) In all cases where an order can be made under this section, the Judge may, if it is more convenient, appoint some proper person to make or join in making the transfer (*a*).

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves, or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order.

Person to be appointed to transfer.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred (*b*).

Charity trustees.

138. The powers conferred by this Act as to vesting orders may b exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power, or by the High Court under its general or statutory jurisdiction.

Declarations and directions.

139. The Judge in Lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

Order to be conclusive evidence of allegation on which it is founded.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any Court upon any question as to the validity of the order, but this section shall not prevent a Judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party

(*a*) See p. 865.

(*b*) This section has no application where an order vesting stock standing in the name of a lunatic trustee is made according to the form in *Re Gregson*, (1893) 3 Ch. (C.A.) 233, see *ante*, p. 856, and not under sub-s. 4 of s. 136; and, therefore, in such a case the Bank of England have no right to require that their officer should be appointed to make the transfer; *Re C. M. G.*, (1898) 2 Ch. (C.A.) 324.

to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained.

Power to appoint new trustees.

141. In every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees (*a*).

Costs.

142. The Judge in Lunacy may order the costs of and incident to obtaining an order under the provisions of this Act as to vesting orders and carrying the same into effect, to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the Judge may think fit (*b*).

Saving of power of High Court.

143. The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

Power to make rules.

338. *By this section, sub-sect.* 2, *the Lord Chancellor is empowered to make rules in lunacy* "for carrying this or any other Act relating to lunacy, into effect, and also for regulating costs in relation thereto."

Definitions.

341. In this Act, if not inconsistent with the context—

"Contingent right" as applied in lands, includes a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent.

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands.

"Land" includes an undivided share of land; "Lease" includes an underlease; "Lunatic" means an idiot or person of unsound mind.

"Property" includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest and any undivided share therein.

(*a*) See p. 862.

(*b*) As to the jurisdiction under the section to order the Bank of England to pay costs, see *Re C. M. G.*, (1898) 2 Ch. (C.A.) 324, referring to *Re Shortridge*, (1895) 1 Ch. 278.

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854.

"Transfer" includes assignment, payment, and other disposition, and the execution and performance of every assurance and act to complete a transfer.

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

THE LUNACY ACT, 1891.

54 & 55 VICT. c. 65.

Procedure as to Chancery Lunatics.

27. (1) Subject to rules in lunacy the jurisdiction of the Judge in Lunacy, as regards administration and management, may be exercised by the masters, and every order of a master in that behalf shall take effect, unless annulled or varied by the Judge in Lunacy (*a*).

(2) The power to make rules under sect. 338, sub-sect. 2, of the principal Act, shall extend to all applications under the principal Act and this Act, and also to applications in the Chancery Division of the High Court, in cases where such applications are also made under the principal Act.

Definition of "seised" and "possessed."

28. In the principal Act, the word "seised" shall include any vested estate for life or of a greater description, and shall extend to estates at law and in equity in possession or in futurity in any lands; and the word "possessed" shall include any vested estate less than a life estate at law or in equity, in possession or in expectancy in any lands.

(*a*) See p. 865.

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FINIS.